Passage of the

Education (Additional Support for Learning) (Scotland) Bill 2008

SPPB 132
Passage of the

Education (Additional Support for Learning) (Scotland) Bill 2008

SP Bill 16 (Session 3), subsequently 2009 asp 7

SPPB 132
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Contents

Foreword

Introduction of the Bill
Bill (As Introduced) (SP Bill 16) 1
Explanatory Notes (and other accompanying documents) (SP Bill 16-EN) 11
Policy Memorandum (SP Bill 16-PM) 27
Delegated Powers Memorandum (SP Bill 16-DPM) 37

Stage 1
Stage 1 Report, Education, Lifelong Learning and Culture Committee 41
Annexe A: Report from the Subordinate Legislation Committee 87
Annexe B: Letter from Convener of Finance Committee to Karen Whitefield 88
Annexe C: Extracts from Minutes of the Education, Lifelong Learning and Culture Committee 106
Annexe D: Oral evidence and associated written evidence 108
Annexe E: List of other written evidence 191
Note of informal roundtable discussion, 26 November 2008 356
Letter from the Scottish Government, 18 December 2008 361
Letter from the Scottish Government, 16 January 2009 364
Extract from the Minutes of the Parliament, 4 March 2009 365
Official Report, Meeting of the Parliament, 4 March 2009 366

Before Stage 2
Extract from the Minutes of the Parliament, 11 March 2009 392
Letter from Scottish Government, 17 March 2009 393

Stage 2
1st Marshalled List of Amendments for Stage 2 (SP Bill 16-ML1) 402
1st Groupings of Amendments for Stage 2 (SP Bill 16-G1) 413
Extract from the Minutes, Education, Lifelong Learning and Culture Committee, 25 March 2009 415
Official Report, Education, Lifelong Learning and Culture Committee, 25 March 2009 416

Official Report, Meeting of the Parliament, 25 March 2009 425
Extract from the Minutes of the Parliament, 26 March 2009 426
Extract from the Minutes of the Parliament, 1 April 2009 427
<table>
<thead>
<tr>
<th>Document</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Paper for the meeting of the Education, Lifelong Learning and Culture Committee, 22 April 2009</td>
<td>428</td>
</tr>
<tr>
<td>Extract from the Minutes, Education, Lifelong Learning and Culture Committee, 22 April 2009</td>
<td>433</td>
</tr>
<tr>
<td>Official Report, Education, Lifelong Learning and Culture Committee, 22 April 2009</td>
<td>434</td>
</tr>
<tr>
<td>2nd Marshalled List of Amendments for Stage 2 (SP Bill 16-ML2)</td>
<td>461</td>
</tr>
<tr>
<td>2nd Groupings of Amendments for Stage 2 (SP Bill 16-G2)</td>
<td>471</td>
</tr>
<tr>
<td>Extract from the Minutes, Education, Lifelong Learning and Culture Committee, 29 April 2009</td>
<td>473</td>
</tr>
<tr>
<td>Official Report, Education, Lifelong Learning and Culture Committee, 29 April 2009</td>
<td>475</td>
</tr>
<tr>
<td>Bill (As Amended at Stage 2) (SP Bill 16A)</td>
<td>505</td>
</tr>
<tr>
<td>Revised Explanatory Notes (SP Bill 16A-EN)</td>
<td>519</td>
</tr>
<tr>
<td>Revised Financial Memorandum (SP Bill 16A-FM)</td>
<td>531</td>
</tr>
<tr>
<td><strong>Stage 3</strong></td>
<td></td>
</tr>
<tr>
<td>Marshalled List of Amendments selected for Stage 3 (SP Bill 16A-ML)</td>
<td>543</td>
</tr>
<tr>
<td>Groupings of Amendments for Stage 3 (SP Bill 16A-G)</td>
<td>549</td>
</tr>
<tr>
<td>Extract from the Minutes of the Parliament, 20 May 2009</td>
<td>551</td>
</tr>
<tr>
<td>Official Report, Meeting of the Parliament, 20 May 2009</td>
<td>553</td>
</tr>
<tr>
<td>Bill (As Passed) (SP Bill 16B)</td>
<td>589</td>
</tr>
</tbody>
</table>
Foreword

Purpose of the series

The aim of this series is to bring together in a single place all the official Parliamentary documents relating to the passage of the Bill that becomes an Act of the Scottish Parliament (ASP). The list of documents included in any particular volume will depend on the nature of the Bill and the circumstances of its passage, but a typical volume will include:

- every print of the Bill (usually three – “As Introduced”, “As Amended at Stage 2” and “As Passed”);
- the accompanying documents published with the “As Introduced” print of the Bill (and any revised versions published at later Stages);
- every Marshalled List of amendments from Stages 2 and 3;
- every Groupings list from Stages 2 and 3;
- the lead Committee’s “Stage 1 report” (which itself includes reports of other committees involved in the Stage 1 process, relevant committee Minutes and extracts from the Official Report of Stage 1 proceedings);
- the Official Report of the Stage 1 and Stage 3 debates in the Parliament;
- the Official Report of Stage 2 committee consideration;
- the Minutes (or relevant extracts) of relevant Committee meetings and of the Parliament for Stages 1 and 3.

All documents included are re-printed in the original layout and format, but with minor typographical and layout errors corrected.

Where documents in the volume include web-links to external sources or to documents not incorporated in this volume, these links have been checked and are correct at the time of publishing this volume. The Scottish Parliament is not responsible for the content of external Internet sites. The links in this volume will not be monitored after publication, and no guarantee can be given that all links will continue to be effective.

Documents in each volume are arranged in the order in which they relate to the passage of the Bill through its various stages, from introduction to passing. The Act itself is not included on the grounds that it is already generally available and is, in any case, not a Parliamentary publication.

Outline of the legislative process

Bills in the Scottish Parliament follow a three-stage process. The fundamentals of the process are laid down by section 36(1) of the Scotland Act 1998, and amplified by Chapter 9 of the Parliament’s Standing Orders. In outline, the process is as follows:

- Introduction, followed by publication of the Bill and its accompanying documents;
- Stage 1: the Bill is first referred to a relevant committee, which produces a report informed by evidence from interested parties, then the Parliament debates the Bill and decides whether to agree to its general principles;
- Stage 2: the Bill returns to a committee for detailed consideration of amendments;
- Stage 3: the Bill is considered by the Parliament, with consideration of further amendments followed by a debate and a decision on whether to pass the Bill.

After a Bill is passed, three law officers and the Secretary of State have a period of four weeks within which they may challenge the Bill under sections 33 and 35 of the Scotland Act respectively. The Bill may then be submitted for Royal Assent, at which point it becomes an Act.

Standing Orders allow for some variations from the above pattern in some cases. For example, Bills may be referred back to a committee during Stage 3 for further Stage 2 consideration. In addition, the procedures vary for certain categories of Bills, such as Committee Bills or Emergency Bills. For some volumes in the series, relevant proceedings prior to introduction (such as pre-legislative scrutiny of a draft Bill) may be included.

The reader who is unfamiliar with Bill procedures, or with the terminology of legislation more generally, is advised to consult in the first instance the Guidance on Public Bills published by the Parliament. That Guidance, and the Standing Orders, are available free of charge on the Parliament’s website (www.scottish.parliament.uk).

The series is produced by the Legislation Team within the Parliament’s Chamber Office. Comments on this volume or on the series as a whole may be sent to the Legislation Team at the Scottish Parliament, Edinburgh EH99 1SP.

Notes on this volume

The Bill to which this volume relates followed the standard 3 stage process described above.

The Education, Lifelong Learning and Culture (ELLC) Committee was designated as lead committee. The report on the Bill As Introduced by the Subordinate Legislation Committee is included in the ELLC Committee’s Stage 1 Report at Annexe A, and submissions received by the Finance Committee are included at Annexe B. A list of written evidence submitted to the ELLC Committee appears at Annexe E of the Stage 1 Report – all submissions received, originally published online only, are included in this volume immediately that Annexe.

The Bill As Introduced did not require a financial resolution under Rule 9.12 of the Parliament’s Standing Orders. Under Rule 9.12.6 of the Standing Orders as the Rule then stood, no proceedings were permitted to be taken on amendments which would cause the Bill to require a financial resolution, unless a motion for such a resolution had been agreed to. “No proceedings” being permitted meant that an amendment could not be moved, debated or the question put on it during formal Stage 2 proceedings. A number of amendments to this Bill which (alone or in combination with other amendments) caused the Bill to require a financial resolution were lodged at both Stages 2 and 3. On the first day of Stage 2, the Committee concluded proceedings for the day just before the first amendment which gave rise
to an issue in terms of Rule 9.12.6 was reached on the Marshalled List. Had the Committee proceeded further, this would have been the first occasion on which debate on an amendment had been prohibited by virtue of a resolution being required under Rule 9.12.6 and no such resolution having been lodged or agreed to.

Subsequent to this, the deadline by which the ELLC Committee was required to complete Stage 2 was extended by the Parliament on two occasions, in order to enable the Committee to take evidence on all of the amendments which gave rise to an issue in terms of Rule 9.12.6. Relevant minute and Official Report extracts concerning these timetable extensions are included in this volume at the appropriate points, as are the minute and Official Report extracts relating to the ELLC Committee evidence session, which took place on 22 April 2009. Formal Stage 2 proceedings then resumed, and were completed, on 29 April 2009.

Estimates of the costs of various amendments were submitted to the Presiding Officer by members, and the Scottish Government, in order to assist in a cost being determined for each amendment. The Official Reports of the meetings at which the amendments giving rise to an issue in terms of Rule 9.12.6 were discussed contain a number of references to such estimates. These estimates were, however, circulated on an ad hoc basis, with information sometimes being made available to members by other members or by the Scottish Government, rather than the estimates being formally provided to the Committee as a whole. Information of this type is therefore not included in this volume; rather, only the information made formally available to the Committee about the determination made by the Presiding Officer in relation to each amendment and about the implications that these determinations would have on whether proceedings could be taken on each amendment once formal Stage 2 proceedings resumed is included. For the evidence session on 22 April 2009, this information was provided in a paper provided to the Committee, that paper being included in this volume immediately before the minute and Official Report extracts for that meeting. For the meeting on 29 April 2009, and at Stage 3, this information was provided in the Groupings of Amendments.

Following this Bill’s passage, the Parliament’s Standards, Procedures and Public Appointments Committee proposed changes to how amendments which would cause a Bill to require a financial resolution that it would not otherwise require should be dealt with. The Committee’s report on the issue is available at http://archive.scottish.parliament.uk/s3/committees/stanproc/reports-11/stprr11-01.htm#7. The Parliament agreed the Standing Orders Rule changes recommended in that report on 9 March 2011.

The Bill to which this volume relates amended the Education (Additional Support for Learning) (Scotland) Act 2004. Readers of this volume may therefore also be interested in the volume relating to the Bill which led to that Act, available at http://www.scottish.parliament.uk/parliamentarybusiness/Bills/72408.aspx.
Education (Additional Support for Learning) (Scotland) Bill
[AS INTRODUCED]

CONTENTS

Section

Placing requests etc.

1  Placing requests
2  Mediation services
3  Dispute resolution
4  Contributions not recoverable in respect of certain services
5  Arrangements between education authorities

Additional Support Needs Tribunals for Scotland

6  References to Tribunal in relation to co-ordinated support plan
7  Power to make rules in respect of Tribunal practice and procedure

General

8  Ancillary provision
9  Orders
10  Short title and commencement
ACCOMPANYING DOCUMENTS
Explanatory Notes, together with other accompanying documents, are printed separately as SP Bill 16-EN. A Policy Memorandum is printed separately as SP Bill 16-PM.

Education (Additional Support for Learning) (Scotland) Bill
[AS INTRODUCED]

An Act of the Scottish Parliament to amend the law in respect of placing requests in relation to the school education of children and young persons having additional support needs and in respect of arrangements between education authorities in relation to such school education; to make further provision in relation to the practice and procedure of the Additional Support Needs Tribunals for Scotland; and for connected purposes.

Placing requests etc.

1 Placing requests

(1) The Education (Additional Support for Learning) (Scotland) Act 2004 (asp 4) (“the 2004 Act”) is amended in accordance with this section.

(2) In section 1(3)(a) (additional support needs), after “authority” insert “responsible for the school education of the child or young person, or in the case where there is no such authority, the education authority”.

(3) In section 7(1)(b) (other children and young persons), for “the” substitute “an”.

(4) In section 10 (reviews of co-ordinated support plans)—

(a) in subsection (1), for “belonging to their area” substitute “for whose school education they are responsible”,

(b) after subsection (5) insert—

“(5A) Where any such co-ordinated support plan as is mentioned in subsection (1) is transferred to the education authority by virtue of regulations made in pursuance of section 11(8), the authority must carry out a review of the plan as soon as practicable after the date of transfer.”.

(5) In section 11(8) (co-ordinated support plans: further provision), in paragraph (e) the words from “when” to the end of the paragraph are repealed.

(6) In section 18 (references to Tribunal in relation to co-ordinated support plan)—

(a) in paragraph (e) of subsection (3)—

(i) for “the”, where it occurs for the first time, substitute “an”,

(ii) for “the”, where it occurs for the second time, substitute “a”,

SP Bill 16
Session 3 (2008)
(iii) at the end add “(including such a decision in respect of a child or young person for whose school education the authority refusing the request are not responsible),”.

(b) after that paragraph insert—

“(f) a decision of an appeal committee on a reference made to them under paragraph 5 of schedule 2 but only where the things mentioned in any of paragraphs (a), (b), (ba) and (c) of subsection (4) occur—

(i) after the decision of the appeal committee, but

(ii) before the time by which any appeal must be lodged in accordance with paragraph 7(3) of schedule 2.”,

(c) in subsection (4)—

(i) the words “, at the time the placing request is refused” are repealed,

(ii) after paragraph (b) insert—

“(ba) no such plan has been prepared, but under subsection (2)(a) of section 11 the education authority have informed the persons mentioned in subsection (3) of that section of their proposal to establish whether the child or young person requires, or would require, such a plan,.”.

(7) In section 19 (powers of Tribunal in relation to reference)—

(a) in subsection (5)—

(i) after paragraph (b) insert—

“(ba) where—

(i) the decision was referred to the Tribunal by virtue of the application of subsection (4)(ba) of that section, and

(ii) the education authority have decided the child or young person does not require a co-ordinated support plan and that decision has not been referred to the Tribunal under subsection (1) of that section by the time within which such references are to be made, refer the decision to an appeal committee set up under section 28D of the 1980 Act,”,

(ii) after paragraph (c) add—

“(d) where—

(i) the decision was transferred from an appeal committee to the Tribunal by virtue of paragraph 6(4) and (5) of schedule 2 because the thing described in subsection (4)(ba) of that section occurred, and

(ii) the education authority have decided the child or young person does not require a co-ordinated support plan and that decision has not been referred to the Tribunal under subsection (1) of that section by the time within which such references are to be made, refer the decision back to the appeal committee,

(e) where—
(i) the decision was transferred from an appeal committee to the Tribunal by virtue of paragraph 6(4) and (5) of schedule 2 because the things described in subsection (4)(c) of that section occurred, and

(ii) the Tribunal has confirmed the decision of the education authority that the child or young person does not require a co-ordinated support plan,

refer the decision back to the appeal committee,

(f) where—

(i) the decision was transferred from the sheriff to the Tribunal by virtue of paragraph 7(8) and (9) of schedule 2 because the thing described in subsection (4)(ba) of that section occurred, and

(ii) the education authority have decided the child or young person does not require a co-ordinated support plan and that decision has not been referred to the Tribunal under subsection (1) of that section by the time within which such references are to be made,

refer the decision back to the sheriff,

(g) where—

(i) the decision was transferred from the sheriff to the Tribunal by virtue of paragraph 7(8) and (9) of schedule 2 because the things described in subsection (4)(c) of that section occurred, and

(ii) the Tribunal has confirmed the decision of the education authority that the child or young person does not require a co-ordinated support plan,

refer the decision back to the sheriff.

(5A) Where the reference relates to a decision referred to in subsection (3)(f) of that section the Tribunal has the powers as mentioned in paragraphs (a) and (b) of subsection (5) of this section.”,

(b) in subsection (6), for the words “subsection (5)(c)” substitute “paragraph (ba) or (c) of subsection (5)”.

(8) In schedule 2 (placing requests)—

(a) after paragraph 2(4) add—

“(5) In sub-paragraph (1), the reference to an education authority includes an education authority which are not responsible for the school education of the child.”,

(b) after paragraph 4(2) insert—

“(2A) Sub-paragraph (2) does not apply where the placing request was made to an education authority which, at the time of the request, were not responsible for the school education of the child.”,

(c) in paragraph 6—

(i) in sub-paragraph (1), after “paragraph 5” insert “(including such a reference relating to a decision which has been referred back under section 19(5)(d) or (e))”,
(ii) in sub-paragraph (4), for the words from “there” to the end of the sub-paragraph substitute—
“the things mentioned in any of paragraphs (a), (b), (ba) and (c) of section 18(4) occur.”;

(d) in paragraph 7—
(i) in sub-paragraph (1), after “paragraph 5” insert “(including such a reference relating to a decision which has been referred back under section 19(5)(d) or (e))”,
(ii) after that sub-paragraph insert—
“(1A) Sub-paragraph (1) does not apply where the decision of the appeal committee may be referred to a Tribunal under section 18(1).”;
(iii) in sub-paragraph (8), for the words from “there” to the end of the sub-paragraph substitute—
“the things mentioned in any of paragraphs (a), (b), (ba) and (c) of section 18(4) occur.”.

2 Mediation services

In section 15(1) of the 2004 Act (mediation services)—
(a) for paragraph (a) substitute—
“(a) the parents of any children,”,
(b) for paragraph (b) substitute—
“(b) any young persons,”,
(c) in paragraph (c), the word “such” is repealed,
(d) after the word “of”, where it occurs for the fifth time, insert “any of”,
(e) for the word “such”, where it occurs for the third time, substitute “the”.

3 Dispute resolution

In section 16(1) of the 2004 Act (dispute resolution), the following are repealed—
(a) in paragraph (a), the words “belonging to the area of the authority”,
(b) in paragraph (b), the words “belonging to that area”,
(c) in paragraph (c), the word “such” where it occurs for the first time.

4 Contributions not recoverable in respect of certain services

In section 23 of the Education (Scotland) Act 1980 (c.44) (provision by education authority for education of pupils belonging to areas of other authorities), after subsection (2) insert—
“(2A) Subsection (2) does not permit an education authority to recover contributions in respect of—
(a) mediation services provided under arrangements made in pursuance of section 15(1) of the 2004 Act (mediation services), or
(b) services provided by the authority forming part of any procedure provided for in regulations under section 16(1) of that Act (dispute resolution).”.

5 **Arrangements between education authorities**

In section 29 of the 2004 Act (interpretation)—

(a) in subsection (3), after the word “Act” insert “and subject to subsection (3A),”;

(b) after that subsection insert—

“(3A) For the purposes of this Act, where arrangements are made or entered into by an education authority in respect of the school education of a child or young person with another education authority, the authority responsible for that school education is the authority for the area to which the child or young person belongs despite the education being, or about to be, provided in a school under the management of another authority.”.

6 **References to Tribunal in relation to co-ordinated support plan**

In section 18 of the 2004 Act (references to Tribunal in relation to co-ordinated support plan), after subsection (5) insert—

“(5A) Where an education authority fails, in response to a request referred to in section 6(2)(b)—

(a) to inform under subsection (2)(a) of section 11 the persons mentioned in subsection (3) of that section of their proposal to establish whether a child or young person requires, or would require, a co-ordinated support plan by the time required by regulations made in pursuance of subsection (8) of that section, or

(b) to inform those persons of any decision not to comply with the request by the time required by such regulations,

that failure is to be treated for the purposes of this section as a decision of the authority that the child or young person does not require a co-ordinated support plan.

(5B) Where under subsection (2)(a) of section 11 the education authority have informed the persons mentioned in subsection (3) of that section of their proposal to establish whether the child or young person requires, or would require, a co-ordinated support plan, failure by the authority so to establish by the time required by regulations made in pursuance of subsection (8) of that section is to be treated for the purposes of this section as a decision of the authority that the child or young person does not require a co-ordinated support plan.”.

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

In paragraph 11(2) of schedule 1 to the 2004 Act (Additional Support Needs Tribunals for Scotland)—

(a) after paragraph (k) insert—
“(ka) enabling specified matters relating to the failure by an education authority to comply with time limits required by virtue of this Act to be determined by the convener of a Tribunal alone,”,

(b) after paragraph (t) add—

“(u) enabling a Tribunal, in specified circumstances, to—

(i) review,

(ii) vary or revoke,

any of its decisions, orders or awards,

(v) enabling a Tribunal, in specified circumstances, to review the decisions, orders or awards of another Tribunal and take such action (including variation and revocation) in respect of those decisions, orders or awards as it thinks fit.”.

General

8 Ancillary provision

(1) The Scottish Ministers may by order make such transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, or in consequence of, or for the purposes of giving full effect to, any provision of this Act.

(2) An order under this section may modify any enactment, instrument or document.

9 Orders

(1) Any power conferred by this Act on the Scottish Ministers to make an order—

(a) must be exercised by statutory instrument,

(b) may be exercised so as to make different provision for different purposes.

(2) A statutory instrument containing an order under section 8 is, subject to subsection (3), subject to annulment in pursuance of a resolution of the Scottish Parliament.

(3) An order containing provisions which add to, replace or omit any part of the text of an Act is not to be made unless a draft of the statutory instrument containing the order has been laid before, and approved by resolution of, the Parliament.

10 Short title and commencement

(1) This Act may be cited as the Education (Additional Support for Learning) (Scotland) Act 2009.

(2) This section and sections 8 and 9 come into force on Royal Assent.

(3) The remaining provisions of this Act come into force on such day as the Scottish Ministers may by order appoint.
Education (Additional Support for Learning) (Scotland) Bill
[AS INTRODUCED]

An Act of the Scottish Parliament to amend the law in respect of placing requests in relation to the school education of children and young persons having additional support needs and in respect of arrangements between education authorities in relation to such school education; to make further provision in relation to the practice and procedure of the Additional Support Needs Tribunals for Scotland; and for connected purposes.

Introduced by: Fiona Hyslop
On: 6 October 2008
Bill type: Executive Bill
EDUCATION (ADDITIONAL SUPPORT FOR LEARNING) (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. As required under Rule 9.3 of the Parliament’s Standing Orders, the following documents are published to accompany the Education (Additional Support for Learning) (Scotland) Bill introduced in the Scottish Parliament on 6 October 2008:
   
   • Explanatory Notes;
   • a Financial Memorandum;
   • a Scottish Government Statement on legislative competence; and
   • the Presiding Officer’s Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 16–PM.
EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

BACKGROUND TO THE BILL

4. The Bill amends the Education (Additional Support for Learning) (Scotland) Act 2004 (“the 2004 Act”) which came into force on 14 November 2005. The 2004 Act introduced a new system for identifying and addressing the additional support needs of children and young persons who face a barrier to learning. References to young persons are to those aged 16 or 17 who are still receiving school education.

5. The 2004 Act sets out how children with additional support needs should be provided for by education authorities (“EAs”), supported, where necessary, by appropriate agencies, such as Health Boards, Careers Scotland and other local authorities.

6. The 2004 Act made provision for the establishment of new independent Additional Support Needs Tribunals for Scotland (“the Tribunal”). The Tribunal hears and decides appeals made by parents against the decisions by or failures of EAs in relation to a co-ordinated support plan (“CSP”). Reference to the Tribunal may also be made regarding the refusal of a placing request in certain circumstances.

7. In determining all its decisions and directions, the Tribunal must take account of the code of practice published by the Scottish Ministers. The 2004 Act also provides for the Tribunal to be governed by rules of procedure and regulations separate from the code of practice.

8. Her Majesty’s Inspectorate of Education (“HMIE”) conducted a 2 year inspection programme into how local authorities were implementing the 2004 Act. An interim report of their findings was published in October 2006 and the final report was published on 14 November 2007. The report highlighted that authorities did not always provide sufficient information for parents, children and young people about their rights under the new legislation.

9. There have been two recent Court of Session judgements which concerned the interpretation of the 2004 Act:

- *Gordon, Appellant* 2007 FamLR 76, in which Lady Dorrian accepted the appellant’s argument that none of the circumstances described in section 18(4)(a) to (c) existed on the day on which the placing request was refused, namely:
These documents relate to the Education (Additional Support for Learning) (Scotland) Bill (SP Bill 16) as introduced in the Scottish Parliament on 6 October 2008

- Section 18(4)(a): a CSP has been prepared (and not discontinued) for the child or young person,
- Section 18(4)(b): no such plan has been prepared, but it has been established by the education authority that the child or young person requires such a plan, or
- Section 18(4)(c): the education authority have decided that the child or young person does not require such a plan and that decision has been referred to a Tribunal under subsection (1).

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

- WD v Glasgow City Council 2007 SLT 1057, held that the Tribunal does not have jurisdiction to hear appeals in relation to out of area placing request decisions and that parents of children with a CSP cannot make out of area placing requests. The ruling also infers that parents of children with additional support needs cannot make out of area placing requests.

10. This Bill amends the 2004 Act in light of the HMIE reports, recent Court of Session rulings, the annual report from the President of the Additional Support Needs Tribunals for Scotland and informed observations in light of practice.

11. The Bill includes the following adjustments to the 2004 Act:
- it permits parents of children with additional support needs and young people with additional support needs, including those with CSPs, to make out of area placing requests.
- following the refusal of an out of area placing request, a parent or young person will be able to appeal the decision to refuse the request to the Tribunal.
- following the submission of an out of area placing request, a parent or young person will be able to access mediation from the potential host authority regarding the placing request.
- following a successful out of area placing request, parents or a young person will be able to access mediation and/or dispute resolution from the host authority regarding that authority’s functions under the 2004 Act.
- where a child is being educated outwith the area in which he or she lives as a result of a successful out of area placing request, it prevents the EA (the host authority) from recovering the cost of providing any mediation and/or dispute resolution services from the authority for the area in which the child lives (the home authority).
- where a child is being educated outwith his or her home authority as a result of a successful out of area placing request, responsibility for the child’s or young person’s education and carrying out all of the duties under the 2004 Act transfers to the host authority.
- where a child is being educated outwith his or her home authority as a result of arrangements made or entered into by the authority for the area to which the child or young person belongs with another authority, responsibility for the school education of
These documents relate to the Education (Additional Support for Learning) (Scotland) Bill (SP Bill 16) as introduced in the Scottish Parliament on 6 October 2008

11. The child or young person will remain with the authority for the area to which the child belongs.

- it permits the Tribunal to consider any placing request appeal, where a CSP has been prepared or is being considered, at any time before final determination by an education appeal committee (“EAC”) or sheriff.
- it extends the circumstances in which the decision of an education authority to refuse a placing request can be referred to a Tribunal, to include those decisions where an EA has issued its proposal to establish whether a CSP is required.
- it extends the circumstances in which parents and young persons can make references to the Tribunal consequent on certain procedural failures of the EAs.
- it enables Scottish Ministers to make rules to allow a convener sitting alone to consider certain references and to allow the Tribunal to review its decisions in certain specified circumstances.
- it clarifies the definition of “a child or young person for whose school education an education authority are responsible”.

THE BILL – SECTION BY SECTION

Section 1: Placing requests

12. Section 1 of the Bill enables parents of children with additional support needs and young persons with additional support needs including those with CSPs to make requests for their children or themselves (as appropriate) to attend a school outwith the local authority area in which the child or young person lives. It does this by amending paragraph 2 of schedule 2 to the 2004 Act to ensure that the description of the EA which is to consider a placing request is not restricted to the EA which is currently responsible for the child or young person’s education (see subsection (8)(a)). It also extends the jurisdiction of the Tribunal to enable it to hear appeals on refusals of such out of area placing requests by amending section 18(3)(e) of the 2004 Act to allow referral to the Tribunal of a placing request decision by an EA which is not the EA responsible for the child (or young person) (see subsection (6)(a)(iii)).

13. The other provisions in section 1 make amendments that relate to placing requests to ensure the existing system continues to operate in a logical manner. They also ensure the system properly accommodates the possibility of an “out of area” placing request being made.

14. For children or young persons with additional support needs who are attending a school outwith the area in which they live following a successful out of area placing request, section 1 also transfers the duty to keep under review any CSP from the original home authority to the new host authority (see subsection (4)(a)). New subsection (5A) is inserted to section 10 of the 2004 Act which places a duty on the new host authority to carry out a review of the co-ordinated support plan as soon as possible after the date of any transfer of the CSP from the home authority to the host authority (time limits for conducting this review will be specified in secondary legislation).

15. Section 1 of the 2004 Act defines what is meant by the term “additional support needs”. Subsection (2) amends the basis on which additional support needs are assessed to accommodate out of area placing requests. It provides that a child’s or young person’s additional support needs
These documents relate to the Education (Additional Support for Learning) (Scotland) Bill (SP Bill 16) as introduced in the Scottish Parliament on 6 October 2008

will be assessed against the provision made for children or young people of the same age in schools run by the education authority that is responsible for his/her education. Where no education authority is responsible for the child’s or young person’s education e.g. the child or young person is home or privately educated, his/her additional support needs will be assessed against the provision made for children or young people of the same age in schools run by the education authority in which he/she lives.

16. Section 7 of the 2004 Act enables a request to be made to an EA to establish whether a child or young person belonging to that EA’s area, but for whose education the EA are not responsible, has additional support needs or requires a co-ordinated support plan. This allows the education authority for the area to which the child belongs (the home authority) to comply with such a request where the child or young person is home educated, privately schooled or attending school under the management of another authority (a host authority). Subsection (3) amends section 7 of the 2004 Act to restrict a home authority from complying with such a request in relation to children and young people for whose school education any education authority are responsible. The effect of this is that where a successful out of area placing request is made, the child or young person will be covered by the provisions in section 6 of the 2004 Act and will be unable to utilise the provision in section 7.

17. Subsection (6)(b) inserts new paragraph (f) into section 18(3) of the 2004 Act to provide that a decision made by an EAC to refuse a placing request may be referred to the Tribunal if, before the expiry of the time limit for appeal to the sheriff court (28 days), a CSP is involved or being considered.

18. Section 18(4) of the 2004 Act sets out circumstances which indicate (for the purposes of the 2004 Act) when a CSP is involved or is being considered. Subsection (6)(c)(ii) adds a new circumstance to that list. The new circumstance is that the EA have advised the parent or young person that they will establish whether a CSP is required. The effect of this amendment is that a decision by an EA referred to in section 18(3)(e) of the 2004 Act or by an EAC referred to in section 18(3)(f) of that Act refusing a placing request can now be referred to the Tribunal if the EA have advised the parent that they will establish whether a CSP is required.

19. Subsection 8(d)(ii) inserts a new subsection (1A) to section 7 of schedule 1 to ensure that where a child or young person has a CSP or is being considered for a CSP, appeals regarding placing requests should be referred to the Tribunal rather than to the sheriff.

20. Subsection 8(c)(ii) and (d)(iii) extend the circumstances in which a placing request appeal must be transferred from the EAC or sheriff to the Tribunal from being limited to the event described in section 18(4)(c) of the 2004 Act to include the things described in the other paragraphs of section 18(4) (as amended by this Bill). The effect of this extension, and subsection (6)(c)(i) (which removes the words “at the time the placing request is refused” from section 18(4) of the 2004 Act), is that if, at any time before the EAC or sheriff has made their final decision on a placing request appeal, a CSP is being prepared or is being considered, the appeal is to be transferred to the Tribunal.

21. Subsection (7) extends the circumstances in which a placing request appeal can be transferred from the Tribunal to the Education Appeal Committee (see subsection (7)(a)(i)). This
These documents relate to the Education (Additional Support for Learning) (Scotland) Bill (SP Bill 16) as introduced in the Scottish Parliament on 6 October 2008

section also provides the Tribunal with the discretion to transfer placing request decisions back to the EAC or sheriff where it has been decided that no CSP is required (see subsection (7)(a)(ii)).

Section 2: Mediation services

22. Section 2 amends section 15 of the 2004 Act. Section 15 places a duty on EAs to arrange for independent mediation services in relation to the exercise of the EA’s functions under the 2004 Act to be provided, free of charge, to parents of children or young people belonging to its area. Mediation aims to bring parties together to discuss the issues and to help broker a way forward. Section 2 removes the requirement for the child or young person to belong to the authority’s area. This will allow parents of children or young persons who have submitted an out of area placing request or are being educated in an authority outwith the authority in which they live as a result of a successful out of area placing request, to access the mediation services provided by the host authority.

Section 3: Dispute resolution

23. Section 3 amends section 16 of the 2004 Act. Section 16 enables Scottish Ministers, by regulations, to require EAs to put in place arrangements to resolve disputes between the authority and any parents or young persons belonging to that authority’s area in relation to the EA’s functions under the 2004 Act. Dispute resolution is carried out by an independent third party who considers the facts of the case and makes recommendations to the EA. As with section 2, section 3 removes the requirement for the child or young person to belong to the authority’s area. This will allow parents of children or young persons who are being educated in an authority outwith the authority in which they live as a result of a successful out of area placing request, to access the dispute resolution services provided by the host authority.

Section 4: Contributions not recoverable in respect of certain services

24. Section 23 of the Education (Scotland) Act 1980 (c.44) (“the 1980 Act”) provides that where a child or young person is being educated outwith the authority in which he or she lives, the EA for the area in which the child or young person is being educated (the host authority) may recover from the home authority contributions in respect of provision of the child’s/young person’s school education and/or other services, including additional support under the 2004 Act.

25. Section 4 of the Bill amends section 23 of the 1980 Act to prevent the “host” authority from recovering the cost of providing any mediation or dispute resolution services under the 2004 Act for pupils being educated in their area as a result of a successful out of area placing request.

Section 5: Arrangements between education authorities

26. Section 29(3) of the 2004 provides the definition of “a child or young person for whose school education an education authority are responsible”. However Lord Brailsford’s Court of Session ruling, RB v. a decision of an Additional Support Needs Tribunal [2007] CSOH 126, which concerned a child who was being educated at home, stated that if, as a matter of fact, a particular authority controlled the education of the child, then that authority was responsible within the terms of section 29(3). Section 5 amends section 29(3) of the 2004 Act to provide that where arrangements are entered into between two authorities in respect of the school education of a child
or young person, it will always be the authority for the area to which the child or the young person belongs (known as the “home authority”) that is the responsible authority.

27. A successful out of area placing request does not involve any arrangements being made between authorities. Therefore, where a child is being educated outwith his or her home authority as a result of a successful out of area placing request, the host authority will be the EA with responsibility for the child’s or young person’s education and carrying out all of the duties under the 2004 Act (see section 29(3)(a) of the 2004 Act).

Section 6: References to Tribunal in relation to co-ordinated support plan

28. Section 6 extends the circumstances in which parents and young persons can make references to the Tribunal consequent on certain procedural failures of the EAs. It provides that where parents or young persons have requested that the authority establish whether the child or young person requires a CSP and the authority have not responded to that request within a specified period of time (set out in regulations), the failure so to respond is treated as if it were a decision by the EA that no CSP was required. It also provides that where an authority have notified a parent or young person that they will establish whether the child or young person requires a CSP but, after a specified period of time (set out in regulations), the authority has not made a decision on the matter either way, that failure is to be treated as if it were a decision of the EA that no CSP is required. Decisions of an EA that no CSP is required can be referred to the Tribunal.

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

29. As detailed in paragraph 28 above, the Bill will extend the circumstances in which parents and young persons can make references to the Tribunal consequent on certain procedural failures of the EAs. These new circumstances relate to an authority’s failure to take action within a specified period of time. Section 7 enables Scottish Ministers to make rules regarding the ability of Convener of a Tribunal to sit alone to consider references where they relate to failures by EAs to comply with specified time scales.

30. Section 7 will also allow Scottish Ministers to make rules to allow the Tribunal to review its decisions in certain circumstances.

Section 8: Ancillary provision

31. This section enables the Scottish Ministers to make further provision, by order, which is consequent upon the Bill.

Section 9: Orders

32. This section makes general provision about orders made under the Bill by Scottish Ministers. They will be made by statutory instrument. The section also specifies the Parliamentary procedure for an order under section 8.
Section 10: Short title and commencement

33. This section allows the Scottish Ministers to set different dates to commence different provisions of the Bill by order, other than sections 7, 8 and 9 which will come into force on Royal Assent.

FINANCIAL MEMORANDUM

INTRODUCTION

34. This document relates to the Education (Additional Support for Learning) (Scotland) Bill introduced in the Scottish Parliament on 6 October 2008. It has been prepared by the Scottish Government to satisfy Rule 9.3.2 of the Parliament’s Standing Orders. It does not form part of the Bill and has not been endorsed by the Parliament.

35. The Education (Additional Support for Learning) (Scotland) Bill amends the Education (Additional Support for Learning) (Scotland) Act 2004 (“the 2004 Act”), which came into force in November 2005 with the aim of creating a stronger, better system for supporting children’s learning. The 2004 Act, inter alia, places new duties on education authorities to make adequate and efficient provisions for the additional support needs of every child and young person for whom they are responsible and who requires additional support for learning. Education authorities must identify, support and keep under review the needs of all children with additional support needs.

36. The original policy intention behind the 2004 Act was to allow young people with additional support needs, and parents of children with additional support needs, including those with co-ordinated support plans (CSPs) to make out of area placing requests. However, this was called in to doubt by an Inner House, Court of Session ruling by Lord Macphail on 11 October 2007. Lord Macphail’s ruling held that the 2004 Act did not make, and should not be construed as making, any provision in respect of a child with additional support needs, who required a CSP, for the making of a placing request to any education authority who were not responsible for the child’s young person’s education. The ruling also inferred that young people with additional support needs and parents of children with additional support needs could not make out of area placing requests. Prior to Lord Macphail’s ruling, local authorities were considering out of area placing requests for children with additional support needs, including those with co-ordinated support plans. Therefore, the estimated number of future out of area placing requests contained within this memorandum is likely to be fairly accurate.

37. The Convention of Scottish Local Authorities (COSLA) and 6 of the 32 local authorities in Scotland participated in a survey to assist the Scottish Government with the calculations contained within this Financial Memorandum. The six authorities were Dumfries and Galloway Council, Dundee City Council, East Ayrshire Council, Highland Council, City of Edinburgh Council and West Lothian Council. These authorities represent a good cross section of all authorities in Scotland.

38. The survey indicates that each are involved in only a small number of cases which would be affected by this Bill per year and that cases vary considerably in their complexity and length. As
such, the estimated cost of dealing with a case also varies, with a wide range of estimated cost per case both between and within local authorities.

39. Estimates used in this Memorandum are based on an examination of the data gathered with ranges given and representative averages chosen to indicate the likely scale of the impact. The estimates below should be treated as an indicative average only.

40. It is important to note that given both the very small number of cases involved and the large variability in cost due to the individual nature of cases, it is not possible to assess precisely either the number of cases or the cost involved. Both number and cost are likely to vary from year to year. However, the small number of cases means the total overall additional cost to all of the 32 local authorities as a result of this Bill is likely to be below £55,000 a year.

41. The funding originally allocated to education authorities for CSPs was based on the information contained in the Financial Memorandum that accompanied the 2004 Act, which stated that “It is expected there will be around 11,200 to 13,700 CSPs at any one time. The number of new CSPs being prepared each year could range from 1,700 to 2,500. This estimate is drawn from a model based on an assumption that 50% of children who currently have Records of Needs will have such needs that require a CSP plus an additional proportion of the school population (0.3-0.6%) who will also have such needs but who do not currently have a Record”. However, the National Statistics publication “Pupils in Scotland, 2007” shows that only 1881 pupils had a co-ordinated support plan (CSP) at September 2007. Education authorities have therefore already received excess funding for their work in this area.

42. COSLA provided the Scottish Government with the following statement “COSLA and 6 of our councils have been involved in the preparation of the draft Financial Memorandum and we believe that the cost estimates reflect the outcomes from these discussions……”.

**COST ON LOCAL AUTHORITIES**

**Extending the jurisdiction of the Tribunal to hear all placing request appeals involving a co-ordinated support plan (CSP)**

43. Currently, the 2004 Act makes provision for the transfer of a placing request appeal from the Education Appeal Committee (EAC) or the sheriff to the Additional Support Needs Tribunals for Scotland (the Tribunal) only in respect of the situation where the education authority has decided that no CSP is appropriate and that decision has been referred to the Tribunal.

44. The Bill extends the jurisdiction of the Tribunal to include consideration of any placing request appeal where a CSP has been prepared or is being considered, at any time before final determination by an EAC or sheriff (as appropriate). An example would be where the education authority is in the process of establishing whether a CSP is required.

45. The National Statistics publication “Placing Requests in Schools in Scotland, 2006/2007” states that of the 28,645 placing requests received for all pupils, 529 were appealed to the Education Appeal Committee (EAC), and 5 of those subsequently appealed to the sheriff. From a total school population of 692,227, the percentage of school pupils identified as having additional support needs 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 is currently 5.3% (36,518). Only 5.2% of those pupils identified as having additional support needs have a CSP (1,881). Therefore, based on these percentages, it is estimated that the number of placing request appeals referred to the Tribunal from the EAC or sheriff because a CSP has been prepared or is being considered will increase by no more than 2 or 3 cases per annum. Conversely, this will also mean a decrease in the number of placing request appeals heard by the EAC or sheriff by 2 or 3 cases per annum.

46. There is considerable variation in the estimated cost of a Tribunal which includes an oral hearing, both between individual cases within the same authority and between local authorities - the cost for a Tribunal case with representation ranges between £500 and £18,000. On the basis of information received, an indicative average cost per case is around £5,000. Therefore, the total cost to all authorities for Tribunals cases with representation at an oral hearing is estimated to be £15,000 per annum (3 x £5,000).

47. On the other hand, the survey indicates that the cost of a sheriff Court appearance ranges between £2,700 and £25,000. An indicative average cost per case is around £9,000. The cost of an appeal to EAC ranges between £350 and £4,800. An indicative average cost per case is around £2,000. Therefore the savings incurred by authorities for those cases that are transferred from either the EAC or sheriff to the Tribunal is estimated to range between £6,000 (3 cases from the EAC at £2,000 each) to £27,000 (3 cases from the sheriff at £9000 each). Depending on the make up of cases, this could result in either an increase in cost or a saving for local authorities. Assuming the reduction in cases is more likely to be an EAC appeal rather than a Sheriff Court appearance, this suggests an indicative saving of £13,000 per annum (2 EAC cases at £2,000 each + 1 sheriff case at £9,000).

Out of area placing requests

48. As detailed in paragraph 36, the original policy intention behind the 2004 Act was to allow young people with additional support needs, and parents of children with additional support needs, including those with co-ordinated support plans (CSPs) to make out of area placing requests. However, this was called into doubt by Lord Macphail’s ruling.

49. The Bill will amend the legislation to make it clear that young people with additional support needs, and parents of children with additional support needs, including those with CSPs, are able to make a placing request to an education authority outwith the local authority area in which they live. Additionally, where a CSP has been prepared or is being considered, an appeal against a decision to refuse an out of area placing request can be referred to the Tribunal.

50. There is considerable variability among the authorities who responded to our survey on the reported cost of an out of area placing request – this ranged between £450 and £12,500. An indicative average cost is around £3,600. Following Lord Macphail’s ruling, the Scottish Government contacted COSLA in March 2008 to establish the extent of the impact of Lord Macphail’s ruling on authorities. COSLA confirmed that in their work with the Association of Directors of Education in Scotland (ADES), they could not find any evidence to suggest that authorities were refusing to accept placing requests for children with additional support needs who were resident in another authority’s area. As a result, there is unlikely to be any increase in cost to local authorities in processing out of area placing request for children with additional support needs (excluding those with a co-ordinated support plans). The National Statistics publication “Placing
Requests in Schools in Scotland, 2006/2007” states the total number of “out of area” placing requests received for all pupils is 3008. The number of pupils identified as having a co-ordinated support plan, as detailed in paragraph 45 above is 1881 (5.3% of the total pupil population have been identified as having additional support needs (36,518) and of those, 5.2% have a CSP). Therefore, the estimated number of out of area placing requests for pupils with a CSP is estimated to be around 9 per annum (5.3% of 3008 = 159, 5.2% of 159 = 9). The total estimated cost to all authorities for processing out of area placing requests for pupils with co-ordinated support plans is £32,400 per annum (9 x £3,600).

51. It should also be noted that under section 23(2) of the Education (Scotland) Act 1980, where an education authority has provided school education, with or without other services (excluding mediation or dispute resolution), for any pupil, child or young person belonging to the area of some other authority, or have provided additional support within the meaning of the 2004 Act for any such pupil, the education authority, may, if a claim is made, recover from that other authority such contributions in respect of such provision as may be agreed between the authorities or as the Scottish Ministers may determine. As such, successful placing requests are cost neutral overall.

52. The National Statistics publication “Placing Requests in Schools in Scotland, 2006/2007” states the total number of “out of area” placing requests received for all pupils is 3008. Of those, 2249 (75%) were granted. As detailed in paragraph 45, 5.3% of pupils have been identified with additional support needs, including those with CSPs. Therefore, the estimated number of out of area placing requests for pupils with additional support needs, including those with CSPs is 159 (5.3% of 3008) and the estimated number granted is 119 (75% of 159). Based on these figures there could be a maximum of 40 (159 minus 119) appeals to either the EAC or the Tribunal for children with additional support needs/CSPs respectively. If only 5.2% of all pupils identified with additional support needs have a CSP, we would expect two of those cases (5.2% of 40) to be cases of children with a CSP. Those cases would go to the Tribunal and the remaining 38 cases could be appealed to the EAC. However, as only 19% of refused placing requests are actually appealed, the numbers could be as little as 1 appeal per annum to the Tribunal and 8 appeals to the EAC. There is considerable variation in the estimated cost of a Tribunal case with representation at an oral hearing, both between individual cases within the same authority and between local authorities - the cost for a case ranges between £500 and £18,000. On the basis of information received, an indicative average cost per case is around £5,000. The results of the survey indicate that the cost of an appeal to EAC ranges between £350 and £4,800. An indicative average cost per case is around £2,000. Therefore, the estimated total increase in cost to all authorities for placing request appeals is around £21,000 per annum (1 x £5,000 plus 8 x £2,000).

Mediation and dispute resolution

53. The Bill provides that following the submission of an out of area placing request, a parent or young person will be able to access mediation from the potential host authority regarding the placing request. It will also provide that following a successful out of area placing request, the duty to provide mediation and dispute resolution services will lie with the new “host” authority. Any costs associated with providing these services to the parents of a child or a young person who does not belong to the authority’s area will not be recoverable under section 23(2) of the Education (Scotland) Act 1980.

54. To date, there have not been any cases in which a home authority has been required to provide mediation or dispute resolution for a child being educated in another authority’s area as a
These documents relate to the Education (Additional Support for Learning) (Scotland) Bill (SP Bill 16) as introduced in the Scottish Parliament on 6 October 2008

result of a placing request. Therefore, the cost to authorities is likely to be minimal. Of the 6 local authorities who responded to the survey, 5 authorities purchase mediation services from the voluntary sector using either a service level agreement or a case by case basis, and 1 authority provides mediation services in house. For those authorities that purchase mediation services from the voluntary sector this cost could range from £0 to £1790 per case depending upon whether they have a service level agreement or purchase services on a case by case basis.

55. The 6 local authorities who responded to the survey estimated the cost of staff time for mediation at around £800 per case. Scottish Ministers have set the fee payable by authorities to an Independent Adjudicator for dispute resolution at £355 per case. This excludes the cost of staff time estimated at around £850. If parents or young persons were to request mediation from the host authority in 1% – 5% of the estimated 159 out of area placing requests for pupils with additional support needs/CSPs (see paragraph 52), this could result in an increase of between 2 to 8 mediation cases per annum. If parents or young person were to request dispute resolution from the host authority in 1% - 5% of the estimated 119 out of area placing requests granted for pupils with additional support needs/CSPs (see paragraph 52), this could result in an increase of between 2 to 6 dispute resolution cases per annum. The total cost to all authorities per annum for providing mediation and/or or dispute resolution services to pupils belonging to another authority’s area is estimated to range between £1,600 (2 x £800) for mediation only to £22,770 (6 x (£1,790+£800+£355+£850)) for provision of mediation and dispute resolution.

Reviewing a co-ordinated support plan (CSP) following a successful out of area placing request

56. Section 10 of the 2004 Act provides for reviews of CSPs. The 2004 Act states that education authorities have a duty to keep under consideration the adequacy of any co-ordinated support plan prepared for a child or young person belonging to their area. The education authority must therefore review each plan every 12 months. It may be reviewed earlier if there has been a significant change in the circumstances of the child or young person, for example if their needs change or the level of additional support provided changes. In practice, it is likely that an authority would review a co-ordinated support plan when a child changes school, particularly if the new school was based in another local authority’s area.

57. Where an education authority accepts a placing request for a child who does not belong to its area, that authority will assume responsibility for the child’s education and will be required to review any CSP as soon as is reasonably practical after the date of transfer. The cost of reviewing a CSP in the Financial Memorandum which accompanied the 2004 Act was calculated at £440. The current estimated cost for reviewing a CSP is around £800 per plan. The estimated number of out of area placing requests granted for children with additional support needs is 119 and of those, only 5.2% are likely to have a CSP, indicating that there will be approximately 6 cases per annum. Total cost to authorities for reviewing a co-ordinated support plan following a successful out of area placing request is estimated to be around £4,800 per annum (6 x £800).

58. It is useful to note that under section 23(2) of the Education (Scotland) Act 1980, these costs can be recovered from the home authority.
Two new Tribunal reference categories - education authorities exceed specified timescales

59. Parents will be able to submit references to the Tribunal in relation to two new procedural failures by local authorities to take action within specified timescales. The first is where an authority fails to acknowledge (within a specified time to be stipulated in secondary legislation) a request from a parent of a child with additional support needs or a young person with additional support needs to establish whether the child/young person requires a CSP. The second is where an authority has notified a parent or young person that it will establish whether their child/young person requires a CSP and after a specified period of time (to be stipulated in secondary legislation), the authority has not made a decision either way. **It is important to note that authorities can avoid references under these new categories by involving parents/young people in the process, keeping parents/young people abreast of the situation and taking action within the specified timescales.** Furthermore, with regard to the second new appealable failure, the 2004 Act currently enables a local authority to write out to a parent or young person to advise them that it requires an extension to the timescale. The extension cannot exceed 24 weeks starting from the date the authority issued its proposal to establish whether a CSP is required. It is estimated that these two new reference categories will result in a 5% to 10% increase per annum in the number of referrals to the Tribunal (4–8 cases). The costs of these extra cases are set out below in paragraph 60.

Expedited Tribunal paper based decision making process

60. The Bill will make possible a new expedited Tribunal paper based decision making process for those references in which authorities have exceeded any specified timescales. This will include the two new reference categories detailed in paragraph 59 above and those cases that are currently appealable under the 2004 Act (where it has been established by the authority that a child/young person requires a co-ordinated support plan and the authority fails to prepare a plan by the time specified in regulation (16 weeks, or 24 weeks if the authority has written to the parent or young person notifying them that it cannot meet the 16 week timescale). While the cases that are currently appealed under the 2004 Act could result in an oral hearing, experience to date indicates that these references have been decided without the need for an oral hearing. The reason for this is that these references have not been opposed or subject to dispute in terms of facts. As mentioned in paragraph 59, authorities have the power to avoid appeals made under these categories by involving parents/young people in the process, keeping parents/young people abreast of the situation and taking action within the specified timescales. The new expedited paper based decision making process will enable the Convener of an Tribunal to consider such cases alone and this will keep the cost to authorities to a minimum – estimated to be around £2,800 per case. The total cost to all authorities for these new reference categories is estimated to range between £11,200 (4 x £2,800) - £22,400 (8 x £2,800). Using the mid range of 6 cases the cost is estimated to be £16,800 per annum.

Enabling the Tribunal to review its decisions

61. The Bill will enable the Tribunal to review, vary or revoke its decisions in certain circumstances which will be specified in regulations. Currently the 2004 Act enables any person who has made an appeal to the Tribunal, and the relevant education authority, to appeal the decision of the Tribunal to the Court of Session. Such an appeal to the Court of Session may only be made on a point of law. Therefore, if a Tribunal considered it appropriate to review its decision based on a point of law, this could result in possible savings for authorities as fewer cases will need to be referred to the Court of Session. The local authority cost of an appeal to the Court of Session ranges between £9000 and £28,000. An indicative average cost is around £14,000. The indicative
average cost of a Tribunal case with an oral hearing is around £5,000. This would save authorities approximately £9,000 per case. Since the commencement of the 2004 Act, 5 cases per annum have been referred to the Court of Session on a point of law. Therefore, the total saving to all authorities in cases where the Tribunal reviews its decision on a point of law is estimated to be around £45,000 (5 x £9,000).

### TOTAL ESTIMATED COSTS PER ANNUM ON ALL LOCAL AUTHORITIES:

<table>
<thead>
<tr>
<th>Description</th>
<th>Increase in cost</th>
<th>Saving</th>
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</thead>
<tbody>
<tr>
<td>Coordinated support plan appeals - Tribunal cases with representation at an oral hearing (paragraph 46)</td>
<td>£15,000</td>
<td></td>
</tr>
<tr>
<td>Cases transferred from the EAC or sheriff to the Tribunal (paragraph 47)</td>
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<td>£13,000</td>
</tr>
<tr>
<td>Processing out of area placing requests (paragraph 50)</td>
<td>£32,400</td>
<td></td>
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<td>Increase in placing request appeals (paragraph 52)</td>
<td>£21,000</td>
<td></td>
</tr>
<tr>
<td>Providing mediation and/or dispute resolution (paragraph 55)</td>
<td>£22,770</td>
<td></td>
</tr>
<tr>
<td>Reviewing a co-ordinated support plan (paragraph 57)</td>
<td>£4,800</td>
<td></td>
</tr>
<tr>
<td>Expedited Tribunal paper based process (paragraph 60)</td>
<td>£16,800</td>
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<tr>
<td>Tribunal reviews its decision on a point of law (paragraph 61)</td>
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<td>£45,000</td>
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<tr>
<td><strong>Total</strong></td>
<td><strong>£112,770</strong></td>
<td><strong>£58,000</strong></td>
</tr>
</tbody>
</table>

### COST ON THE SCOTTISH ADMINISTRATION

**Additional Support Needs Tribunals for Scotland**

62. The main on-going direct cost to the Scottish Government associated with the 2004 Act and the Bill will be the Additional Support Needs Tribunals for Scotland (the Tribunal), which the Scottish Government directly funds.

63. The Tribunal hears and decides appeals made by parents against the decisions or failures of education authorities about co-ordinated support plans. Reference to the Tribunal may also be made regarding the refusal of a placing request in certain circumstances. The Tribunal’s statutory functions, decisions and dealings with its users and the public are independent of government, national and local.

64. In the original Financial Memorandum that accompanied the 2004 Act, it was estimated that there would be around 300 appeals per annum to the Tribunal and that the cost of running the Tribunal in 2003/04 would be £760,000 per annum. This figure included staffing, members’ fees and expenses, training, travel, accommodation and central service overheads.

65. The actual annual cost of running the Tribunal since the commencement of the 2004 Act has been 2003/2004=£453,000; 2004/2005=£680,000; 2005/2006=£843,000 (this included £150,000 for the purchase and set up of a records management system); 2006/2007=£541,000; and 2007/2008=£402,000. The cost of running the Tribunal in 2008/2009 is expected to be around £542,000.
66. As at 25 July 2008, the total number of appeals received since the commencement of the 2004 Act is 141, broken down as follows: 2005/06 = 2; 2006/07 = 42; 2007/08 = 76; 08/09 = 21.

67. It is expected that the overall changes contained in this Bill will generate an increase of no more than 12 to 18 references to the Tribunal per annum (16% to 24%) The estimated cost of a Tribunal hearing ranges between £1,250 and £8,200. Using the mid ranges of 15 references and a cost of £4,725 per hearing, this will result in an increase in cost to the Tribunal of £70,875. However, it should be noted that the Tribunal should be able to deal with any increase in the number of appeals as part of its day to day work.

68. The Tribunal has estimated that the new paper based expedited process will cut the Tribunal cost of a paper based hearing from £1050 per case to £310 – a 70% savings. As detailed in the third annual report of the President of the Tribunal, 10 references were decided by paper based process i.e. without the need for an oral hearing. Saving the Tribunal £7,400 (10 x (1050- 310)).

69. The Bill will not require the appointment of any additional Tribunal staff, members or conveners

70. However, it is useful to note that if the changes contained in this Bill were to generate any increase in the running costs of the Tribunal, these additional costs could be contained within the current portfolio budget.

### TOTAL ESTIMATED COST TO THE SCOTTISH ADMINISTRATION:

<table>
<thead>
<tr>
<th>Cost Description</th>
<th>Increase in Cost</th>
<th>Saving</th>
</tr>
</thead>
<tbody>
<tr>
<td>20% increase in the number of cases referred to the Tribunal</td>
<td>£70,875</td>
<td></td>
</tr>
<tr>
<td>Introduction of a new paper based Tribunal expedited process</td>
<td></td>
<td>£7,400</td>
</tr>
</tbody>
</table>

### Scottish Court Service

71. Currently a small number of cases a year go to the Sheriff Court or Court of Session and this number is likely to be reduced as a result of this Bill. Due to the small number of cases involved, the considerable variability of the individual cases in terms of length of case and resources required, it has not been possible for the Scottish Court Service to estimate the likely savings to the courts as a result of fewer cases. However, as there have been fewer than 11 cases per annum (in 2007 there were 5 placing request appeals referred to the sheriff in respect of all pupils in Scotland, plus 5 Tribunal decisions referred to the Court of Session on a point of law as detailed in the President of the Tribunal’s annual report), the potential savings will be low and will not impact on the operation of the Courts.

### COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

#### Parents

72. Cost implications of the Bill for individuals rest primarily with parents. There are no duties placed on parents that will result in them having to incur additional costs. Appeals to the Tribunal
may be supported by legal representation if the parent wishes, but the Tribunals are intended to be a family-friendly process where legal representation will not be a necessity. Parents may also wish to seek their own legal advice and may wish to obtain independent assessments and reports of their child. These are optional costs that exist at present and are not a result of the Bill.

73. The Bill will enable the Tribunal to review, vary or revoke its decisions. It is anticipated that this provision will only be used where the Tribunal considers it appropriate to review its decision based on a point of law. This could result in fewer cases being referred to the Court of Session on a point of law and as a result, create a possible saving for parents who will no longer be required to secure legal representation to handle their case.

Other bodies and businesses

74. The Bill has no direct cost impact on businesses, charities or voluntary bodies. Therefore, there was no need for a Regulatory Impact Assessment to be completed. Independent schools have no new obligations placed on them by the Bill.

SCOTTISH GOVERNMENT STATEMENT ON LEGISLATIVE COMPETENCE

75. On 6 October 2008, the Cabinet Secretary for Education and Lifelong Learning (Fiona Hyslop MSP) made the following statement:

“In my view, the provisions of the Education (Additional Support for Learning) (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

76. On 2 October 2008, the Presiding Officer (Alex Fergusson MSP) made the following statement:

“In my view, the provisions of the Education (Additional Support for Learning) (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
EDUCATION (ADDITIONAL SUPPORT FOR LEARNING) (SCOTLAND) BILL

INTRODUCTION

1. This document relates to the Education (Additional Support for Learning) (Scotland) Bill (“the Bill”) introduced in the Scottish Parliament on 6 October 2008. It has been prepared by the Scottish Government to satisfy Rule 9.3.3(c) of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 16–EN.

POLICY OBJECTIVES OF THE BILL

2. The Bill is an important step in the work of the Scottish Government to strengthen, as well as clarifying, the ability of the Education (Additional Support for Learning) (Scotland) Act 2004 (“the 2004 Act”) to deliver its original policy intention, that intention being to provide for any need that requires additional support for the child or young person to learn.

3. 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.
   • following the refusal of an out of area placing request, enable a parent or young person to appeal the decision to refuse the request to the Tribunal.
   • following the submission of an out of area placing request, enable a parent or young person to access mediation from the potential host authority regarding the placing request.
   • following a successful out of area placing request, enable a parent or a young person to access mediation and/or dispute resolution from the host authority regarding that authority’s functions under the 2004 Act.
   • where a child is being educated outwith the area in which he or she lives as a result of a successful out of a area placing request, prevent the EA (the host authority) from recovering the cost of providing any mediation and/or dispute resolution services from the authority for the area in which the child lives (the home authority).
This document relates to the Education (Additional Support for Learning) (Scotland) Bill (SP Bill 16) as introduced in the Scottish Parliament on 6 October 2008

- 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.
- where a child is being educated outwith his or her home authority as a result of arrangements made or entered into by the authority for the area to which the child or young person belongs with another authority, provide for responsibility for the school education of the child or young person to remain with the authority for the area to which the child belongs.
- permit the Tribunal to consider any placing request appeal, where a CSP has been prepared or is being considered, at any time before final determination by an education appeal committee (“EAC”) or sheriff.
- extend the circumstances in which the decision of an education authority to refuse a placing request can be referred to a Tribunal, to include those decisions where an EA has issued its proposal to establish whether a CSP is required.
- extend the circumstances in which parents and young persons can make references to the Tribunal consequent on certain procedural failures of the EAs.
- enable Scottish Ministers to make rules to allow a convener sitting alone to consider certain references and to allow the Tribunal to review its decisions in certain specified circumstances.
- clarify the definition of “a child or young person for whose school education an education authority are responsible”.

CONSULTATION

4. A consultation paper, Education (Additional Support for Learning) (Scotland) Act 2004 – Amendment Bill 2008 was published on 9 May 2008 and included a draft of the Bill. Just under 4500 copies of the consultation paper were distributed, including to every school in Scotland; Scottish education authorities; public bodies; education organisations; equality organisations; health boards; and other interested parties. The document was made available on the Scottish Government’s website at http://www.scotland.gov.uk/Publications/2008/05/08135938/0. The document was also publicised in the “Moving Forward” newsletter produced on behalf of the Scottish Government by Children in Scotland, which is circulated to approximately 10,000 professionals.

5. A total of 9 consultation events were held throughout Scotland and attended by a total of 428 professionals and parents.

6. The views of young people on the current system were sought online on the ENQUIRE web site.

7. The consultation period ran for 6 weeks from 9 May to 19 June. Late responses were accepted and in total 165 responses were received.

8. The Minister for Children and Early Years met with COSLA and key stakeholders – Scotland’s Commissioner for Children and Young People, the Equality and Human Rights
This document relates to the Education (Additional Support for Learning) (Scotland) Bill (SP Bill 16) as introduced in the Scottish Parliament on 6 October 2008

Commission (EHRC), Barnardo’s Scotland, Children in Scotland, National Deaf Children’s Society, the Independent Specialist Education Advice (ISEA) and the Govan Law Centre on 20 May at the Scottish Parliament to discuss the proposed amendments. Officials also met on 14 May with representatives of For Scotland’s Disabled Children – Capability Scotland, National Autistic Society, Downs Syndrome Scotland.


10. Most respondents were very supportive of the proposals with 77% being positive towards the proposals overall, 8% negative and 15% neutral. 89% of respondents provided additional comments on the individual proposals. Less than half of respondents were from the broad education sector (38%), less than half from individuals (23%) and a few health related stakeholders (8%). Of the 32 local authorities in Scotland, 23 responded to the consultation.

11. The key findings to emerge were that amongst the key stakeholders (a group comprising the Association of Directors of Education in Scotland (ADES), the Association of Directors of Social Work (ADSW), Educational Institute of Scotland (EIS), the President of the Tribunal, Govan Law Centre, the Scottish Consumer Council, Scotland’s Commissioner for Children and Young People, Independent Special Education Advice (ISEA) and Learning Teaching Scotland (LTS)) there was little variation in the views expressed. All of these stakeholders provided additional comments on the proposals. The views expressed centred on the complexity of the appeal routes, information provision for parents, the issue of legal capacity and the interpretation of the term “significant” in relation to CSPs.

12. Most responses returned (defined as being between 75% and 90%) were in favour of making the proposed amendments contained in the consultation paper. The exceptions to this were:

- Question 7 – Access to mediation and dispute resolution via the host EA and;
- Question 13 –
  - Introduce a criminal offence punishable by a fine for anyone in breach of a restricted reporting order.
  - Enable enforcement of an award of expenses as if it were an extract registered decree arbitral bearing a warrant for execution issued by a sheriff court.

13. In both these cases, only the majority (defined as being between 50% and 74%) were in favour of the proposal.

14. One of the most pertinent implications from the consultation responses was the potentially adverse impact on parental rights of introducing a penalty for the breaching of a restricted reporting order as laid out in Q13 of the consultation. While on the one hand respondents were generally in favour of the proposed amendment, many qualified this position. However, a number of key stakeholders such as the President of the Additional Support Needs Tribunal (ASNT), who herself consulted all appointed members of the ASNT, was not in favour of the proposed amendment. It is instructive that this position is reflected in the views expressed by; ISEA (the main advocacy service in Scotland for parents making referrals to the ASNT); the
Equalities and Human Rights Commission; and a number of local authorities. Others such as Children in Scotland and Scotland’s Commissioner for Children and Young People are uncertain about the implications and in the Commissioner’s case adopts the position of deferring to “the opinions of those more intimately involved in using the system”. As a result of having the issues contained in these responses brought to our attention, the decision was made not to implement the amendments proposed by this question.

15. The Bill as published in the consultation document proposed to insert two new paragraphs into section 18(4) of the 2004 Act. The first of these, which would have inserted a new paragraph (ba), has now been reconsidered in light of a response from an education authority that correctly highlighted the practical problem that would arise from the proposal.

16. As the only party involved at the stage referred to in that paragraph would be the parent the only practicable way to ensure that the requirements of paragraph (ba) were fulfilled would be to place a duty upon the parent or young person to inform the host authority about any request for an assessment for a CSP. Since the aim of the amendments proposed by question 5 are intended to extend parental rights, placing additional duties upon them was not considered to be a desirable outcome and the decision was made to drop paragraph (ba) from the Bill. The dropping of the paragraph (ba) that appeared in the consultation paper does not affect the policy intention of the Bill. As a consequence of this decision, there is still a paragraph (ba) in the Bill. However, it should be noted that paragraph (ba) was originally paragraph (bb) in the Bill that was published with the consultation document.

POLICY OBJECTIVES

Extension of the Tribunal’s jurisdiction

17. Lady Dorrian’s Court of Session ruling (see paragraph 9 of the Explanatory Notes) accepted the appellant’s argument that none of the circumstances described in section 18(4)(a) to (c) existed on the day on which the placing request was refused, namely: a CSP has been prepared (and not discontinued) for the child or young person; no such plan has been prepared, but it has been established by the education authority that the child or young person requires such a plan; or the education authority have decided that the child or young person does not require such a plan and that decision has been referred to a Tribunal under subsection (1). Therefore, as a result, the Tribunal did not have the jurisdiction to hear the placing request appeal.

18. The Bill amends the 2004 Act to allow the Tribunal to have jurisdiction to consider any placing request appeal where a CSP is being prepared or is being considered, whether directed to the home or host authority, at any time before final determination by the EAC or Sheriff, for example where the education authority is in the process of establishing whether a CSP is required. The amended legislation will also facilitate a transfer of a referral to the EAC or sheriff.

Out of area placing requests

19. A request was made on behalf of a child with additional support needs who lived in West Dunbartonshire to attend a school under Glasgow City Council’s management (WD v Glasgow
This document relates to the Education (Additional Support for Learning) (Scotland) Bill (SP Bill 16) as introduced in the Scottish Parliament on 6 October 2008

City Council 2007 SLT 1057). Glasgow declined the placing request on the grounds of complying with the Standards in Scotland’s Schools etc. Act 2000 which provides for the presumption of mainstreaming. West Dunbartonshire Council were in the process of preparing a CSP when the request was refused.

20. The parent of the child then submitted a reference to the Tribunal appealing Glasgow’s decision. The decision of the Tribunal was that it had no jurisdiction to consider an appeal against Glasgow City Council’s refusal to grant an out of area placing request. The case was subsequently referred to the Court of Session where Lord Macphail held that the 2004 Act did not make, and should not be construed as making, any provision in respect of a child with additional support needs who required a CSP, regarding the submission of a placing request to any education authority who were not responsible for the child’s education, or for a reference to the Tribunal of a refusal by such an authority of such a request.

21. As a result of the above, 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 respect of making out of area placing requests, as parents of children without additional support needs. Additionally, the Bill will allow the refusal of such a request to be referred to the Tribunal.

Access to mediation and dispute resolution following an out of area placing request

22. Currently where an out of area placing request has been granted in relation to a child or young person, the home authority would be required to provide mediation or dispute resolution between the parent and the host authority at the home authority’s expense. Therefore, the costs of these services would be provided by an authority which at that point is not responsible for the child’s school education.

23. The 2004 Act will be amended to require the host authority to provide access to mediation and dispute resolution in circumstances where the host authority has accepted an out of area placing request and is, therefore, responsible for the education of the child, and access to mediation regarding the placing request in circumstances where an out of area placing request has been submitted.

24. As the provision in question will be provided by the host authority, the Bill will amend section 23(2) of the Education Scotland Act 1980 to reflect the fact that the cost of providing any mediation or dispute resolution services will not be recoverable from the home authority. The reason for this is that the parents or young person would request mediation or dispute resolution in relation to the provision provided by, or a decision of, the host authority.

Review of a CSP following an out of area placing request

25. The 2004 Act states that every education authority must keep under consideration the adequacy of any CSP prepared (and not discontinued) for any children or young persons belonging to their area. Therefore, under the current legislation, where a child or young person has been granted an out of area placing request and has a CSP, the home authority would be
responsible for reviewing the CSP, even though at that stage, the home authority would have no responsibility for that child’s school education.

26. Therefore the Bill will amend the 2004 Act to provide that, following the granting of an out of area placing request, the host authority assumes responsibility for duties in relation to reviewing the CSP, and that such a review should be conducted as soon as reasonably practicable by the host authority. The host authority will therefore assume all responsibility for the child’s education by accepting a placing request. This transfer of responsibility will take place at the time the child starts at the school in the host authority.

Responsibility for a child’s education

27. Where arrangements are made between two authorities as to a child being educated in an authority school which is not the authority for the area to which the child belongs, then in all circumstances the 2004 Act was based on the understanding that the “home” authority was to remain the responsible authority.

28. However Lord Brailsford’s recent Court of Session ruling concerning a child who was being educated at home, stated that being responsible was down to the degree of control (B v Highland Council 2007 SLT 844).

29. Therefore, it was important to ensure that where arrangements are made between two authorities, the home authority remains the authority with responsibility for the child’s education, the concept on which a number of Scotland’s Education Acts are based. The Bill will therefore ensure that where arrangements are made or entered into by an education authority in respect of the school education of a child or young person with another education authority, the authority responsible for that school education is the authority for the area to which the child or young person belongs (regardless of whether or not the school in which the education is being, or about to be, provided is under the management of that authority).

30. 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.

References to the Tribunal regarding failures of the education authority

31. Where a parent or young person requests the education authority to establish whether a CSP is required, the “supporting children’s learning code of practice” states that the authority should notify the person making the request of its decision as quickly as possible but certainly no later than 4 weeks from when the request was received.

32. Where an education authority has issued its proposal to establish whether a CSP is required, the code of practice states that it is expected that an education authority will have reached a decision and notified the parent or young person no later than 4 weeks after informing the parent or young person of the proposal, unless it would be impracticable to do so. The 2004 Act does not currently allow for:
This document relates to the Education (Additional Support for Learning) (Scotland) Bill (SP Bill 16) as introduced in the Scottish Parliament on 6 October 2008

- cases to be sent to the Tribunal where the parent or young person requests the authority to establish whether a CSP is required and the education authority fails to acknowledge his/her request.
- cases to be sent to the Tribunal where the education authority has issued a proposal to establish whether a CSP is required but has not taken a decision either way.

33. It has been brought to the Scottish Government’s attention that a number of parents have been faced with these situations but have been unable, under the current legislative framework, to refer the matter to the Tribunal. Therefore, the Bill amends the 2004 Act to allow the situations described above to be referred to the Tribunal, with timescales being described in The Additional Support for Learning (Co-ordinated Support Plan) (Scotland) Amendment Regulations 2005: [http://www.opsi.gov.uk/legislation/scotland/ssi2005/20050518.htm](http://www.opsi.gov.uk/legislation/scotland/ssi2005/20050518.htm), which will be amended in due course. The Bill will introduce the following education authority procedural timescale failures:

- where the education authority, having received a request to establish whether a CSP is required, has failed to respond to the parent’s or young person’s request; and
- where the education authority, having indicated their intention to do so, have failed to establish whether a CSP is required.

** Expedite those references in which an education authority has failed to meet a relevant timescales **

34. A reference can be made to the Tribunal where it has been determined that a child or young person requires a CSP but the education authority has failed to prepare one within the appropriate timescales.

35. However, experience has shown that these references have not, so far, been opposed or subject to any dispute whatsoever on the facts. It may therefore be inappropriate that they follow the same procedure as other types of reference where careful fact finding may be necessary. It is in the interests of parties that a decision is made quickly to ensure that the local authority does not wait until just before the notified date of a hearing to indicate that its opposition has been withdrawn incurring wasteful expenses in the interim.

36. Therefore, we propose to expedite references by the introduction of a documents only Tribunal procedure for references in which authorities fail to meet statutory timescales. The Bill will enable referrals of this nature to be considered by a convener sitting alone.

** The Tribunal to be given the power to review its decisions **

37. As framed, the 2004 Act does not currently allow for the Tribunal to review its decisions, therefore the only way in which a decision can be legally challenged is by a referral to the Court of Session on a point of law with attendant costs.

38. It is therefore intended that the Tribunal should be given the power to review its decisions, and revoke and vary its orders and awards, in such circumstances as may be determined in accordance with the regulations. It is considered appropriate for provision to be made for the Tribunal which made a particular decision to consider whether or not it should be
reviewed, although we also intend to permit a newly convened Tribunal to review a decision at the Tribunal President’s discretion.

ALTERNATIVE APPROACHES

39. On 1 November 2007 the First Minister stated in Parliament that it was the Scottish Government’s intention to ensure that parents of children with additional support needs are able to make placing requests to schools outwith their local authority area. A prime aim of this Bill is to ensure consistent treatment for those with additional support needs in terms of access to out of area placing requests as those without additional support needs. The alternative is to require such requests to be made via the home authority, however this would place this group of parents on a different footing from others who are free to make out of area placing requests. Another alternative is to do nothing thereby ensuring an inequality of opportunity.

40. As explained in paragraphs 15 and 16 above, the decision was made to drop paragraph (ba) that appeared in the draft Bill as published in the consultation document.

EFFECTS ON HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT AND EQUAL OPPORTUNITIES

Human rights

41. The Scottish Government is committed to promoting equality of opportunity for all and we are satisfied that the provisions of this Bill are compatible with, and enhance human rights. The provisions in the Bill touch on human rights specifically in respect to Article 26(2) of the United Nations Universal Declaration of Human Rights of 1948 which states that “Education shall be directed to the full development of the human personality…” In addition, the Charter of Fundamental Rights of the European Union states in Article 24(2) that: “In all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration.”

42. The measures contained in the Bill will improve the support available to children and young people with additional support needs across all Scottish communities.

Island communities

43. Rurality is obviously a factor in the provision of specialised services. The Bill will have however no specific effect on island communities, as it applies equally to all communities in Scotland. National minimum standards for provision are detailed in a Code of Practice, and the provisions in the Bill will be reflected in a revised “supporting children’s learning code of practice”. The 2004 Act was designed to be responsive to local structures and systems and the Bill will not dilute this objective.

Local government

44. It is difficult to estimate the full implications of the Bill for local authorities. All authorities are already implementing the 2004 Act and the Bill will therefore not impose
This document relates to the Education (Additional Support for Learning) (Scotland) Bill (SP Bill 16) as introduced in the Scottish Parliament on 6 October 2008

substantial additional costs as the existing system is not being changed to any significant degree. The costs involved are detailed in the Financial Memorandum.

**Sustainable development**

45. The enactment of this Bill will have no negative effects on sustainable development. Its effects will be positive as it will further promote social inclusion by increasing the opportunities for children who require additional support for learning.

**Equal opportunities**

46. The provisions of the Bill are not discriminatory on the basis of gender, race, disability, marital status, religion or sexual orientation. The Bill makes a positive statement about extending parental rights and the rights of young people with a view to increasing equality of opportunity.

**Race equality impact assessment**

47. Children and young people from ethnic communities can have additional support needs as a result of having English as an additional language. As such the 2004 Act already recognises this as a factor that can give rise to additional support needs and as such, it is not an issue that will be affected by the provisions of the Bill. This policy should not impact differently on different ethnic and racial groups and it is not considered that the Bill will have an adverse impact on any particular group.

**Age**

48. This is an education Bill and will be relevant to those under 18 years of age who are receiving an education for which an education authority is responsible.

**Disability**

49. The definition of disability set out in the Disability Discrimination Act 1995 (DDA) states that a person has a disability...if he has a physical or mental impairment which has a substantial and long term adverse effect on his ability to carry our normal day-to-day activities.

50. The definition of additional support needs by the 2004 Act provides for a broad framework of factors to be taken into account in assessing additional support needs. The vast majority of children and young people who are disabled will be covered by the 2004 Act. In effect, the proposed provisions in the 2008 Bill will strengthen their rights under this legislation.

**Gender**

51. It is not considered that the Bill will have an adverse impact on issues related to gender.

**Lesbian, gay, bisexual & transgender**

52. Children and young people who suffer from homophobic incidents can have additional support needs. As such the 2004 Act already recognises this as a factor that can give rise to additional support needs and as such, it is not an issue that will be affected by the provisions of the Bill.
Monitoring

53. HMIE will report on the impact of the amended 2004 Act on children and young people with additional support needs as part of the inspection process to ensure that, in practice, the policy meets, and continues to meet, the needs of all pupils.
EDUCATION (ADDITIONAL SUPPORT FOR LEARNING) (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government to assist the Subordinate Legislation Committee in its consideration of the Education (Additional Support for Learning) (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

OUTLINE OF THE BILL

2. The Bill amends the 2004 Act to permit out of area placing requests to be made in relation to children and young persons with additional support needs, including those where a co-ordinated support plan (CSP) is being processed by the home education authority, and for refusals of such requests to referred to an Additional Support Needs Tribunal for Scotland (“the Tribunal”) where a CSP is being considered. The Bill makes available to parents and young persons in relation to out of area placing requests the same rights of access to mediation and dispute resolution as are presently available in relation to internal placing requests. It will be for the host education authority to make available such mediation and dispute resolution services under the 2004 Act (and they will not be able to recover the cost of these services from the home authority). The Bill also amends the 2004 Act to extend the circumstances in which references can be made to the Tribunal consequent on certain procedural failures by the education authority and enables the Scottish Ministers to make rules to enable certain matters to be determined by a convener sitting alone and to allow the Tribunal to review its own decisions in certain circumstances.

SUBORDINATE LEGISLATION POWERS – OUTLINE

3. The Bill contains a number of delegated power provisions which are explained in detail below. This memorandum sets out—

- the person upon whom the power to make subordinate legislation is conferred and the form in which the power is to be exercised;
This document relates to the Education (Additional Support for Learning) (Scotland) Bill (SP Bill 16) as introduced in the Scottish Parliament on 6 October 2008

- why it is considered appropriate to delegate the power to subordinate legislation and the purpose of each such provision; and
- the parliamentary procedure to which the exercise of the power to make subordinate legislation is to be subject, if any.

4. In deciding whether provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Ministers have considered which matters of overall structure and policy require detailed scrutiny through the full Parliamentary process against the need to—

- ensure sufficient flexibility to respond to changing circumstances and to make changes quickly in the light of experience without the need for primary legislation; and
- allow detailed administrative arrangements to be made or kept up to date within the basic structures and principles set out in the primary legislation.

5. For the decision on negative or affirmative resolution procedure, the Scottish Ministers have considered carefully the degree of Parliamentary scrutiny that is thought to be required for the orders, balancing the need for the appropriate level of scrutiny with the need to avoid using up Parliamentary time unnecessarily.

SUBORDINATE LEGISLATION POWERS – DETAIL

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

Section 7(a):

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

6. Section 7(a) of the Bill amends paragraph 11(2) of schedule 1 to the 2004 Act to insert into the existing rule making power at paragraph 11(2) a reference to enabling specified matters relating to the failure by an education authority to comply with time limits required by virtue of the 2004 Act to be determined by the convenor of a Tribunal alone. Section 6 of the Bill amends section 18 of the 2004 Act to allow references to be made to the Tribunal in respect of certain procedural failures by an education authority. Where an authority fail, within a specified time limit, in response to a request to establish whether a child requires a CSP, to inform the parent of their proposal to establish whether a CSP is required; or where having issued such a proposal, they fail so to establish within a specified time limit, such a failure is to be treated as a decision that no CSP is required and can be referred to the Tribunal. The rule making power is required to allow Tribunal rules to be made to expedite the procedure for such references, by allowing them to be determined through a documents based procedure by the convenor of the Tribunal, thereby avoiding the need to convene a full Tribunal hearing.

7. It is considered that this level of procedural detail is more appropriate for subordinate legislation, which is in keeping with the general character of the existing rule making power conferred on the Scottish Ministers in relation to the Tribunal. Section 34(4) of the 2004 Act
This document relates to the Education (Additional Support for Learning) (Scotland) Bill (SP Bill 16) as introduced in the Scottish Parliament on 6 October 2008

provides that rules made under paragraph 11(2) of schedule 1 to that Act are subject to negative procedure in the Scottish Parliament. The amendment made by section 7(a) will be included in that existing provision for Parliamentary procedure and is consistent with the existing position for Tribunal rules.

Section 7(b):

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

8. Section 7(b) of the Bill amends paragraph 11(2) of schedule 1 to the 2004 Act to insert into the existing rule making power at paragraph 11(2) a reference to enabling a Tribunal, in specified circumstances, to review, vary or revoke any of its own decisions, orders or awards or those of another Tribunal. The absence of such a provision in the 2004 Act means that parties wishing to appeal a decision of a Tribunal relating to a reference made under section 18 of the 2004 Act can only do so to the Court of Session on a point of law. For both parties this is an expensive and time consuming process, which, in terms of the parent or young person who made the reference to the Tribunal, relies heavily on access to Legal Aid. This amendment would bring the Tribunal into line with other similar tribunals and is recognised in the guidance issued by the Administrative Justice and Tribunals Council. The precise circumstances that may lead to a review have yet to be consulted on, but could include review on account of an error, new evidence becoming available, etc.

9. It is considered that this level of procedural detail is more appropriate for subordinate legislation, which is in keeping with the general character of the existing rule making power conferred on the Scottish Ministers in relation to the Tribunal. Section 34(4) of the 2004 Act provides that rules made under paragraph 11(2) of schedule 1 to that Act are subject to negative procedure in the Scottish Parliament. The amendment made by section 7(b) will be included in that existing provision for Parliamentary procedure and is consistent with the existing position for Tribunal rules.

Section 8 Ancillary provision

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: negative/affirmative resolution of the Scottish Parliament

10. Section 8 enables the Scottish Ministers to make ancillary provisions by order, namely transitional, transitory or savings provisions which may be required in connection with the coming into force of any provision of the Bill and throughout the life of the Bill when it is in force. Subsection (2) provides that such an order may modify any enactment, instrument or document.

11. This provision is considered to be necessary for ensuring a smooth transition from the current arrangements to those as amended by the Bill. For example to ensure that existing cases which may straddle the old and new regimes can be dealt with in an appropriate manner.
12. The powers in section 8 can only be used to deal with technical and other minor matters directly connected or related to the Bill. It would not be an effective use of either the Parliament’s time or the Government’s resources to deal with such matters through subsequent primary legislation. It is considered that matters of technical detail, such as the transitional arrangements for existing cases caught between the two regimes, can be best addressed and fleshed out through subordinate legislation.

13. An order under this section is subject to negative resolution except where it adds to, replaces or omits any part of the text of an Act, in which case the order is subject to affirmative procedure. Negative procedure is thought appropriate given the very limited nature of the ancillary provision (being confined to transitional, transitory and saving provision). It is considered unlikely that such an order would be used to amend the text of primary legislation but if it did, it would be appropriate that the order be subject to affirmative procedure.

Section 10 Short title and commencement
Power conferred on: Scottish Ministers
Power exercisable: Order made by Statutory Instrument
Parliamentary procedure: No procedure

14. Subsection (3) of this section provides for the provisions of the Bill, save for sections 8, 9 and 10, to come into force on such days as the Scottish Ministers may by order appoint.

15. Sections 8, 9 and 10 come into force on Royal Assent. The power in subsection (3) recognises the need for Ministers to control commencement. It is the usual practice for commencement provisions not to be subject to parliamentary procedure. Whilst the order is not subject to parliamentary procedure as such, the Subordinate Legislation Committee will, in terms of its remit, have the opportunity to consider the order.
Education, Lifelong Learning and Culture Committee

2nd Report, 2009 (Session 3)

Stage 1 Report on the Education (Additional Support for Learning) (Scotland) Bill

Published by the Scottish Parliament on 10 February 2009
# REMIT AND MEMBERSHIP

**REPORT**

- Executive Summary: 1
- Introduction: 2
  - Background: 2
- Purpose of the Bill: 2
  - Education (Additional Support for Learning) (Scotland) Act 2004: 2
  - Changes proposed in the Bill: 3
  - Scottish Government consultation: 4
- Consideration of the Bill: 4
  - Informal Roundtable Discussion Session: 4
  - Written Evidence: 5
  - Oral Evidence: 6
- Issues Considered by the Committee: 7
  - Scottish Government consultation: 7
  - General principles of the Bill: 8
  - Out of area placing requests: 10
  - Additional Support Needs Tribunals rules and procedures: 18
  - Other issues: 23
- Subordinate Legislation: 31
- Policy Memorandum: 32
- Financial Memorandum: 32
- Conclusion: 34
- Summary Of Conclusions And Recommendations: 35

**ANNEXE A: REPORT FROM THE SUBORDINATE LEGISLATION COMMITTEE**

**ANNEXE B: LETTER FROM CONVENER OF FINANCE COMMITTEE TO KAREN WHITEFIELD**
ANNEXE C: EXTRACTS FROM MINUTES OF THE EDUCATION, LIFELONG LEARNING AND CULTURE COMMITTEE

23rd Meeting, 2008 (Session 3), Wednesday 1 October 2008
29th Meeting 2008 (Session 3), Wednesday 3 December 2008
30th Meeting, 2008 (Session 3), Wednesday 10 December 2008
31st Meeting, 2008 (Session 3), Wednesday 17 December 2008
1st Meeting, 2009 (Session 3), Wednesday 14 January 2009
2nd Meeting, 2009 (Session 3), Wednesday 21 January 2009
3rd Meeting, 2009 (Session 3), Wednesday 28 January 2009
4th Meeting, 2009 (Session 3), Wednesday 4 February 2009

ANNEXE D: ORAL EVIDENCE AND ASSOCIATED WRITTEN EVIDENCE

ANNEXE E: LIST OF OTHER WRITTEN EVIDENCE
Remit and membership

Remit:

To consider and report on (a) further and higher education, lifelong learning, schools, pre-school care, skills and other matters falling within the responsibility of the Cabinet Secretary for Education and Lifelong Learning; and (b) matters relating to culture and the arts falling within the responsibility of the Minister for Europe, External Affairs and Culture.

Membership:

Claire Baker
Aileen Campbell
Kenneth Gibson (Deputy Convener)
Kenneth Macintosh
Christina McKelvie
Elizabeth Smith
Margaret Smith
Karen Whitefield (Convener)

Committee Clerking Team:

Clerk to the Committee
Eugene Windsor

Senior Assistant Clerk
Nick Hawthorne

Assistant Clerk
Linda Smith
The Committee reports to the Parliament as follows—

EXECUTIVE SUMMARY

1. The Committee recognises, that although experience of additional support needs (ASN) practice under the Education (Additional Support for Learning) (Scotland) Act 2004 has been relatively short, some revision of the Act is now required.

2. The Committee is broadly supportive of the amendments to the 2004 Act proposed in the Education (Additional Support for Learning) Bill. The Committee also welcomes the commitments given by the Minister for Children and Early Years to bring forward further proposals at Stage 2 in response to points raised during the Committee’s scrutiny of the Bill.

3. However, the Committee notes the extent of comment in evidence that it received that the 2004 Act requires further review beyond both the proposals in the Bill and those that the minister indicated would be brought forward at Stage 2.

4. The Committee therefore supports the general principles of the Bill and recommends to the Parliament that they be approved, but also recommends that the Scottish Government continues to keep the 2004 Act under close review and gives careful consideration to the points raised during its own consultation and during the scrutiny carried out by the Committee.

5. The Committee further recommends that the Scottish Government has regard to the views of stakeholders in its revision of the code of practice and any secondary legislation that results from the implementation of the Bill.
INTRODUCTION

Background

6. The Education (Additional Support for Learning) (Scotland) Bill\(^1\) ("the Bill") was introduced in the Scottish Parliament on 6 October 2008 by the Cabinet Secretary for Education and Lifelong Learning, Fiona Hyslop MSP. The Bill was accompanied by Explanatory Notes\(^2\), which include a Financial Memorandum and by a Policy Memorandum\(^3\), as required by the Parliament’s Standing Orders. The Bill was also accompanied by a Delegated Powers Memorandum\(^4\). On 7 October 2008, under Rule 9.6 of Standing Orders, the Parliamentary Bureau referred the Bill to the Education, Lifelong Learning and Culture Committee ("the Committee") to consider and report on the general principles of the Bill.

7. The Bill contains provision for making subordinate legislation. A report from the Subordinate Legislation Committee is therefore attached at Annexe A. The Finance Committee’s correspondence on the Financial Memorandum is attached at Annexe B.

PURPOSE OF THE BILL

Education (Additional Support for Learning) (Scotland) Act 2004

8. The purpose of the Bill is to amend the Education (Additional Support for Learning) (Scotland) Act 2004\(^5\) ("the 2004 Act"), which came into force on 14 November 2005. The Policy Memorandum that accompanies the Bill states that the policy intention of the Bill is—

"[…] to strengthen, as well as clarifying, the ability of the Education (Additional Support for Learning) (Scotland) Act 2004 to deliver its original policy intention, that intention being to provide for any need that requires additional support for the child or young person to learn."\(^6\)

9. The 2004 Act introduced a new system for the assessment of, and provision of support to, children and young people with additional support needs (ASN) in relation to their education.

10. The 2004 Act set out the duties placed on local authorities and other agencies and the rights of parents and young people. It provided for a statutory coordinated support plan (CSP), an appeals system and placing requests.

\(^3\) Education (Additional Support for Learning) (Scotland) Bill. Policy Memorandum [http://www.scottish.parliament.uk/s3/bills/16-EdAddSup/b16s3-introd-pm.pdf](http://www.scottish.parliament.uk/s3/bills/16-EdAddSup/b16s3-introd-pm.pdf)
11. The 2004 Act also made provision for the establishment of a new independent organisation, to be known as the Additional Support Needs Tribunals for Scotland (“the tribunal”). The tribunal hears and decides appeals made by parents against the decisions by, or failures of, education authorities (“EAs”) in relation to a CSP. Reference to the tribunal may also be made, in certain circumstances, regarding the refusal of a placing request.

12. Her Majesty’s Inspectorate of Education (HMIE) conducted a two-year inspection programme examining how local authorities were implementing the 2004 Act. Its final report was published on 14 November 2007.  

13. There have also been a number of Court of Session judgements concerning the implementation of the 2004 Act.

14. The Explanatory Notes state that—

“This Bill amends the 2004 Act in light of the HMIE reports, recent Court of Session rulings, the annual report from the President of the Additional Support Needs Tribunals for Scotland and informed observations in light of practice.”

Implementation of the 2004 Act

15. Evidence taken by the Committee highlighted issues relating to the implementation of the 2004 Act. Some witnesses believed that although local authorities had generally made provision for children with ASN under the terms of the 2004 Act, they had not always been seen to be in tune with what witnesses considered to be the spirit of the Act. The Committee also heard views that the policy effect of the 2004 Act had, to some extent, been compromised by a number of legal rulings. Finally, the Committee heard that different local authorities had taken different approaches leading some to believe that provision was not equitable across Scotland. As a result, in many circumstances parents and others expressed their concerns that the cost of meeting additional support needs remained a major factor influencing decisions on additional support.

16. The Committee notes these concerns and draws them to the attention of the Scottish Government.

Changes proposed in the Bill

17. The main proposal in the Bill is to allow parents of children with ASN, including those with CSPs, to make out of area placing requests. As a result of this proposal a number of related changes are proposed, such as placing on host authorities (i.e. the authority in which the child is being educated, rather than that

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in which they live) responsibility for providing mediation and dispute resolution services to parents who have made a successful out of area placing request.

18. The Bill also proposes minor amendments to the functions of the tribunal, such as amending the grounds on which appeals can be made to the tribunals, giving tribunals the power to review their own decisions and allowing a tribunal convener, sitting alone, to consider issues relating to missed deadlines.

19. In evidence to the Committee at its meeting on 21 January 2009, the Minister for Children and Early Years announced that the Scottish Government was considering bringing forward three further proposals at Stage 2. The additional proposals are that all appeals on out of area placing requests made to special schools should be heard by the tribunal, regardless of whether a CSP is involved; that parents be given the right to request an assessment at any time, regardless of whether a CSP is involved; and that the tribunal be given the power to specify when an out of area placing request should commence.

Scottish Government consultation

20. The Scottish Government published its consultation document Education (Additional Support for Learning) (Scotland) Act 2004 – Amendment Bill 2008\(^9\) on 9 May 2008. The document included a draft of the Bill. The consultation period ran from 9 May to 19 June 2008 and a total of 165 responses was received.\(^10\) The Scottish Government subsequently published its report on the consultation exercise.\(^11\)

21. In addition to this, the Scottish Government held nine consultation events throughout Scotland, which were attended by 428 professionals and parents. The Minister for Children and Early Years and Scottish Government officials also met stakeholders to discuss the proposed Bill on 14 and 20 May 2008 respectively.

CONSIDERATION OF THE BILL

Informal roundtable discussion session

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

23. This session was held on 26 November 2008. Those who attended were:

- Jonathan Sher, Director of Research, Policy and Practice Development, Children in Scotland


24. A note of this session was subsequently made publicly available on the Committee’s webpage.\textsuperscript{12}

**Written evidence**

25. At its meeting on 1 October 2008, the Committee agreed its approach to its Stage 1 scrutiny of the Bill. The Committee issued a call for written evidence\textsuperscript{13} on 15 October 2008 with the deadline for responses set for Thursday 20 November 2008. The Committee requested evidence from stakeholders and invited views from any other interested parties on the general principles of the Bill. In addition it asked:

- How helpful do you find the Policy Memorandum and Financial Memorandum accompanying the Bill?

- Do you have any comments on the consultation that the Scottish Government carried out prior to the introduction of the Bill?

26. The Committee received a total of 37 written submissions in response to its initial call for evidence. In addition, a number of people who gave oral evidence to the Committee provided additional written information to it on a number of issues. Details are provided in Annexes D and E.

27. At its meeting of 3 December 2008, the Committee noted its disappointment that only 12 out of 32 local authorities had responded to the call for evidence. The Committee agreed, given the extent to which the Bill could affect every authority, to write to the remaining 20 local authorities again to invite views, setting a deadline of 18 December 2008 for responses.


28. As a result of this a further eight local authorities made written submissions, bringing the total number of written submissions to 45. A further two local authorities indicated that they had nothing to add to the submissions that they had made to the Scottish Government’s consultation.

29. Several main themes emerged in the written evidence. Many of these were also supported in oral evidence. These themes are explored below.

**Oral evidence**

30. The Committee took oral evidence on the Bill over the course of five meetings as follows:

**3 December 2008**
- Robin McKendrick, Support for Learning Division, Head of Branch and Bill Team Leader, Susan Gilroy, Support for Learning Division, Policy Officer and Bill Team Official, Louisa Walls, Principal Legal Officer, Branch 4 – Solicitors DELA Division, and Joanne Briggs, Economic Advisor, Analytical Services Unit - Schools, Scottish Government.

**10 December 2008**
- Jessica M Burns, President, and Lesley Maguire, Secretary, Additional Support Needs Tribunals for Scotland.

**17 December 2008**
- Lorraine Dilworth, Advocacy Manager, Independent Special Education Advice (ISEA) (Scotland); Iain Nisbet, Head of Education Law Unit, Govan Law Centre.

**14 January 2009**
- Dr Ted Jefferies, Principal Psychologist, Argyll and Bute Council; Martin Vallely, Service Manager Professional Services, City of Edinburgh Council; Margaret Doran, Executive Director for Children and Families, Glasgow City Council; Bryan Kirkaldy, Representative, Association of Directors of Education in Scotland (ADES).

**21 January 2009**
- Adam Ingram MSP, Minister for Children and Early Years, Robin McKendrick, Head of Branch 1, Support for Learning Division, Susan Gilroy, Policy Officer, Support for Learning Division, and Louisa Walls, Principal Legal Officer, Scottish Government.

31. Extracts from the minutes of all the meetings at which the Bill was considered are attached at Annexe C. Where written submissions were made in support of oral evidence, these are reproduced, together with the extracts of the *Official Report* of the relevant meetings, at Annexe D. All other written submissions, including supplementary written evidence, are detailed at Annexe E.

32. The Committee would like to thank all individuals and organisations who provided written or oral evidence.
ISSUES CONSIDERED BY THE COMMITTEE

Scottish Government consultation

33. In its call for evidence the Committee asked for views on the consultation conducted by the Scottish Government prior to the introduction of the Bill (detailed above).

34. Several responses indicated satisfaction with the Scottish Government’s consultation, with some welcoming many aspects of the way that the consultation had been conducted. In its response, Fife Council stated that—

“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.”

35. However, some concerns about the Scottish Government’s consultation were raised by a variety of submissions. These concerns included a view that the consultation was “rushed” (Stirling Council); that it was not sufficiently broad in scope to take account of the issues raised by the HMIE implementation report and that the analysis of the responses did not reflect comments made on such issues (Consumer Focus Scotland); that young people were involved late in the process (Learning and Teaching Scotland); that discussion time in consultation meetings was short and they were often dominated by one person or point of view (Learning and Teaching Scotland); and that parents, children and young people should have had more opportunities to contribute (Quarriers).

36. When questioned on 3 December 2008 about the Bill not taking account of the issues raised outside of the main topic of the consultation in 2008, Robin McKendrick, Bill team leader in the Scottish Government, told the Committee that—

“Various other issues were raised during the consultation process. Indeed, the consultation document sought comments on any issue that affected the implementation of the 2004 Act. Although those issues are regarded as relevant, it is considered to be more appropriate to address them in secondary legislation or, as I have explained, by amending the code of practice that supports the 2004 Act. I have said that we intend to consult on any changes that we propose to make to the code.”

37. Some concern was also expressed by local authorities about the way that the consultation had been structured. Renfrewshire Council stated that—

“The design of the questions was such that debate is limited and respondents are directed into a response which left no room for discussion. This was an opportunity to review and clarify issues such as support for host authorities.

14 Fife Council. Written submission to the Education, Lifelong Learning and Culture Committee.
from external agencies to deliver a CSP; clarification of terms such as ‘significant’ in relation to needs; and the exclusion of young people with agreed additional needs. The opportunity was missed. Additionally, there was a tone which ran throughout the consultation document, which appears to be critical of local authorities. This criticism becomes explicit in the wording of questions 10 and 11 where the repeated use of the term ‘fails’ is completely unhelpful.”

38. This view was supported by West Dunbartonshire Council, which stated that—

“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.”

39. The Committee believes that the Scottish Government’s consultation was satisfactory and is also content with the number of consultation events held.

40. The Committee notes the concerns raised in a number of written submissions and recommends that the Scottish Government takes account of these points when planning future consultation exercises.

General principles of the Bill

41. Giving evidence to the Committee on 3 December 2008, Robin McKendrick told the Committee that—

“[…] the Bill alters neither the ethos nor the fundamental building blocks of the Education (Additional Support for Learning) (Scotland) Act 2004, which is aimed at a broad group of children and young people with additional support needs. Instead, it aims to clarify operational aspects of the 2004 Act and, as members would expect, covers issues that can be addressed only by primary legislation rather than by secondary legislation, in guidance or through implementation of the act’s provisions.”

42. It was frequently stated in evidence received by the Committee that the first priority of the Bill should be what is in the best interests of the child concerned.

43. The general conclusion of the Committee’s informal roundtable discussion, with a range of charities and voluntary sector organisations on 26 November 2008, was that the 2004 Act had been welcomed and that its intention had been widely supported. However, significant concern was expressed in terms of its implementation. The Bill was similarly broadly welcomed, but the view generally expressed was that it did not go far enough in amending the 2004 Act.

16 West Dunbartonshire Council. Written submission to the Education, Lifelong Learning and Culture Committee.

44. The Committee notes that the majority of evidence submitted, both to the Scottish Government’s consultation and to the Committee’s call for evidence, was broadly supportive of the general principles of the Bill. However, many issues were raised about the detail of the proposals and these are considered in more depth below.

45. A broad concern emerged in the evidence to the Committee – also raised in responses to the Scottish Government’s consultation – that the Bill made an already complex Act even more complex and that every effort should be made to ensure that any revisions to the 2004 Act simplified the legislation. In its response to the Scottish Government’s consultation, the Govan Law Centre stated that—

“GLC has a general concern that the ASNTS [Additional Support Needs Tribunals for Scotland], associated procedure and applicable education law seems to be getting more and more complex. As an over-arching principle, we should strive to make the law as simple and accessible as possible at all times. This is fundamentally important if parents, pupils and educationalists are to be able to understand and apply the law. The level of detail and complexity in this field of law is in danger of becoming beyond the reach of most people.”

46. In oral evidence on 14 January 2009, Dr Ted Jefferies from Argyll and Bute Council told members that—

“I subscribe to the view that the direction of travel should be towards a simpler, clearer and more parent-friendly, teacher-friendly and everybody-friendly system. Disputes will always arise—some parents will feel that their child should have something that the local authority feels is unnecessary—but that should not be built up into something that dominates the system. Achieving simpler system should be the direction of travel.”

47. There were also many issues raised, in response both to the Scottish Government’s consultation and to the Committee’s call for evidence, which are not covered in the Bill, but which were considered as necessary amendments to the 2004 Act. These are set out in more detail below in the ‘other issues’ section.

48. The Committee agrees with witnesses and written submissions that stated that the fundamental principle underpinning the Bill, as it had been in the 2004 Act, should be that of serving the best interests of the child concerned. The Committee accepts that the 2004 Act, following rulings in the Court of Session and experience of its implementation, requires amendment in certain areas to ensure that its original intentions are realised and that children and young people with additional support needs and their parents are being properly served.

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18 Govan Law Centre. Written submission to the Scottish Government.
Out of area placing requests

Making requests

49. The main provision of the Bill is to allow parents of children with ASN, including those with a CSP, to make out of area placing requests. An out of area placing request would be made directly to whichever local authority operates the school in question, and not to the home authority to which the child belongs.

50. In giving evidence on 3 December 2008, the Scottish Government’s Bill team leader told the Committee that—

“[...] the first main thrust of the proposals is to provide parents of children with additional support needs, including those with co-ordinated support plans, with the same rights as others to make out-of-area placing requests for their children. That clarification of the original policy intention is required as a result of Lord Macphail’s recent ruling in the Court of Session.”

51. The majority of evidence that the Committee received was supportive of this proposal and the principle that parents of children and young people with ASN, including those with a CSP, should have the same rights as other parents in this respect.

52. However, several local authorities noted potential issues that may arise as a result of out of area placing requests, including matters related to funding, delivery of services and inter-authority cooperation. These issues are set out in more detail below.

53. Giving evidence to the Committee at its meeting on 14 January 2009, the City of Edinburgh Council cautioned the Committee that this proposal had potential consequences that may not be immediately apparent—

“Although we support parents’ ability to make placing requests, the bill’s provisions contain a number of hidden problems. For a start, the bill focuses exclusively on the parent’s rights and does not take into account the authority’s wider duties and responsibilities not only to the child in question but to other children in its area.”

54. In its written submission to the Committee, Glasgow City Council proposed that instead of allowing out of area placing requests, provision outwith the home authority should continue to be arranged between two local authorities, as is currently possible. City of Edinburgh Council proposed, in its submission, that, where there were significant additional support needs, the process should mirror that followed in respect of placing requests for independent special schools. That is, placing requests for out of area local authority schools should be made to the home authority, which can agree to the request or consider whether there are statutory grounds for refusal. The home authority would remain responsible for the costs of any placement.

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55. In response to questions from the Committee on this issue on 21 January 2009, the Minister for Children and Early Years stated the proposal made by Glasgow City Council would not give parents of children and young people with ASN the same rights as other parents, which was a fundamental principle of the Bill—

“Glasgow City Council and, I think, the City of Edinburgh Council, describe scenarios in which a parent can make an out-of-area placing request by submitting a request to their home authority to place their child in a school, but that is not really a parental placing request as such. In effect, the parent is asking one authority to enter into arrangements with another authority to place the child in a host authority area. That is quite different from a parental placing request. Even before the 2004 act commenced, parents could approach their home authority to do just that. It seems that Glasgow seeks to reduce parental choice in this regard; on principle, we do not think that that should be upheld.”

56. The Committee notes that the majority of evidence submitted, both to the Scottish Government’s consultation and to the Committee’s call for evidence, supported the proposal to allow parents of children and young people with additional support needs to make out of area placing requests directly to another local authority. The Committee believes that this was the original intention of the 2004 Act and supports this proposal.

Appealing out of area placing requests

57. The Bill proposes allowing appeals on placing requests to go to the tribunal in cases where a CSP exists or is under development. It makes further provision than the 2004 Act for appeals to transfer between the Education Appeals Committee (EAC) or the Sheriff and the tribunal. The Bill clarifies that were a CSP issue to arise at any time during a placing request appeal, the case would be transferred to the tribunal. If it were then decided that a CSP was not required, the tribunal could decide whether to transfer the case back either to the EAC or the Sheriff.

58. This proposal responds to a ruling made in the Court of Session, in Gordon v. Argyll and Bute Council, [2007 CSOH 45], by Lady Dorrian, involving a case where a placing request had been refused, the local authority subsequently agreed to prepare a CSP and the case was referred to the tribunal. Lady Dorrian ruled that the case should not have been referred to the tribunal because the 2004 Act only allowed for referral in cases where, at the time the placing request was refused, a CSP was in place, there was an agreement to prepare a CSP or a CSP had been refused.

59. Robin McKendrick commented on this issue in his evidence on 3 December 2008—

“Our counsel argued that, although the 2004 Act did not specifically say so, when a CSP was on the agenda and there was a placing request, it should

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Education, Lifelong Learning and Culture Committee, 2nd Report, 2009 (Session 3)

go to the tribunal—it was like the elephant in the corner, and everybody knew it. As Lady Dorrian said, if the Scottish Parliament intended that to be the case, it should have said so in the legislation. The fact is that the legislation does not say that. In the Bill, we are trying to make it clear that if, at any time, a co-ordinated support plan pops its head above the parapet before the sheriff court has made a final determination on a placing request, the matter should go to the additional support needs tribunal.”

60. Jessica Burns, President of the Additional Support Needs Tribunals for Scotland, told the Committee that the procedure could be further simplified by stating that the tribunal should automatically hear any out of area placing request made to a special school regardless of whether a CSP was involved. This position was supported by ISEA.

61. Iain Nisbet, head of the education law unit at the Govan Law Centre, told the Committee that the proposal on this issue would not remove the confusion that exists concerning the most appropriate forum for hearing out of area placing request appeals and expressed concern about using CSPs to make any such determination—

“Confusion will remain under the proposed system and the proposed amendments would serve only to make the system much more complex [...] I do not see the rationale behind the suggested dividing line. It would serve parents, pupils and authorities better if there were a simpler dividing line. Either we should move all additional support needs placing requests to the tribunal, or we should come up with a simpler dividing line. The Administrative Justice and Tribunals Council and the president of the Additional Support Needs Tribunal have suggested that it would be simpler if, for example, all placing requests for special schools were heard by the tribunal and other placing requests were heard by the appeal committee. That would be easy to administer and it uses a sensible criterion that is based on consideration of the likelihood of cases requiring the expertise of the tribunal.”

62. Further concern was expressed by the City of Edinburgh Council when giving evidence on 14 January 2009—

“To my mind, the process has not been thought through properly, because it could lead to confusion, delays, legal wrangling and parents feeling that the system is unfair. The parents of children with additional support needs but no CSP request could feel that preferential treatment had been given to a child with a CSP request.”

63. At the Committee’s meeting on 21 January 2009, the Minister for Children and Early Years announced that the Scottish Government is giving consideration

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to bringing forward an amendment to the Bill at Stage 2 that would ensure that all out of area placing request appeals relating to special schools would be heard by the tribunal, regardless of whether a CSP is involved or not.

64. The Committee understands the rationale put forward by the Scottish Government in proposing a change to the 2004 Act to allow cases to go to the tribunal where a CSP is either in place or under development. The Committee also welcomes the additional proposal announced by the Minister for Children and Early Years that all out of area placing request appeals involving special schools would be heard by the tribunal. However, the Committee remains concerned that, despite these proposed improvements, the out of area placing request procedure and appeals mechanisms would remain complex and difficult to understand. Under the proposals as they stand, for example, appeals in respect of placing requests to special schools and to mainstream schools on behalf of children with a CSP either in place or under development would be heard by the tribunal, while appeals in respect of requests to mainstream schools on behalf of children who had ASN but no CSP would continue to be heard by the EAC or sheriff. The Committee agrees with many of the witnesses who gave evidence that it is important for parents of children and young people with additional support needs to have a clear understanding of which body will hear an appeal under what circumstances. The Committee therefore recommends that the minister gives further consideration to the following proposals that were raised in evidence to the Committee, that the:

- tribunal takes placing requests relating to special schools only;
- tribunal takes all placing requests where child has ASN;
- tribunal takes placing requests where the reason for the request is the child’s ASN.

Responsibility for reviewing CSPs
65. The Bill proposes, in cases where a successful out of area placing request had been made, that the host authority would take responsibility for reviewing any CSP involved and that this would happen as soon as was practicable after the date of transfer.

66. This proposal was supported in some submissions made both to the Scottish Government’s consultation and to the Committee’s call for evidence (e.g. Barnardos Scotland).

67. However, giving evidence to the Committee on 17 December 2008, Lorraine Dilworth from ISEA offered an example of potential difficulties in this area—

“I have a case in which a family has moved from one of the islands to a mainland town. The CSP was completed to the parents' satisfaction on the island and was very detailed. The receiving authority has, in the parents' opinion, ignored the CSP and is in the process of reviewing it—as is an authority’s right because the child has come in. As I have said to the parents, the process will take a long time because none of the professionals knows
the child and they need to get to know them. In the interim, the child is not receiving what is currently in the CSP. We have suggested to the authority and to the school that they should contact the professionals on the island who have worked with the child, but a barrier has gone up and they have said, "No. We'll do our own assessment."26

68. Lorraine Dilworth went on to suggest to the Committee that, rather than the Bill stating that a review should take place "as soon as is practicable", it should be more specific—

"Time limits need to be placed in respect of by when reviews of CSPs should be done. It would be helpful to the children and the parents if the local authorities worked within such timescales."27

69. The Committee notes that the Explanatory Notes that accompany the Bill state that the time limits for the review would be specified in secondary legislation.

70. In their joint written submission to the Committee, ADES and ADSW noted 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."28

71. These concerns were shared by West Lothian Council—

"In the instance of placing requests for children with Co-ordinated Support Plans (CSPs), there will be a requirement on the host authority to review the CSP as soon as practicable, but there is currently no corresponding obligation on the home authority to provide the CSP and necessary information to enable the host authority to do that. In this respect a timescale is required within the legislation."29

72. The Committee understands the potential advantages in a host authority taking responsibility for reviewing the CSP of any child who is being educated in its area. The Committee also notes the concerns raised by ISEA and recommends that the Scottish Government considers this issue carefully before drafting the proposed secondary legislation. Finally, the Committee recommends that the points raised by ADES/ADSW and West

28 ADES/ADSW. Written submission to the Education, Lifelong Learning and Culture Committee.
29 West Lothian Council. Written submission to the Education, Lifelong Learning and Culture Committee.
Lothian Council are taken into account by the Scottish Government when making any revisions to the code of practice or bringing forward any secondary legislation.

Mediation and dispute resolution

73. The Bill proposes that mediation and dispute resolution in relation to an out of area placing request would be the responsibility of the host authority. The host authority would not be able to reclaim resulting costs from the home authority.

74. Support for this proposal was expressed both in written and oral evidence to the Committee, including by ISEA and the Govan Law Centre. However, concern was also expressed in several submissions, and in oral evidence, that parents were not sufficiently aware of their rights in respect of mediation and dispute resolution and that more needed to be done to ensure that awareness was raised. In its written evidence, ISEA referred to a survey of parents that it had carried out, which showed that 75% of respondents were unaware that they could request mediation and that 80% had poor or no information on the right to request dispute resolution.

75. The Committee also heard, both in its informal roundtable session with stakeholders on 26 November 2008 and in written and oral evidence, concerns that certain groups in society could be particularly at risk in terms of not being sufficiently aware of their rights. Low income families, looked after and accommodated children, Gypsy/Travellers and children with parents in the armed forces were identified as groups who required specific efforts to ensure they received sufficient and appropriate information. There was also a concern that, in cases of looked after children where local authorities act as corporate parents, there could be a conflict of interest.

76. When questioned on this specific issue on 21 January 2009, the Minister for Children and Early Years outlined to the Committee the work that was currently underway with regard to Gypsy/Travellers—

“On Traveller children, we have the Scottish Traveller education programme. There are clearly issues with interrupted learning and assessing where Traveller children are in terms of their education when they arrive at a school. There is the same sort of issue with the children of service personnel, so we are pulling together a forum, or seminar, of local authorities to discuss the issues. The Scottish Traveller education programme has come up with a series of recommendations for addressing the issues that relate to Traveller children.”

77. Speaking about the general issues of parents understanding their rights under the 2004 Act, the Scottish Government’s Bill team told the Committee that—

“The Scottish Government funds the national advice line, which is called Enquire. […] although we are satisfied with the work that it does in providing advice to those who phone, we think that more could be done to seek out

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parents and engage actively with them. It is not enough to send information leaflets to all general practitioner surgeries and early years centres; it is important to ensure that the leaflets are received and put on display. We acknowledge and do not underestimate the challenge of getting the message over to parents.”

78. The Minister for Children and Early Years noted his concern on this issue when giving evidence to the Committee at its meeting on 21 January 2009—

“I am still astonished at people’s lack of awareness about their rights— despite all the statutory duties that are placed on local authorities and others to inform people of their rights, whether through the Scottish Schools (Parental Involvement) Act 2006 or whatever. We have tried several different ways of marketing—if you like—that area, but we have not cracked it yet. We will look again at the support for learning code of practice and try to address the issue through strengthening the obligation on authorities to provide information. Let us consider the correspondence that goes backwards and forwards, especially in the dispute resolution process. For example, when the tribunal writes to parents with its decisions—especially if it is upholding the parents’ case—it should point out that, if the local authority does not comply, they have rights under section 70 of the Education (Scotland) Act 1980 to pursue the matter by complaint. I understand that that does not necessarily happen at the moment. We must try to get consistency throughout the country in the methodology for informing parents, especially in the mediation and dispute resolution process. Some local authorities are better than others at providing the information.”

79. The Committee supports the proposal to place on host authorities responsibility for mediation and dispute resolution in relation to out of area placing requests. The Committee is concerned at the apparent lack of awareness amongst parents of their rights in this area and recommends that the Scottish Government addresses this as a matter of urgency. In addressing this issue, the Committee recommends that the Scottish Government pays particular attention to low income families, looked after and accommodated children, Gypsy/Travellers and parents who serve in the armed forces.

Home authority responsibility for inter-authority placements

80. The Bill proposes clarifying that where a placement were to be made by a home authority for a child to attend a school in another authority, the home authority would remain responsible for the child’s education. In contrast, where there was an out of area placing request, all the responsibility for providing education would transfer to the host authority.

81. Concern was expressed by ISEA that this could lead to a two-tier system, where children placed in another authority via an arrangement between authorities

would be the responsibility of the home authority, whereas children placed as a result of an out of area placing request would be the responsibility of the host authority.

82. The Committee heard evidence from three local authorities and ADES on this issue at its meeting on 14 January 2009. Some concern was expressed that such a two-tier system could further complicate an already complex area. It was argued that the home authority should retain responsibility in all cases, regardless of how the child came to be placed in a school in a host authority. Cameron Munro from Glasgow City Council said that—

“Ultimately, our concern is that, if a child receives support from one part of the council and the health board in their residential area but is schooled in another area, co-ordination difficulties will arise. More important, what if a child’s change in circumstances concerns the break-up of a marriage, the end of a tenancy or another problem that means that they are decanted? A range of relevant matters might be in the remit and gift of only the residential authority while the responsibility for the child’s school education rests elsewhere. The bill does not get to the nub of that confusion.”

83. The Committee notes the level of concern expressed on this issue, particularly by local authorities, at its meeting on 14 January 2009. The Committee is concerned about the potential for confusion over the question of which local authority is responsible for providing which service and the complexities involved in inter-authority coordination. The Committee recommends that the Scottish Government provides clarification on this issue, either at Stage 2 or in the revised code of practice.

Cost responsibility
84. The Committee heard a great deal of evidence concerning the potential impact of either the home or host authority having financial responsibility for provision of certain services. Much of this centred on concern that placing on host authorities the financial responsibility for provision of mediation services and reviewing CSPs, where a successful out of area placing request had been made, would affect the decision of any such host authority whether to accept an out of area placing request.

85. In oral evidence to the Committee, the Bill team provided information on cost responsibility following an out of area placing request. The local government settlement in respect of education is based on school census data, so where a pupil was being educated in a host authority this would be accounted for in calculations. Under Section 23 of the Education (Scotland) Act 1980, a host authority may claim additional costs back from the home authority in relation to children with ASN. The Bill team also noted that an authority can refuse a placing request, for example if accepting the request would mean that the school in question would require an extra teacher or if there would be unreasonable costs. The Bill team later stated that this matter could be clarified in the code of practice.

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86. The Committee notes the evidence it heard that although Section 23 of the Education (Scotland) Act 1980 provides that host authorities may reclaim costs from the home authority, in practice it can be difficult to do so. The Committee also notes that there is no statutory provision to ensure that the home authority meets the costs, other than appeal to the Scottish Ministers under Section 70 of the 1980 Act. The Committee recommends that the Scottish Government considers bringing forward, at Stage 2, proposals for a statutory right for host authorities to reclaim costs from home authorities in appropriate circumstances.

Additional Support Needs Tribunals rules and procedures

New grounds for referral

87. The Bill proposes two new grounds for taking a case to tribunal. These are that:

- the local authority fails to say whether or not it will comply with a request that it establishes whether a CSP is required; and
- the local authority fails to prepare a CSP within the required timescale.

88. The Govan Law Centre expressed concern, in its response to the Scottish Government’s consultation, that the second of these new grounds would be likely only to result in the imposition of a new deadline, which could also then fail to be met. In the same consultation, some local authorities questioned whether the tribunal was the most appropriate body to consider matters raised under the proposed new grounds. Glasgow City Council asked, “is the ASNT really the most efficient, cost effective and best means of addressing such issues?”. Stirling Council felt that such issues should be dealt with through local authorities’ complaints procedures.

89. At the Committee meeting on 10 December 2008, the Tribunal President told members that a benefit of introducing these new grounds would be that they would allow details of local authorities’ performance in relation to the new grounds to be included in the President’s annual report. However, she expressed concern about the ability of the tribunal to enforce any decisions—

“Even if a tribunal decides that the authority has not met the timescale and should carry out an assessment or issue a co-ordinated support plan, we have no teeth to ensure that that is done within the timescale. We do not have any way of monitoring compliance with the directions that are given by tribunals.”

90. In evidence to the Committee at its meeting on 14 January 2009, ADES noted that the new ground would only apply to local authorities and not to partner agencies—

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“The ADES view is that it is reasonable that local authorities should be held to account for the timescales that are applied. However, the legislation applies only to the council and not to the partner agencies that contribute to the council meeting the timescale. For example, if Fife Council is opening a CSP for a youngster, it will often depend on national health service speech and language therapists and perhaps colleagues in other agencies to make that commitment happen. Therefore, there is a dislocation of power and responsibility. If a local authority is accountable for achieving an outcome that is dependent on the NHS, there is a dislocation that will be difficult to manage. The solution is to apply the duty equally to the NHS and other agencies.”

91. **The Committee is content with the proposed new grounds for taking cases to a tribunal. However, the Committee notes the concern expressed by the Tribunal President and Secretary about the ability of the tribunal to monitor or enforce any decisions. The Committee recommends that the Scottish Government considers this matter when revising the rules and procedures of the tribunals through secondary legislation with a view to enabling the tribunal to monitor outcomes of any such decisions.**

**Ability to review its own decisions**

92. The Bill proposes that the tribunal be allowed to review its own decisions. Some concerns were raised, during the Committee’s informal roundtable discussion session on 26 November 2008, about the ability of the tribunal to remain impartial in reviewing its own decisions.

93. Further concerns were raised in written evidence to the Committee, for example from East Ayrshire Council and the Govan Law Centre. The concerns were that such a power could lead to a conflict of interest and that local authorities might gain an advantage over parents because they had access to more resources to commission new reports or present fresh evidence to challenge a decision.

94. The Bill team told the Committee that being able to review decisions in this way is common practice for such organisations. The Bill team also stated that the detail of what could be reviewed under such circumstances would be the subject of secondary legislation and would be consulted upon and subject to parliamentary scrutiny.

95. The Tribunal President, Jessica Burns, supported this, telling the Committee that such a power would be useful when a decision requires clarity. She also noted that the equivalent body in England, the Special Educational Needs and Disability Tribunal (SENDIST), has this power. Whilst SENDIST rarely uses the power, where it has been used, the resultant process has been quick, inexpensive and user-friendly.

96. **The Committee notes the concerns raised about giving the tribunal the power to review its own decisions. However, the Committee accepts that**

such powers exist in comparable organisations and could bring to the tribunal system the benefits experienced by SENDIST, the equivalent body in England. The Committee believes that it is important that giving the tribunal such a power does not lead to significant inequalities between local authorities and parents. The Committee notes that the detail of this power would be the subject of secondary legislation and therefore subject to parliamentary scrutiny.

Adversarial process

97. The Committee was told, both in written and oral evidence, that the tribunal process was becoming increasingly adversarial and that there was an inequality between the legal representation resources available to local authorities and to parents of children and young people with ASN. This was also a main theme of the informal roundtable discussion session the Committee held with voluntary organisations and charities.

98. Lorraine Dilworth from ISEA told the Committee, on 17 December 2008, that—

“"The code of practice said that parents and local authorities would be discouraged from bringing solicitors and advocates. That part of the code is obviously not working. I think that I have attended more tribunals in Scotland than anybody else and I see a trend of authorities using solicitors and advocates more than officials. I believe that as officials make the decision, they should come and state their case. That would make the playing field more level."”

99. The Tribunal President, Jessica Burns, told the Committee that in the majority of cases parents did have representation and there had been only two oral hearings in the last year in which the parents had represented themselves. She also indicated that local authorities had legal representation in fewer than half of the cases in the last year. However, she also noted that in 10 cases, local authorities had instructed counsel to represent them and it was in such circumstances that parents could be disadvantaged. She proposed a solution to this problem—

“I have suggested that the tribunal should have the power, in limited circumstances, to indicate that legal representation for the parent is appropriate, particularly when a case involves issues of statutory interpretation. Of the cases that we have dealt with, there have been two or three that could have come into that category and in which a parent should perhaps have had legal representation.”

100. The minister stated, when giving evidence to the Committee on 21 January 2009, that he did not want to make the tribunal system more adversarial, but rather sought to neutralise the effect of the use of solicitors—

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“A lot of witnesses suggested that there is an imbalance between local authorities and parents in the power of argument that can be brought to a tribunal with legal representation: local authorities are obviously better able to afford legal representation. How do we level the playing field? I do not want to make the process more adversarial and bring more lawyers into it. I want to neutralise the effect of local authorities employing solicitors … I want to make lawyers redundant in the tribunal situation, which we can do through the rules and procedures of the tribunal. We have three members on the tribunal who could be more interrogative of both sides and could limit the opportunities for legal representatives to advocate their side of the argument. The tribunal members could ask all the questions and we might not allow cross-examination by someone else’s representative.”

101. The minister also commented on the Scottish Government’s intentions in relation to advocacy—

“I am pleased to announce that we intend to develop proposals to take forward representative advocacy support for parents. I want to ensure that parents have access to advocacy at a tribunal.”

102. The Committee notes the concerns expressed about the perceived increasingly adversarial nature of the tribunal process and understands that such procedures could be daunting for parents. The Committee has heard no evidence to suggest that ‘arming’ parents with their own legal representation or making legal aid available to parents at tribunals would have any beneficial effect. Indeed, it would be likely to make tribunals even more adversarial.

103. The Committee also notes the suggestions of the Tribunal President that making more legal resources available to the tribunal would be likely to be helpful in that it would provide the tribunal with an alternative legal opinion to any presented by the local authority without necessarily making the process any more adversarial. The Committee asks the minister to reflect on this suggestion before Stage 2.

104. Finally, the Committee considers that, in support to parents within the tribunal system, the emphasis should be on advocacy, mediation and dispute resolution rather than on legal support. The Committee therefore welcomes the measures announced by the minister to widen the availability of these services and to raise awareness of their existence.

Placement commencement and implementation of decisions

105. The Tribunal President, in both written and oral evidence to the Committee, proposed that the tribunal be given a power to state when a placement would start. The Committee heard similar views expressed at its informal roundtable discussion session on 26 November 2008.

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106. When questioned on this issue on 3 December 2008, Robin McKendrick explained the reasons why this proposal had not been included in the Bill—

“[…] the 2004 act does not specify that any decision of the tribunal should be acted on by an authority within a specified period of time. That was considered when the original bill was being drafted. I think I am right in saying that the thinking at the time was that an authority would be under a duty to deal with quite complex issues and to put arrangements in place, which might take some time, and that it was difficult to specify how that might apply in a rural authority, as opposed to a city authority.”

107. However, when giving evidence to the Committee at its meeting on 21 January 2009, the Minister for Children and Early Years stated that the Scottish Government was now giving consideration to bringing forward an amendment at Stage 2 whose effect would be to allow tribunals to be able to specify when a placement should commence.

108. The Tribunal President also proposed allowing a parent to refer a case back to the tribunal if the local authority concerned had not implemented a decision.

109. When questioned on this issue on 3 December 2008, Robin McKendrick explained the reasons why this proposal had not been included in the Bill—

“[…] when an education authority fails to take the action that is specified by the tribunal, although the legislation does not permit people to go back to the tribunal to complain about the issue, there is certainly the opportunity to complain through dispute resolution—although that might not be so relevant in such cases—or under section 70 of the Education (Scotland) Act 1980, or by seeking from Scottish ministers an order under section 27 of the 2004 Act. If the tribunal has said that something should happen, but it has not happened, would a further decision of the tribunal make it happen, or would it be better to bring the matter to the Scottish ministers, which can be done under section 70 of the 1980 Act, as a failure of an authority to make provision for the additional support needs of a child?”

110. In giving evidence to the Committee at its meeting on 21 January 2009, the Minister for Children and Early Years stated that one reason that few cases are referred to Scottish Ministers under section 70 of the Education (Scotland) Act 1980 was that the potential use of section 70 in this regard was not widely known, adding—

“When we get section 70 complaints, we need to pursue them vigorously. We should take them up on behalf of complainants in a way that encourages

local authorities to respond. I have had a meeting with officials to that effect.”

111. The Committee notes both the proposals made by the Tribunal President on the issues of placement commencement and implementation of decisions and the response of the Scottish Government to those proposals. The Committee notes that the Scottish Government intends to bring forward an amendment at Stage 2 to allow tribunals to specify when a placement would start. The Committee broadly welcomes this proposal. However, the Committee believes that some flexibility is likely to be required in this to take account of factors such as the coordination of services, needs of the individual child and characteristics of the local authority and area involved.

112. The Committee also understands that it is important for there to be a clearly understood process should a local authority fail to implement a decision taken by the tribunal. The Committee is satisfied that such procedures are in place and recommends that the Scottish Government ensures that the procedures are clearly understood by the tribunal and all those working with parents on such matters. The Committee welcomes the comments made by the Minister for Children and Early Years with regard to ‘vigorously pursuing’ any section 70 referrals made to the Scottish Government.

Other issues

113. Other issues, which did not relate to the specific proposals in the Bill but which did propose possible changes to the 2004 Act, were raised in written and oral evidence. These issues followed a theme that emerged in much of the evidence given to the Committee that the Bill did not sufficiently amend the 2004 Act to achieve the improvements that the witnesses considered were required.

Code of practice

114. In giving evidence to the Committee on 3 December 2008, Scottish Government officials acknowledged that issues outwith those specifically detailed in the Bill had been raised, both in the Scottish Government consultation and in responses to the Committee. They indicated that such issues would be looked at, but suggested that the Bill was not necessarily the most appropriate mechanism by which to examine them. Officials considered that revising the code of practice and introducing secondary legislation would be more appropriate. Issues relating to secondary legislation are detailed below. With regard to the code of practice, Robin McKendrick told the Committee—

“We have had two and a half years of working with the code of practice. At the risk of being put up against a wall and shot, I say that we recognise that there are areas where it might be improved, for example in the language that is used. We did not have two and a half years of experience when we wrote the code of practice. We can make it better than it is, not only by explaining parents’ rights and the duties on education authorities but by making it clear

what the procedures are for placing requests, and what happens when someone requests a co-ordinated support plan and makes a placing request at the same time. That process has been introduced as a result of the legislation. There are issues that go from primary legislation to secondary legislation and through to the code of practice. I cannot predict what else stakeholders will say when we discuss with them the tribunal rules and procedures, and whether they will say, "You should be changing this. You should be changing that." There will be a consultation on that."43

115. In giving evidence to the Committee on 14 January 2009, Cameron Munro, Senior Solicitor (Education) at Glasgow City Council, expressed concern at the possible extent of the revision to the code of practice—

"I would be concerned if the Government’s solution were to shift all the issues that have been mentioned into a code of practice. That would be disastrous, as it would clarify nothing and would simply add more confusion."44

116. **The Committee recommends that the Scottish Government consults widely before revising the code of practice that accompanies the 2004 Act. The Committee notes that the 2004 Act requires ministers to lay the code of practice before the Scottish Parliament, to allow 40 days for scrutiny and to take account of the views of the Parliament before publishing the code.**

**Definition of ‘significant’**

117. The 2004 Act uses the term ‘significant’ when describing the degree of ASN in certain circumstances. However, the 2004 Act does not define the term. Some written submissions to the Committee argued that it was important that any legislation amending the 2004 Act should include a definition of ‘significant’. In its written submission to the Committee, West Lothian Council stated that—

"It is noted that there is no attempt to set out a workable definition of what constitutes significant in terms of additional support needs. It is considered essential that this is done. The current dubiety and uncertainty is counter productive and in some situations can inhibit consideration of the child’s needs."45

118. This view was also expressed at the Committee informal roundtable discussion session on 26 November 2008 by Colin Young, Young People’s Information and Advocacy Worker, Special Needs Information Point.

119. When questioned on this issue on 3 December 2008, Robin McKendrick told the Committee—

"We will seek in the code of practice to develop understanding of the term "significant". The matter has been taken to the Court of Session and the inner

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45 West Lothian Council. Written submission to the Education, Lifelong Learning and Culture Committee.
house—not just the outer house—has ruled on the definition of the term. From their lordships' ruling, which builds on what already appears in the code of practice, we can develop a better understanding of the issue.”

120. In evidence to the Committee on 21 January 2009, the Minister for Children and Early Years stated that a working group has been established to examine CSPs, including the issue of definitions of terms such as ‘significant’. The minister stated that it was the intention for the working group to conclude during the Bill’s passage through the Parliament, in order that its findings could inform the Bill and the revision of the code of practice.

121. The Committee notes both the comments raised in evidence on the issue of the definition of terms such as ‘significant’, ‘temporary’ and ‘permanent’ and the response given by the Scottish Government. The Committee notes the establishment of a working group that will consider, amongst other matters, the issue of definitions and welcomes the indication given by the minister that the working group will report during the Bill’s passage through the Parliament, in order that it can inform the legislative process.

122. The Committee reserves its position, for the meantime, on whether the most appropriate place to clarify the definition of such terms is in the code practice or on the face of the Bill.

Looked after and accommodated children, children and young people with mental health issues and young carers

123. During the informal roundtable discussion session on 26 November 2008, a view was expressed that looked after and accommodated children and young carers were not being served as well as they should be by the 2004 Act. It was further suggested that the Bill does not address this issue and that specific reference to looked after children should be on the face of the Bill.

124. Written evidence from the Additional Support Needs Tribunals for Scotland argued that the Bill should be amended to—

“Provide for a statutory review to determine if there should be an assessment for any child who is accommodated or looked after for any period in excess of six months within the following three month period to identify whether or not the criteria for a coordinated support plan are satisfied”.  

125. This view was supported in a joint submission led by the Govan Law Centre and signed by 13 other organisations, which stated that—

“HMIE’s report has identified provision under the Act for looked after children and young carers as one of the key areas for improvement for authorities. Although planning to meet the needs of looked after and accommodated children was improving, practice across authorities varied considerably. Few

47 Additional Support Needs Tribunals for Scotland. Written submission to the Education, Lifelong Learning and Culture Committee.
authorities had effective provision for children and young people with mental health issues and those who were young carers.  

126. The Scottish Government was questioned on this when officials gave evidence to the Committee on 3 December 2008. The Scottish Government subsequently wrote to the Committee to provide further information on this issue. That letter stated that—

“[…] regarding the work currently being undertaken in relation to looked after children, a number of products were launched in September aimed at improving outcomes for looked after children, young people and care leavers. These were: These are Our Bairns - a guide for community planning partnerships on being a good corporate parent; The We Can and Must Do Better training materials for professionals involved in the lives of looked after children and young people; Core Tasks for designated managers in educational and residential child care establishments in Scotland; and research into the ways educational attainment of looked after children and young people can be improved. Additionally, the Scottish Government is currently consulting on revised Looked After Children (Scotland) Regulations. The revised regulations more accurately reflect the requirements for all looked after children, whatever their care setting, through the looked after system.”

127. The minister gave further evidence on this point on 21 January 2009—

“I notice that the president of the Additional Support Needs Tribunals for Scotland suggested that there should be some sort of six-monthly review to determine whether looked-after children ought to have co-ordinated support plans. I do not favour that approach, which would be overly bureaucratic and burdensome, but I am keen that every looked-after child should have a care plan from the outset of their becoming looked after. We are developing policy on that all the time: we have launched "These Are Our Bairns: A guide for community planning partnerships on being a good corporate parent"; and we are developing our regulations on looked-after children, which will come through this summer. We have also designated managers within residential care establishments and education establishments to focus on looked-after children. That is the way to deal with those issues: at the source of the problem, rather than trying to build in some sort of remedial action through the tribunal process, which would be cumbersome and ineffective.”

128. The Committee notes the concerns raised in relation to the issue of looked after and accommodated children and young carers. The Committee further notes the information provided by the Scottish Government and will pay close attention to the revised Looked After Children (Scotland) Regulations when they come before it. The Committee recommends that the

48 Joint submission led by Govan Law Centre. Written submission to the Education, Lifelong Learning and Culture Committee.
49 Scottish Government. Written submission to the Education, Lifelong Learning and Culture Committee.
Scottish Government gives specific consideration to the issue of looked after and accommodated children, children and young people with mental health issues and young carers, when revising the code of practice and drafting any secondary legislation that results from the Bill.

Issues relating to transition

129. A view was expressed at the Committee’s informal roundtable discussion session on 26 November 2008 that the Bill should address issues involved in transition between pre-school and primary school, primary and secondary school, and the period after school education. This issue was also raised in written submissions to the Committee. In particular, it was considered that duties contained in the 2004 Act were not being properly carried out in all cases. In written evidence, Afasic Scotland told the Committee that—

“Members continue to report transition from pre-school to primary where concerns about support remain. Transition from school to college also remains problematic, particularly where there are additional support needs but no CSP.”

130. This issue was addressed by Scottish Government officials when giving evidence to the Committee on 3 December 2008. They stated that—

“We will give symmetry to the early years strategy and will reflect that in the code of practice. On the transition to post-school, we recognise that more needs to be done to spread the message. During the consultation, a few people lamented the passing of the future needs assessment as if it were the only lighthouse—the only planning mechanism for children and young people moving on to post-school life. We had to explain to them that the 2004 Act put that on a completely different level. No longer will there be one planning meeting in the last year of the child's education. Planning should start as early as second or third year and should be concluded before the young person or child enters the final year of their school experience. There is a link between additional support for learning and the children and young people on whom the more choices, more chances strategy is focused. With colleagues who are involved in that initiative, we will interview this Friday for a development officer position that will be funded by the schools and lifelong learning directorates. The officer will work not only with schools but with stakeholders in further and higher education, Careers Scotland and other agencies that are involved in transitions. They will be based in LTS and will try to build up exemplars of good practice in transitions to post-school provision.”

131. In a joint written submission to the Committee, 13 organisations proposed that a failure of a local authority to meet its duties on transition should be a ground for appeal to the tribunal.

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51 Afasic Scotland. Written submission to the Education, Lifelong Learning and Culture Committee.
132. The Committee recognises that periods of transition, whether in the early years, from primary to secondary school, or on leaving school, are very important and require specific attention. The Committee notes the comments made by the Scottish Government on this issue and its commitment to deal with early years issues in the revised code of practice and appoint a development officer to consider post-school provision. The Committee recommends that the minister gives consideration to making failure of a local authority to meet its duties on transition grounds for referral to the tribunal.

Issues relating to age
133. In its written evidence to the Committee, the Additional Support Needs Tribunals for Scotland stated that the Bill should—

“Provide for the jurisdiction of the tribunal to be extended to cover all persons undergoing school education (including where this is provided within a FE college under school-college partnership arrangements) whether or not they have attained 18 years in view of the duties under the Act in respect of school leavers and transitions […]”

134. The Committee recommends that the Scottish Government considers the issue raised by the Additional Support Needs Tribunals for Scotland that jurisdiction of the tribunal be extended to cover all persons undergoing school education whether or not they have reached 18 years of age.

Coordinated support plans
135. The Committee heard, at its roundtable discussion session, that there were a variety of concerns regarding CSPs, such as that they were often overly complex and confusing; there was a very low number of CSPs; there was a lack of consistency across local authorities in establishing CSPs; children who did not have a CSP were being lost in the system; CSPs could be difficult to establish at all; and that CSPs were used as a determination in access to various services.

136. Some of the written evidence received by the Committee also expressed concern regarding CSPs, such as the submission made by Quarriers, which stated that CSPs were “not being utilised in the way intended by the Act”, and the National Deaf Children’s Society, which said that “HMIE has identified huge variation in the criteria which local authorities use when issuing CSPs […]”.

137. In giving evidence to the Committee, the Bill team leader told the Committee that—

“We are determined to ensure that every child who requests a co-ordinated support plan has their request considered seriously by the education authority, and if the conditions are met, a plan should be put in place. The plan gives them rights, including the right to an annual review, and it also

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53 Additional Support Needs Tribunals for Scotland. Written submission to the Education, Lifelong Learning and Culture Committee.
54 Quarriers. Written submission to the Education, Lifelong Learning and Culture Committee.
55 National Deaf Children’s Society. Written submission to the Education, Lifelong Learning and Culture Committee.
gives the parents rights. That is not to say that parents of children who do not have co-ordinated support plans do not have any rights."\(^{56}\)

138. The minister told the Committee at its meeting on 21 January 2008 that he had “recently set up a working group on co-ordinated support plans, not least because of the low number of such plans.”\(^{57}\)

139. The minister also stated that—

“I have tasked the short-term CSP working group to examine such issues and find out the precise number of co-ordinated support plans and what we need to do to ensure that, if there is a shortfall, it is dealt with.”\(^{58}\)

140. The Committee notes the wide variety of concerns raised in evidence concerning coordinated support plans and recommends that the Scottish Government takes account of all of these points in relation to the considerations of the short term working group on coordinated support plans announced by the minister.

**Educational support**

141. In evidence received by the Committee, some concern was expressed about the 2004 Act and the Bill being interpreted as making provision only in relation to a child’s additional support needs in the direct context of education, with the result that other types of need might not be taken into account.

142. The joint submission led by the Govan Law Centre states that—

“The consultation document on the draft Bill stated that the Scottish Government did not intend to change the “thrust or ethos” of the 2004 Act. However, the decision of Lord Wheatley in the case of SC v. City of Edinburgh Council [2008] CSOH 60 did just that, striking at the central feature of the Act – the definition of “additional support needs”. In paragraph 29 of his decision he stated: “The whole burden of the test of what constitutes additional support needs clearly refers to educational support, and further to education support offered in a teaching environment. This in turn must refer to the educational needs of the child, and not to anything else. It cannot refer to the social and environmental needs of the appellant herself, or indeed of the child.” The idea that “additional support” is restricted to “education support offered in a teaching environment” runs directly contrary to the Code of Practice.”\(^{59}\)

143. The joint submission goes on to suggest how the Bill could be amended to deal with this issue—

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\(^{59}\) Joint submission led by the Govan Law Centre. Written submission to the Education, Lifelong Learning and Culture Committee.
“In Section 1 of the 2004 Act, delete the word “educational” where it occurs in both s.1(3)(a) & 1(3)(b) and/or insert the words “(whether relating to education or not)” which are already used in the Additional Support for Learning Dispute Resolution (Scotland) Regulations 2005. This amendment would underline the fact that, while the purpose of additional support is to enable the child or young person to benefit from school education, that support need not itself be educational – and is in line with the Code of Practice.”

144. When questioned on the points raised in the joint submission the minister said that—

“The intention behind the 2004 act was clear. The purpose of additional support is to allow children and young people to benefit from school education. That support should not be limited to support that is offered in a teaching environment; it can involve not only education services, but other agencies, such as health and social work services. Lord Wheatley's decision casts doubt on the interpretation of the 2004 act. The Government's policy officials and solicitors are still considering the implications of his ruling. We intend to make the bill as clear as possible, to meet the policy intention that I described. We think that the issue is for the code of practice, but we will continue to reflect on that and we will tell the committee our further thoughts.”

145. When questioned specifically on whether the minister supported the joint submission’s proposal of removing the word “educational” in light of the Wheatley ruling, the minister replied that—

“The Wheatley judgment is definitely an issue. However, as the focus of the original legislation was additional support for education, removing references to education does all kinds of things to the potential scope of the bill, so I am not in favour of such a move. That said, we need to address the Govan Law Centre's particular question whether additional support applies only to the teaching environment. That is not the case; as the original legislation intended, such support goes much wider than that. We need to restore that intention if it has, indeed, been brought into doubt.”

146. The Committee notes the concerns raised in the joint submission led by the Govan Law Centre relating to provision of additional support needs support outwith educational support. The Committee also notes the response by the minister that he is still reflecting on this issue. The Committee recommends that the minister clarifies his position on this issue before Stage 2 of the Bill commences.

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60 Joint submission led by the Govan Law Centre. Written submission to the Education, Lifelong Learning and Culture Committee.
SUBORDINATE LEGISLATION

147. The Bill contains delegated powers provisions. The Scottish Government, therefore, provided the Parliament with a memorandum on the delegated powers provisions within the Bill. The proposed powers were considered by the Subordinate Legislation Committee (SLC).

148. The SLC subsequently reported to the Committee. A copy of its report can be found at Annexe A. The SLC had no comment to make on the delegated powers provisions and approved sections 7(a), 7(b), 8 and 10.

149. Giving evidence on 3 December 2008, Robin McKendrick told the Committee that—

“Various other issues were raised during the consultation process. Indeed, the consultation document sought comments on any issue that affected the implementation of the 2004 Act. Although those issues are regarded as relevant, it is considered to be more appropriate to address them in secondary legislation […]”\(^{63}\)

150. Mr McKendrick also stated that the rules and procedures of the Additional Support Needs Tribunals for Scotland would be revised and amended through secondary legislation and that any secondary legislation required by the Bill would be “fully consulted on”.\(^{64}\) He also stated that “[…] we have not yet started to draft the secondary legislation that will flow from the bill.”\(^{65}\)

151. When questioned about the detail of such secondary legislation, Mr McKendrick stated that—

“[…] primary legislation has a certain function, and secondary legislation is more detailed, so it will give the detail stipulated by the bill. Specifically, the bill will require the co-ordinated support plan regulations and the tribunal rules and procedures to be amended to clarify, for example, what is meant by the tribunal reviewing its own decision. The regulations will specify what the circumstances would be for that. It is not proper for an act to reflect that; it needs to be reflected in secondary legislation.”\(^{66}\)

152. The Committee notes the Subordinate Legislation Committee’s report. The Committee further notes the comments made by the Scottish Government regarding the secondary legislation that will follow in due course should the Bill be passed. The Committee recommends that the Scottish Government consults as widely as possible on any forthcoming secondary legislation.

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POLICY MEMORANDUM

153. In its call for evidence, the Committee asked for views on the Policy Memorandum that accompanied the Bill. The majority of submissions that commented on this indicated satisfaction with the Policy Memorandum, noting that it helpfully explained what some found to be a detailed and complex piece of proposed legislation.

154. Stirling Council stated that—

“We appreciated the plain English contained within the Policy Memorandum; it provides a clear and concise summary with all salient points suitably detailed.”

155. Consumer Focus Scotland expressed disappointment that whilst the Policy Memorandum noted the issues raised outwith the limits of the consultation, it did not explain why these issues were not being taken forward in the Bill.

156. The Committee notes the comments on the Policy Memorandum made in submissions it received and the comments made by the Scottish Government.

FINANCIAL MEMORANDUM

157. The Finance Committee adopted its level one scrutiny when considering the Bill’s Financial Memorandum. This means that the Finance Committee did not take any oral evidence on the Financial Memorandum and did not report to the Committee. It did, however, seek written evidence from a range of affected organisations and wrote to the Committee. A copy of the letter received from the Finance Committee, together with the written evidence it received, is attached at Annexe B.

158. During evidence to the Committee on 21 January 2009, the Minister for Children and Early Years announced the intention of the Scottish Government to consider bringing forward an amendment to the Bill at Stage 2 which would allow any appeal relating to a placing request at a special school to be heard by the tribunal, regardless of whether a CSP is involved or not. The minister also provided some information on the financial impact of this amendment, should it be agreed to—

“There is significant demand, but there is also a natural ceiling on demand for places in special schools, so I do not anticipate a large increase, although we have factored in additional costs that will need to be taken into consideration in the financial memorandum to accommodate extra provision in special schools. The placing requests figures for 2006-07 show that 14 special school placing requests were referred to education appeal committees and none was referred to the sheriff. When we transfer cases to the tribunal, the

67 Stirling Council. Written submission to the Education, Lifelong Learning and Culture Committee.
cost is £2,000 per case, so we need to make available an additional sum—the total would come to something like £40,000.”

159. The Finance Committee noted that—

“Most of those who submitted evidence are broadly content with the Financial Memorandum, although local authorities appear to have a range of views on the financial implications of the Bill.”

160. In addition to the evidence submitted to the Finance Committee, many of the submissions made directly to the Education, Lifelong Learning and Culture Committee commented on the Financial Memorandum.

161. Some submissions found the Financial Memorandum to be helpful in giving an indication of projected costs.

162. However, a number of submissions (mostly from local authorities) raised concerns regarding the Financial Memorandum. A primary concern was that the Financial Memorandum’s projected costs did not have a sufficiently robust evidence base and therefore the estimations given were not sufficiently indicative, reliable or accurate.

163. The Financial Memorandum states that—

“It is important to note that given both the very small number of cases involved and the large variability in cost due to the individual nature of cases, it is not possible to assess precisely either the number of cases or the cost involved. Both number and cost are likely to vary from year to year.”

164. West Dunbartonshire Council commented that—

“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.”

165. Some submissions highlighted concerns whilst acknowledging that the Scottish Government was correct in attempting to project costs. School Leaders Scotland commented that—

“We read the Financial Memorandum with some interest but with some scepticism in relation to the figures on display. There is a degree of confident extrapolation in this memorandum which we did not share: the legislation is still bedding in and is not still widely known or applied by parents who might

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71 West Dunbartonshire Council. Written submission to the Education, Lifelong Learning and Culture Committee.
well have a legitimate claim to make on an authority. The projections are
decidedly conjectural but we concede that it was the correct thing to
attempt.”

166. Concern was also expressed on how the figures had been determined. ISEA
stated that—

“The Financial Memorandum accompanying the Bill is, in our opinion,
fundamentally flawed in that the figures presented are based on current
figures of children/young people with Coordinated Support Plans (CSPs) –
that being 1881. However, as alluded to in paragraph 41 of the Explanatory
Notes, “it was expected there will be around 11,200 to 13,700 CSPs at any
one time”. This figure has not been realised and this, in our opinion, is due to
the reluctance of education authorities to open CSPs as was the case with
Records of Needs.”

167. The Committee notes the comments made by the Finance Committee in
its letter to the Committee. The Committee believes it was appropriate for the
Scottish Government to give an indication of likely costs associated with the
Bill, including those with regard to local authorities, in the Financial
Memorandum. The Committee notes the concerns raised in submissions
made to it and recommends that the Scottish Government takes account of
these concerns in its further discussion with local authorities and other
organisations should the Bill be passed.

CONCLUSION

168. The Committee recognises, that although experience of ASN practice
under the Education (Additional Support for Learning) (Scotland) Act 2004
has been relatively short, some revision of the Act is now required.

169. The Committee is broadly supportive of the amendments to the 2004
Act proposed in the Bill. The Committee also welcomes the commitments
given by the Minister for Children and Early Years to bring forward further
proposals at Stage 2 in response to points raised during the Committee’s
scrutiny of the Bill.

170. However, the Committee notes the extent of comment in evidence that
it received that the 2004 Act requires further review beyond both the
proposals in the Bill and those that the minister indicated would be brought
forward at Stage 2.

171. The Committee therefore supports the general principles of the Bill and
recommends to the Parliament that they be approved, but also recommends
that the Scottish Government continues to keep the 2004 Act under close
review and gives careful consideration to the points raised during its own
consultation and during the scrutiny carried out by the Committee.

72 School Leaders Scotland. Written submission to the Education, Lifelong Learning and Culture
Committee.
73 ISEA. Written submission to the Education, Lifelong Learning and Culture Committee.
172. The Committee further recommends that the Scottish Government has regard to the views of stakeholders in its revision of the code of practice and any secondary legislation that results from the implementation of the Bill.

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

Implementation of the 2004 Act
173. Some witnesses believed that although local authorities had generally made provision for children with ASN under the terms of the 2004 Act, they had not always been seen to be in tune with what witnesses considered to be the spirit of the Act. The Committee also heard views that the policy effect of the 2004 Act had, to some extent, been compromised by a number of legal rulings. Finally, the Committee heard that different local authorities had taken approaches leading some to believe that provision was not equitable across Scotland. As a result, in many circumstances parents and others expressed their concerns that the cost of meeting additional support needs remained a major factor influencing decisions on additional support. The Committee notes these concerns and draws them to the attention of the Scottish Government. (see paragraphs 15-16)

Scottish Government consultation
174. The Committee believes that the Scottish Government’s consultation was satisfactory and is also content with the number of consultation events held.

175. The Committee notes the concerns raised in a number of written submissions and recommends that the Scottish Government takes account of these points when planning future consultation exercises. (see paragraphs 20-21 and 33-40)

General principles of the Bill
176. The Committee agrees with witnesses and written submissions that stated that the fundamental principle underpinning the Bill, as it had been in the 2004 Act, should be that of serving the best interests of the child concerned. The Committee accepts that the 2004 Act, following rulings in the Court of Session and experience of its implementation, requires amendment in certain areas to ensure that its original intentions are realised and that children and young people with additional support needs and their parents are being properly served. (see paragraphs 41-48)

Making requests
177. The Committee notes that the majority of evidence submitted, both to the Scottish Government’s consultation and to the Committee’s call for evidence, supported the proposal to allow parents of children and young people with additional support needs to make out of area placing requests directly to another local authority. The Committee believes that this was the original intention of the 2004 Act and supports this proposal. (see paragraphs 49-56)
Appealing out of area placing requests
178. The Committee understands the rationale put forward by the Scottish Government in proposing a change to the 2004 Act to allow cases to go to the tribunal where a CSP is either in place or under development. The Committee also welcomes the additional proposal announced by the Minister for Children and Early Years that all out of area placing request appeals involving special schools would be heard by the tribunal. However, the Committee remains concerned that, despite these proposed improvements, the out of area placing request procedure and appeals mechanisms would remain complex and difficult to understand. Under the proposals as they stand, for example, appeals in respect of placing requests to special schools and to mainstream schools on behalf of children with a CSP either in place or under development would be heard by the tribunal, while appeals in respect of requests to mainstream schools on behalf of children who has ASN but no CSP would continue to be heard by the EAS or sheriff. The Committee agrees with many of the witnesses who gave evidence that it is important for parents of children and young people with additional support needs to have a clear understanding of which body will hear an appeal under what circumstances. The Committee therefore recommends that the minister gives further consideration to the following proposals that were raised in evidence to the Committee, that the:

- tribunal takes placing requests relating to special schools only;
- tribunal takes all placing requests where child has ASN;
- tribunal takes placing requests where the reason for the request is the child’s ASN. (see paragraphs 57-64)

Responsibility for reviewing CSPs
179. The Committee understands the potential advantages in a host authority taking responsibility for reviewing the CSP of any child who is being educated in its area. The Committee also notes the concerns raised by ISEA and recommends that the Scottish Government considers this issue carefully before drafting the proposed secondary legislation. Finally, the Committee recommends that the points raised by ADES/ADSW and West Lothian Council are taken into account by the Scottish Government when making any revisions to the code of practice or bringing forward any secondary legislation. (see paragraphs 65-72)

Mediation and dispute resolution
180. The Committee supports the proposal to place on host authorities responsibility for mediation and dispute resolution in relation to out of area placing requests. The Committee is concerned at the apparent lack of awareness amongst parents of their rights in this area and recommends that the Scottish Government addresses this as a matter of urgency. In addressing this issue, the Committee recommends that the Scottish Government pays particular attention to low income families, looked after and accommodated children, Gypsy/Travellers and parents who serve in the armed forces. (see paragraphs 73-79)
Home authority responsibility for inter-authority placements

181. The Committee notes the level of concern expressed on this issue, particularly by local authorities, at its meeting on 14 January 2009. The Committee is concerned about the potential for confusion over the question of which local authority is responsible for providing which service and the complexities involved in inter-authority coordination. The Committee recommends that the Scottish Government provides clarification on this issue, either at Stage 2 or in the revised code of practice. (see paragraphs 80-83)

Cost responsibility

182. The Committee notes the evidence it heard that although Section 23 of the Education (Scotland) Act 1980 provides that host authorities may reclaim costs from the home authority, in practice it can be difficult to do so. The Committee also notes that there is no statutory provision to ensure that the home authority meets the costs, other than appeal to the Scottish Ministers under Section 70 of the 1980 Act. The Committee recommends that the Scottish Government considers bringing forward, at Stage 2, proposals for a statutory right for host authorities to reclaim costs from home authorities in appropriate circumstances. (see paragraphs 84-86)

Additional Support Needs Tribunals: new grounds for referral

183. The Committee is content with the proposed new grounds for taking cases to a tribunal. However, the Committee notes the concern expressed by the Tribunal President and Secretary about the ability of the tribunal to monitor or enforce any decisions. The Committee recommends that the Scottish Government considers this matter when revising the rules and procedures of the tribunals through secondary legislation with a view to enabling the tribunal to monitor outcomes of any such decisions. (see paragraphs 87-91)

Additional Support Needs Tribunals: ability to review its own decisions

184. The Committee notes the concerns raised about giving the tribunal the power to review its own decisions. However, the Committee accepts that such powers exist in comparable organisations and could bring to the tribunal system the benefits experienced by SENDIST, the equivalent body in England. The Committee believes that it is important that giving the tribunal such a power does not lead to significant inequalities between local authorities and parents. The Committee notes that the detail of this power would be the subject of secondary legislation and therefore subject to parliamentary scrutiny. (see paragraphs 92-96)

Additional Support Needs Tribunals: adversarial process

185. The Committee notes the concerns expressed about the perceived increasingly adversarial nature of the tribunal process and understands that such procedures could be daunting for parents. The Committee has heard no evidence to suggest that ‘arming’ parents with their own legal representation or making legal aid available to parents at tribunals would have any beneficial effect. Indeed, it would be likely to make tribunals even more adversarial.
186. The Committee also notes the suggestions of the Tribunal President that making more legal resources available to the tribunal would be likely to be helpful in that it would provide the tribunal with an alternative legal opinion to any presented by the local authority without necessarily making the process any more adversarial. The Committee asks the minister to reflect on this suggestion before Stage 2.

187. Finally, the Committee considers that, in support to parents within the tribunal system, the emphasis should be on advocacy, mediation and dispute resolution rather than on legal support. The Committee therefore welcomes the measures announced by the minister to widen the availability of these services and to raise awareness of their existence. (see paragraphs 97-104)

Placement commencement and implementation of decisions

188. The Committee notes both the proposals made by the Tribunal President on the issues of placement commencement and implementation of decisions and the response of the Scottish Government to those proposals. The Committee notes that the Scottish Government intends to bring forward an amendment at Stage 2 to allow tribunals to specify when a placement would start. The Committee broadly welcomes this proposal. However, the Committee believes that some flexibility is likely to be required in this to take account of factors such as the coordination of services, needs of the individual child and characteristics of the local authority and area involved.

189. The Committee also understands that it is important for there to be a clearly understood process should a local authority fail to implement a decision taken by the tribunal. The Committee is satisfied that such procedures are in place and recommends that the Scottish Government ensures that the procedures are clearly understood by the tribunal and all those working with parents on such matters. The Committee welcomes the comments made by the Minister for Children and Early Years with regard to ‘vigorously pursuing’ any section 70 referrals made to the Scottish Government. (see paragraphs 105-112)

Code of practice

190. The Committee recommends that the Scottish Government consults widely before revising the code of practice that accompanies the 2004 Act. The Committee notes that the 2004 Act requires ministers to lay the code of practice before the Scottish Parliament, to allow 40 days for scrutiny and to take account of the views of the Parliament before publishing the code. (see paragraphs 114-116)

Definition of ‘significant’

191. The Committee notes both the comments raised in evidence on the issue of the definition of terms such as ‘significant’, ‘temporary’ and ‘permanent’ and the response given by the Scottish Government. The Committee notes the establishment of a working group that will consider, amongst other matters, the issue of definitions and welcomes the indication given by the minister that the working group will report during the Bill’s
passage through the Parliament, in order that it can inform the legislative process.

192. The Committee reserves its position, for the meantime, on whether the most appropriate place to clarify the definition of such terms is in the code practice or on the face of the Bill. (see paragraphs 117-122)

*Looked after and accommodated children, children and young people with mental health issues and young carers*

193. The Committee notes the concerns raised in relation to the issue of looked after and accommodated children and young carers. The Committee further notes the information provided by the Scottish Government and will pay close attention to the revised Looked After Children (Scotland) Regulations when they come before it. The Committee recommends that the Scottish Government gives specific consideration to the issue of looked after and accommodated children, children and young people with mental health issues and young carers, when revising the code of practice and drafting any secondary legislation that results from the Bill. (see paragraphs 123-128)

*Issues relating to transition*

194. The Committee recognises that periods of transition, whether in the early years, from primary to secondary school, or on leaving school, are very important and require specific attention. The Committee notes the comments made by the Scottish Government on this issue and its commitment to deal with early years issues in the revised code of practice and appoint a development officer to consider post-school provision. The Committee recommends that the minister gives consideration to making failure of a local authority to meet its duties on transition a ground for referral to the tribunal. (see paragraphs 129-132)

*Issues relating to age*

195. The Committee recommends that the Scottish Government considers the issue raised by the Additional Support Needs Tribunals for Scotland that jurisdiction of the tribunal be extended to cover all persons undergoing school education whether or not they have reached 18 years of age. (see paragraphs 133-134)

*Coordinated support plans*

196. The Committee notes the wide variety of concerns raised in evidence concerning coordinated support plans and recommends that the Scottish Government takes account of all of these points in relation to the considerations of the short term working group on coordinated support plans announced by the minister. (see paragraphs 135-140)

*Educational support*

197. The Committee notes the concerns raised in the joint submission led by the Govan Law Centre relating to provision of additional support needs support outwith educational support. The Committee also notes the response by the minister that he is still reflecting on this issue. The
Committee recommends that the minister clarifies his position on this issue before Stage 2 of the Bill commences. (see paragraphs 141-146)

Subordinate legislation
198. The Committee notes the Subordinate Legislation Committee’s report. The Committee further notes the comments made by the Scottish Government regarding the secondary legislation that will follow in due course should the Bill be passed. The Committee recommends that the Scottish Government consults as widely as possible on any forthcoming secondary legislation. (see paragraphs 147-152)

Policy Memorandum
199. The Committee notes the comments on the Policy Memorandum made in submissions it received and the comments made by the Scottish Government. (see paragraphs 153-156)

Financial Memorandum
200. The Committee notes the comments made by the Finance Committee in its letter to the Committee. The Committee believes it was appropriate for the Scottish Government to give an indication of likely costs associated with the Bill, including those with regard to local authorities, in the Financial Memorandum. The Committee notes the concerns raised in submissions made to it and recommends that the Scottish Government takes account of these concerns in its further discussion with local authorities and other organisations should the Bill be passed. (see paragraphs 157-167)
ANNEXE A: REPORT FROM THE SUBORDINATE LEGISLATION COMMITTEE

Report on Education (Additional Support for Learning) (Scotland) Bill at Stage 1

The Committee reports to the lead committee as follows—

1. At its meeting on 4 November 2008, the Subordinate Legislation Committee considered the delegated powers provisions in the Education (Additional Support for Learning) (Scotland) Bill at Stage 1. The Committee submits this report to the Education, Lifelong Learning and Culture Committee, as the lead committee for the Bill, under Rule 9.6.2 of Standing Orders.

2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill.74

Delegated Powers Provisions

3. The Committee considered each of the delegated powers provisions in the Bill. The Committee approves without further comment: sections 7(a), 7(b), 8 and 10.

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74 Delegated Powers Memorandum
ANNEXE B: LETTER FROM CONVENER OF FINANCE COMMITTEE TO KAREN WHITEFIELD

Education (Additional Support for Learning) (Scotland) Bill – Financial Memorandum

As you are aware, the Finance Committee examines the financial implications of all legislation, through the scrutiny of Financial Memoranda. At its meeting on 28 October 2008, the Committee agreed to adopt level one scrutiny in relation to the Education (Additional Support for Learning) (Scotland) Bill. Applying this level of scrutiny means that the Committee does not take oral evidence or produce a report, but it does seek written evidence from affected organisations.

The Committee received submissions from—

- Aberdeen City Council;
- The Association of Directors of Education;
- The Additional Support Needs Tribunal for Scotland;
- Clackmannanshire Council;
- COSLA;
- Dumfries and Galloway Council;
- Inverclyde Council;
- East Renfrewshire Council; and
- The Scottish Court Service.

All submissions received are attached to this letter. Most of those who submitted evidence are broadly content with the Financial Memorandum, although local authorities appear to have a range of views on the financial implications of the Bill. Some submissions also make comment on the policy aspects of the Bill, and those comments are properly addressed to the lead committee.

If you have any questions about the Committee’s consideration of the Financial Memorandum, please contact Allan Campbell, Assistant Clerk to the Committee, on 0131 348 5451, or email: allan.campbell@scottish.parliament.uk.

Yours sincerely

Andrew Welsh MSP
Convener
As you will appreciate the implications and financial impact of the original Act and this new bill are not necessarily easy to identify. However, this Council does wish to respond to your invitation and we welcome the opportunity. I will address the questions set out in your letter of the 11th November 2008 in the order they appear:

1. **Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?**

This Council did take part in the original consultation (copy attached as an Annex for convenience). However, the consultation did not specifically ask for comments on any financial assumptions being made and therefore we did not offer any views at that time, so welcome the opportunity to do so now.

2. **Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?**

Please see comments above at question 1.

3. **Did you have sufficient time to contribute to the consultation exercise?**

Whilst I was not in post at the time, I have consulted with those colleagues who were involved with the consultation exercise. Their view is that it did feel a little rushed.

4. **If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.**

Having examined the Financial Memorandum, it makes clear that COSLA and six Local Authorities participated in a survey about the potential costs of implementing the Bill. It seems that, given that the six Authorities do represent an appropriate cross section of all Authorities, we would have a reasonable degree of confidence in the outcome of the survey and, therefore, in the financial implications for this Council.

5. **Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?**

This Council has experienced three Tribunal cases to date but even so this small sample demonstrates the difficulty, at this stage, of anticipating and quantifying costs. We note that the Financial Memorandum estimates costs to be in the region of £55K. The cost figures quoted in the Memorandum in relation to different aspects and
procedures seem to be appropriate. Although, as intimated, it is problematic for us to be able to conduct a detailed cost analysis at this stage. If costs do escalate or the assumptions contained within the Memorandum transpire to be less robust than appears at the moment, then it would be helpful for consideration to be given to the possibility of additional funding.

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

Following on from Question 5, it is acknowledged by this Council that it is difficult to predict costs associated with the Bill because it is not possible to quantify in advance how many cases will arise on any particular Additional Support for Learning matter. For example, it is possible to envisage a number of Placing Requests from parents of children with a Co-ordinated Support Plan in any given year and for that number to be a rise on a previous year. This scenario would obviously lead to additional costs to those planned for. On-the-other-hand, it is entirely feasible that in any given year there may be no such cases.

Another scenario would involve an increase in cases with complicated features, which could require that a hearing lasts for a longer duration than anticipated. Thus, leading to a rise in costs.

Overall, the Council is satisfied that the Financial Memorandum reflects the difficulties associated with qualifying the costs connected with the Bill and as illustrated by the above scenarios.

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

In this Council, the implementation of and the consequences of the Bill is part of our wider Inclusion approaches and strategies. Overall it would seem that any associated costs are reasonably accurately reflected in the Financial Memorandum. Additional costs associated with Placing Requests, particularly transport costs, may need better quantifying but this can only come with experience and even then be a problematic exercise to do accurately as part of forward planning of budgets.

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

It seems reasonable to assume that there may well be future costs associated with the Bill if further duties are placed upon Authorities by secondary legislation or as any Scottish Government guidance becomes more developed. Obviously it is not possible to quantify any such costs at this stage. However, in the short term following enactment, it is very likely that there will be increased costs resulting from Authorities needing to provide and/or amend documentation, training materials, information packs for parents, schools, young people etc.
I trust the above information and response will be of assistance to you in your work with the Finance Committee. Please do not hesitate to contact me should you require any further information and/or clarification

Sohail Faruqi
Strategist (Support for Children & Young People)

SUBMISSION FROM THE ASSOCIATION OF DIRECTORS OF EDUCATION

This written evidence is provided by ADES to the Scottish Parliament in relation to the financial memorandum of the Education (Additional Support for Learning) (Scotland) Bill. It follows the general evidence provided jointly by ADES and ADSW in relation to the Bill. This submission will expand upon points made in relation to costs in that general evidence.

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, ADES 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.

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.

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 dis-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, allow a 'no cost' alternative to building such capacity.

In addition, ADES 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.

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.

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.
We would estimate the cost of this compliance to be £200,000 per annum for an authority of 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  
Fife Council (on behalf of ADES)

SUBMISSION FROM THE ADDITIONAL SUPPORT NEEDS TRIBUNAL FOR SCOTLAND

Consultation

1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?

I did not submit a response to the initial consultation exercise for the Bill but the President of ASNTS did submit a response. I did work with the President in preparation of a response to the call for written evidence from the Education, Lifelong Learning and Culture Committee on the proposals outlined in the draft bill.

Prior to the publication of the draft Bill, I prepared a paper for colleagues in the Scottish Government’s Support for Learning division on the financial implications of a documents-only expedited process in prescribed circumstances and provided a calculation of the cost of hearings relating to placing requests.

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

My comments on the financial assumptions have been accurately applied on a ‘per unit’ basis. I would suggest the new activity for ASNTS arising from the amendment Bill is over-estimated. On this basis, the increased costs to the Tribunals may be less than set out in the financial memorandum.

3. Did you have sufficient time to contribute to the consultation exercise?

Yes

Costs

4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

I would suggest the new activity for ASNTS arising from the amendment bill is over-estimated in the financial memorandum. The ‘per unit’ information
which I supplied has been accurately applied but the overall increased costs to ASNTS may not be as high as predicted.

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

We are monitoring our budget carefully as we expect an under-spend this financial year, due to a drop in hearings activity. Indications are that the level of under-spend for this year would be enough to cover the increased costs arising from these proposals and budget projections for next year should therefore be based on this year's budget before the under-spend was returned.

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

From our perspective the margins are generous and I would not foresee a difficulty if it was decided to proceed on basis set out in the financial memorandum. Again, I suspect an allocation based on our original budget for this year would be sufficient.

Wider Issues

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

N/A

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

It is very difficult to give an informed response to this question as other bodies may have suggested amendments which would have an impact on ASNTS, if the suggestions are taken forward. ASNTS has made a number of suggestions to the Enterprise, Lifelong Learning and Culture Committee which extend the scope of the Bill but our view is that if these changes are implemented, the activity generated for the Tribunals could be absorbed within our current budget. Again, whilst we can take an informed view of the impact of our suggestions on our business, we cannot have the same confidence about the financial ramifications for other bodies such as the education authorities.

Necessary changes to the subordinate legislation which governs the functions of the Tribunals should not precipitate further costs; the Tribunal will have an opportunity to contribute to the consultation relating to changes to the Tribunal Practice and Procedure Rules; these changes should either be financially neutral or should give rise to modest savings. The Tribunal will
not have a direct input into more developed guidance through a revised Code of Practice as this is not within our ownership.

Lesley Maguire
Secretary
ASNTS
25 November 2008

SUBMISSION FROM CLACKMANANNSHIRE COUNCIL

Consultation
1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?

Yes. We expressed general concerns.

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

No. We think that the Memorandum is overly optimistic about the financial implications of the proposed legislation.

3. Did you have sufficient time to contribute to the consultation exercise?

Yes

Costs
4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

No. We think that the Memorandum is overly optimistic in its assumptions. The central assumption is that the proposed legislation will have no significant impact on people's/organisations' behaviour. We think that the number of out-of-authority placing requests is likely to increase and that there will be, therefore, significant additional costs, both direct and opportunity costs, which will have to be borne by Councils and others.

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

If behaviours are unaltered, then yes. But, see 4 above. We will bear the bureaucratic costs of the changes within existing budgets. This will give rise to significant opportunity costs. The Memorandum under-estimates the extent of these. Beyond this, we believe that it is essential that a pupils' 'home' authority continues to be responsible for the cost of a successful out-of-authority placing request to avoid such requests becoming a device for resolving disputes over provision by, effectively, 'exporting' a problematic provision to another authority.
6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

See 5 above.

**Wider Issues**

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

The Memorandum restricts itself to a small range of bureaucratic costs. It ought to take a broader view of the possible cost implications of its provisions.

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

9. See 5 above. It is difficult to quantify these with any real accuracy at this stage.

Jim Goodall
Head of Education and Community Services
Clackmannanshire Council

**SUBMISSION FROM COSLA**

**Introduction**

COSLA welcomes the chance to comment on the financial memorandum of the Education (Additional Support for Learning) (Scotland) Bill.

We have responded to the Committee’s questionnaire, and have made have additional comments as appropriate. We would be happy to provide further information if the Committee requires it.

**Key Points**

- COSLA believes that the memorandum is accurate and based on the best information that was available at the time. However, there are a range of factors which make quantifying the exact costs of the Bill difficult. For this reason we cannot guarantee that there will be no increased financial burden on councils, but at this time our best estimate is that additional costs should be minimal.

- The Committee will be aware that local authority budgets are under pressure generally. On its own this Bill should not have large financial implications for councils, but with little or no spare funding available to councils we need to be very careful that legislation does not have unintended consequences for local authorities.
Consultation

1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?

COSLA did not provide a formal submission to the Scottish Government’s consultation. However, COSLA officials have attended formal meetings with other key stakeholders, hosted by the Scottish Government, and we have had informal discussions with Scottish Government officials which have been very helpful in clarifying both the need for and the intentions of the draft legislation.

COSLA hosted a meeting of the 6 councils whose inputs to the Scottish Government survey assisted with the cost calculations set out in the Financial Memorandum. This was very helpful in gauging the many factors and variables which might affect implementation of the draft legislation.

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

For the most part. It is evident that there are already significant cost variations across council areas in implementation of the current legislation and that the number, complexity and length of individual cases are contributing factors to these variations.

For these reason we cannot guarantee that local authorities will be able to meet the costs of implementing the new legislation from existing budgets. As the Committee will be aware councils budgets are under pressure due to a range of factors stemming partly from the economic downturn. We are in discussions from Scottish Government to try and address these pressures, but now more than ever we have to be very careful that we do not place additional burdens on councils. Predicting the likely financial impact of the new legislation is an inexact science but we consider that the Financial Memorandum is founded on the best information available.

One of the main intentions of the draft legislation is to clarify the policy intentions governing the 2004 Act, particularly around out of council placing requests and the associated responsibilities for funding. Given that placing requests are being negotiated and funded already among local authorities as a matter of course, we do not foresee that implementing the new legislation will lead to a surge of new placing requests with serious additional cost burdens. However, if this was to happen – and there was increased demand for out of council placements from parents of children who have additional support as a result of the legislation - then this could place a burden on council budgets. It is not possible to quantify how much this could potentially cost councils as additional support for learning is a demand led service.

Our only point of issue with the financial memorandum is that we do not accept the statement in paragraph 41 that “education authorities have already received excess funding for their work in this area”. This contention seems to be based on a smaller number of Coordinated Support Plans than originally envisaged in the Financial
Memorandum to the 2004 Act. We believe that it would be more appropriate to look at the wider costs of providing support for children who require additional support for learning, not just a comparison based on CSPs.

It is also worth pointing out that funding of additional support for learning – as with all local government funding – is not allocated for any one purpose. The Concordat and the spending review settlement provide local authorities with one budget which they have to work within to deliver a range of services. Our best estimate based on the information we have is that the legislation as currently drafted should not place additional burdens on councils. Nonetheless, all indications are that budgets are currently extremely tight and there is little or no spare funding to cover increased costs if they arise from the Bill. If costs did rise, for what ever reason, then this could have an impact of other council services.

3. Did you have sufficient time to contribute to the consultation exercise?

Yes.

Costs

4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

The Bill has no financial implications for COSLA directly. Our main concern is to represent the interests of our member councils who will be responsible for implementing the legislation.

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

See answer to question 4.

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

We believe so. As indicated in our response to question 2, the Financial Memorandum reflects that there are already cost variations and it describes the cost ranges identified in the survey. As previously detailed there are uncertainties in predicting the financial implications of implementing this legislation. However, we consider that these uncertainties are articulated appropriately in the Memorandum.

Wider Issues

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?
We believe that the Bill should be seen as part of improving educational and other outcomes for children in Scotland and as a contribution to meeting several of the national outcomes in the National Performance Framework. It should also be seen alongside wider policy frameworks on the early years and tackling inequalities and more specific initiatives to improve the integration and quality of services aimed at meeting the needs of the individual child, particularly Getting It Right for Every Child.

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

Possibly. For example, we understand that the intention is to produce a revised Code of Practice which may also address some of the other issues raised through the SG consultation. We look forward to continued working with the Scottish Government on this and we anticipate that any further cost factors will be covered in these discussions.

Jim Stephen
COSLA

SUBMISSION FROM DUMFRIES AND GALLOWAY COUNCIL

Consultation
1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?

Dumfries & Galloway Council did take part in the consultation exercise, and yes did comment on the financial assumptions.

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

On the whole, yes, however it is still early days for the Bill, hence costs may increase.

3. Did you have sufficient time to contribute to the consultation exercise?

Yes

Costs
4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

Still early days, however on the whole, the published figures appear to be correct.

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?
Currently we have only had a couple of cases, so it is manageable. However, if this was to increase the burden would increase the current budget deficit.

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

Currently yes.

**Wider Issues**

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

Again, currently yes, but I must reiterate that it is still early days.

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

Yes – but as yet they are not quantifiable.

**SUBMISSION FROM INVERCLYDE COUNCIL**

1. Education Services took part in the consultation exercise for the draft Bill on behalf of Inverclyde Council. Comments were made where the question raised issues around possible costs eg (Q3, 6, 7). Comments on the financial memorandum were sent in to the Clerk to the Committee in late October. These are attached for ease of reference.

2. No. The current burden of costs around paying for placements outwith one’s own authority is not taken into account.

3. No, the ‘turnaround time’ was very tight.

4. No. Please see the points made in our previous section under the General Principles and Financial Memorandum.

5. No. ASL-related costs are no longer ring-fenced, are included in a general budget, still nominally labelled Inclusion in this authority. These monies are used to meet recent demands of the Act, such as mediation, auxiliary support, printing of information. The additional costs generated by the Bill will be difficult to meet with the current level of support.

6. No. The financial situations outlined are theoretical and take inadequate account of the uncertainties of variable demand in terms of placement and mediation costs.

7. See attached response relative to the call for evidence.
8. This is hard to determine with no experience behind us. The Bill ducks the issue of transport costs for example. Recent ASN related legislation seems to give parents/carers the upper hand in determining placements. The trend if continued would bring increased costs to authorities.

Colin Laird
Head of Lifelong Learning and Educational Support

**Response to lead committee call for evidence**

Thank you for giving us the opportunity to provide written evidence on the above Bill. Our context is that of Education Services, Inverclyde Council. Inverclyde has a pupil population of 10,800 including around 300 pupils with additional support needs who attend mainstream schools.

We have operated within the terms of the Act since 14 November 2005. Approximately 60 Coordinated Support Plans are either already opened or are in the process of being opened. Since 2005 we have had only one case involving mediation, no cases of dispute resolution and no referrals to Additional Support Needs Tribunals at the time of writing (7 November 2008).

Please find below our comments:

**POLICY MEMORANDUM**

The Policy Memorandum is entirely clear and provides an excellent summary of the Bill’s objectives in section 3. References to significant Court rulings are also extremely useful.

**CONSULTATION**

The consultation carried out was both appropriate and extensive. Inverclyde took its response to the Education and Lifelong Learning Committee for approval. The number of responses received is disappointingly low given the significance of this piece of legislation.

**GENERAL PRINCIPLES**

The Bill makes no reference to young people older than 17 who may still be attending special schools.

- Permitting the parents of young people with additional support needs to make out of area placing requests is on the one hand a sensible move towards equality but also potentially the generator of some difficulties for authorities. At the present time budgets in authorities for external placements are under significant pressure. A high number of requests for additional places would increase the pressure still further.
- An interesting area of tension might arise in the following circumstances: A parent feels the local special schools would stigmatise her son/daughter and request a place in a neighbouring authority with transport and placing cost
arising? How are both the home and host authority expected to deal with that issue? Is there a high risk of legal challenge? How does the request comply with Best Value requirements?

By agreeing places from outwith an authority pressure will emerge on the receiving authority from within its own requirements. There are issues of prioritisation which authorities will have to address. These also present a risk of legal challenge.

- The early paragraphs on page 2 of the Policy Memorandum go a long way towards clarifying the relationships between and the responsibilities allocated to both the home and host authority.
- The early possible involvement of an ASN Tribunal as highlighted in paragraph 18 of the Policy Memorandum dilutes the role and significance of Education Appeal Committees.
- The Bill makes no mention of split placements and where and how placing requests could be used. Could placing requests be made to organisations contracted to authorities, such as Unity Enterprise, as well as to other education authorities?
- It is most appropriate that HMIe report back on the eventual operation of the Bill.
- It is important in the operation of the Bill that pupils have the appropriate Statutory documentation prepared for them in the style of the authority in which they are being educated, that access to this by the home authority is granted and that on transfer any documentation held is made available to the receiving authority.
- Requirements to carry out reviews of CSPs in receiving authorities are appropriate.

FINANCIAL MEMORANDUM

- In paragraph 36 it is worth noting that some authorities did not accept placing request to schools in the special sector.
- In paragraph 37 there is no definition of what constitutes a “good cross section of all authorities in Scotland”. How was that cross-section determined? Were factors, such as deprivation and previous levels of recording (RoN) used? Why are no authorities in west-central parts of the country included?
- In paragraphs 39 it should be emphasised that the costs are indicative only. In reality, in a difficult year, the costs could be considerably higher to authorities.
- In paragraph 40 how can account be taken of rising costs when erratic increases in placements costs are involved (Glasgow City – increase in visual impairment placements increased by 70% in August 2008). The additional cost since August to Inverclyde alone has been £72,000 per annum.
- Funding was provided to authorities to support the introduction and thereafter implementation/maintenance of the 2004 Act not specifically for the opening of Coordinated Support Plans.
- COSLA would not have been aware of the increased costs imposed by this year (paragraph 42)
- In paragraph 45 this figure could be subject to major fluctuation. It could also be argued that if the annual figure is very high, there is little point in referring these cases to ASN Tribunals.
• With some luck authorities may have no Tribunal-related costs whatsoever. By removing some of the legal involvement which is creeping increasingly into educational matters the costs could be reduced still further.
• In paragraph 47 it is unclear how EAC costs are being calculated.
• In paragraph 50 our experience puts costs at special schools in neighbouring authorities at around £20,000 per annum each. This is close to the charges to our neighbours where they buy places from us.
• In paragraph 51 cost neutrality ceases where additional support is needed e.g. authority time.
• Paragraph 52 represents a best case scenario. Parents pursuing placements out of the area may be more inclined given new legislative backing to pursue cases to a Tribunal with some vigour.
• Paragraph 53 Authorities will need to budget for possible mediation or dispute resolution costs. A helpful solution might be to employ a service or consultant for a purpose and building mediation into the contract at no additional cost. Our experience suggests costs would be minimal.
• The costs indicated in paragraph 55 are likely to be accurate. The cost of dispute resolution is reasonable at £355.
• Paragraph 58 is helpful. Authorities may strike a deal not to charge each other. It is often labour intensive to recover relatively low costs.
• I would agree with the aspects listed in paragraph 59, 60 and 61. These are useful additions to Act related activity.
• The costs of the Tribunal operation annually are high – it is justifiable to increase their role. It represents better value to the public.
• It is helpful to reduce legal involvement in educational matters. Education should not become an area of intensive legislation. Paragraph 73 is also useful in this context.

SUBMISSION FROM EAST RENFREWSHIRE COUNCIL

Consultation
1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?

Yes, East Renfrewshire Council took part. The following comments were made on the financial assumptions as follows:

It is still considered appropriate that the general costs of supplying additional support ie resources/equipment/staff etc should be borne by the authority to which the child belongs.

This alteration should not however negate the home authority’s responsibility to pay for services provided or assessed as required upon review. Support costs should still be paid by the home authority; any concerns such an authority may have regarding what they perceive as excessive provision could still be addressed under Section 23 arrangements.
The extent of “responsibility” needs to be defined or clarified. Is it responsibility to provide the necessary services in terms of the CSP or does it entail a wider responsibility to not only provide such services but also to ultimately bear the cost of the same? The question as it stands is ambiguous.

Assuming the question relates to practical responsibility for support provision then commencement at school appears the appropriate stage for transfer. Generally, this is already what happens. Costs remain with the home authority.

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

NO.

3. Did you have sufficient time to contribute to the consultation exercise?

YES.

Costs
4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

Wider Issues
7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

Response to Questions 4-8

The sample of six authorities used for the financial analysis does not reflect the experiences or current position of East Renfrewshire.

As a popular authority with a recognised high quality education provision, large numbers of placing requests are processed each year. With the changes outlined in the Bill it will be inevitable that tribunals will increase.
Projection of costs for a popular authority with a rising school population is problematic. Future plans to increase the school estate will inevitably increase the opportunity for more placing requests. With this comes the added costs of additional support needs. Timescales are difficult to define as ASN can become more significant over time.

It is our view that we will be unable to meet the financial costs associated with the Bill. We would, therefore, expect the Central Government Grant Allocation to reflect the needs of the pupils in East Renfrewshire schools.

There is currently a significant case progressing through the Court of Session, as we have incurred significant costs which remain unpaid by another authority.

We would like to see a reinforcement of Section 23. Clarification of “home” authority responsibilities is needed.

We urge that consideration be given to recalculation of Central Government Grants to take account of the “actual” pupil population, as at present the allocation does not follow the pupil.

SUBMISSION FROM THE SCOTTISH COURT SERVICE

Consultation

1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?

The Scottish Court Service did not take part in the formal consultation exercise for the Bill, but we were consulted separately by the Scottish Government, on how the proposed changes would impact upon the courts in Scotland.

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

We offered no comment on the financial assumptions made.

3. Did you have sufficient time to contribute to the consultation exercise?

Yes

Costs

4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

We are satisfied that the financial implications for the Scottish Court Service are accurately reflected in the Financial Memorandum. The projected decrease in applications represents less than 0.01% of civil court business in both the the Court of Session and the Sheriff Court, and as such will have an insignificant impact upon the courts.
5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

We do not anticipate that the proposals will generate any additional work for the courts.

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

We take no issue with the estimates contained within the Financial Memorandum.

Wider Issues

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

We have no knowledge of this.

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

We are unaware of any future costs.
ANNEXE C: EXTRACTS FROM MINUTES OF THE EDUCATION, LIFELONG LEARNING AND CULTURE COMMITTEE

23rd Meeting, 2008 (Session 3), Wednesday 1 October 2008

1. **Decision on taking business in private:** The Committee agreed to take item 4 in private.

4. **The proposed Education (Additional Support for Learning) (Scotland) Bill (in private):** The Committee agreed its approach to the scrutiny of the proposed Bill at Stage 1.

29th Meeting 2008 (Session 3), Wednesday 3 December 2008

1. **Decision on taking business in private:** The Committee agreed to take item 7 in private.

6. **Education (Additional Support for Learning) (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Robin McKendrick, Support for Learning Division, Head of Branch and Bill Team Leader, Susan Gilroy, Support for Learning Division, Policy Officer and Bill Team Official, Louisa Walls, Principal Legal Officer, Branch 4 – Solicitors DELA Division, and Joanne Briggs, Economic Advisor, Analytical Services Unit - Schools, Scottish Government.

7. **Education (Additional Support for Learning) (Scotland) Bill (in private):** The Committee considered written evidence received from local authorities and agreed to write to those local authorities that had not provided written evidence to invite them to do so. The Committee also agreed to invite a number of local authorities to give oral evidence.

30th Meeting, 2008 (Session 3), Wednesday 10 December 2008

**Education (Additional Support for Learning) (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Jessica M Burns, President, and Lesley Maguire, Secretary, Additional Support Needs Tribunals for Scotland.

31st Meeting, 2008 (Session 3), Wednesday 17 December 2008

**Education (Additional Support for Learning) (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Lorraine Dilworth, Advocacy Manager, ISEA (Scotland); Iain Nisbet, Head of Education Law Unit, Govan Law Centre.

1st Meeting, 2009 (Session 3), Wednesday 14 January 2009
Education (Additional Support for Learning) (Scotland) Bill: The Committee took 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.

2nd Meeting, 2009 (Session 3), Wednesday 21 January 2009

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

Adam Ingram MSP, Minister for Children and Early Years, Robin McKendrick, Head of Branch 1, Support for Learning Division, Susan Gilroy, Policy Officer, Support for Learning Division, and Louisa Walls, Principal Legal Officer, Scottish Government.

3rd Meeting, 2009 (Session 3), Wednesday 28 January 2009

1. Decision on taking business in private: The Committee agreed that its consideration of a draft report on the Education (Additional Support for Learning) (Scotland) Bill at this and future meetings would be taken in private.

3. Education (Additional Support for Learning) (Scotland) Bill: The Committee considered a draft Stage 1 Report and agreed to consider a further draft at its next meeting.

4th Meeting, 2009 (Session 3), Wednesday 4 February 2009

Education (Additional Support for Learning) (Scotland) Bill (in private): The committee considered a revised draft stage 1 report. Subject to a number of minor changes, the report was agreed to.
On resuming—

**Education (Additional Support for Learning) (Scotland) Bill: Stage 1**

The Convener: The sixth—and most substantive—agenda item is consideration of the Education (Additional Support for Learning) (Scotland) Bill at stage 1. We will take evidence from Scottish Government officials and I welcome to the meeting Robin McKendrick, head of the support for learning branch and bill team leader; Susan Gilroy, policy officer in the support for learning branch and bill team official; Louisa Walls, principal legal officer, branch 4 of solicitors development, education and local authorities division; and Joanne Briggs, economic adviser in the analytical services unit—schools. I understand that Mr McKendrick wishes to make a brief opening statement.

Robin McKendrick (Scottish Government Schools Directorate): Thank you, convener. It might be helpful if I provide a short explanation of why it was necessary to amend the existing legislation and what the bill seeks to achieve.

First, the bill alters neither the ethos nor the fundamental building blocks of the Education (Additional Support for Learning) (Scotland) Act 2004, which is aimed at a broad group of children and young people with additional support needs. Instead, it aims to clarify operational aspects of the 2004 act and, as members would expect, covers issues that can be addressed only by primary legislation rather than by secondary legislation, in guidance or through implementation of the act’s provisions.

As I am sure members have gathered, the bill focuses on placing requests and the powers of the additional support needs tribunal. In keeping with that, the first main thrust of the proposals is to provide parents of children with additional support needs, including those with co-ordinated support plans, with the same rights as others to make out-of-area placing requests for their children. That clarification of the original policy intention is required as a result of Lord Macphail’s recent ruling in the Court of Session. The amendment relates only to parental placing requests, not to situations in which the child is placed in a school outwith the home authority as a result of placing arrangements that are agreed between two authorities. Those quite separate arrangements are already covered in legislation and are not in any way affected by Lord Macphail’s ruling.

The bill’s second main thrust is to clarify the jurisdiction of the additional support needs tribunal to allow it to consider any placing request in which a CSP is involved or is under consideration before final determination by an education appeal committee or, indeed, the sheriff. We are seeking to make the amendment as a result of Lord Dorrian’s ruling in the Court of Session, which questioned the timing of referrals to the tribunal.

The bill also seeks to increase parental rights of access to the tribunal with regard to failures by the education authority. As voluntary organisations and indeed the president of the tribunal made clear to us, in some cases, local authorities did not respond to parents as required under the code of practice; however, parents had no rights to refer such matters to the tribunal, and the bill seeks to amend that situation.

The bill seeks to give the tribunal the ability for the first time to review its decisions in keeping with the guidance that is issued by the Administrative Justice and Tribunals Council on such issues. At the moment, if someone wants to challenge a tribunal ruling, the only option is to go to the Court of Session.

The bill seeks to allow for parental access to mediation and dispute resolution from the host authority following a successful out-of-area placing request.

Through its amendment of section 29(3) of the 2004 act, the bill clarifies that when arrangements are entered into between two authorities in respect of the school education of a child or young person, it will always be “the authority for the area to which the child or young person belongs”, which is known as the home authority, that is the responsible authority in such circumstances.

We will use the “Supporting Children’s Learning” code of practice that supports the 2004 act as a vehicle to place that act in the context of the growing policy agenda around children and young people—namely, getting it right for every child, the early years strategy that is due to be published shortly and, of course, curriculum for excellence. That is the role of the code of practice, not of the amending bill.

It is our intention that the redrafted code will develop the definition of the term “significant”, which is used when determining whether a child or young person requires a co-ordinated support plan, and will clarify the process of placing requests for the people involved, including parents. The code is scheduled to be amended in due course, subject to the Parliament’s agreeing to pass the bill. As the 2004 act requires, any
changes to the code will be fully consulted on, as will any secondary legislation that is required.

As the committee may know, we have consulted extensively on the proposed changes. A public consultation on the draft bill was conducted between 9 May and 19 June 2008. Slightly fewer than 4,500 copies of the consultation document, which included a copy of the draft bill, were circulated among a wide range of stakeholders, including all local authority education and social work departments; health boards; all Scottish schools, colleges and universities; community councils; and relevant voluntary organisations and parental bodies. In addition, the document was publicised in Children in Scotland’s “Moving Forward” newsletter, which is circulated to 10,000 professionals, and nine consultation events, which were held throughout Scotland, were attended by approximately 450 professionals and parents.

The consultation document posed questions in a genuine and open manner and sought respondents’ views on all the questions. The consultation events generated discussion on a number of topics, and I am pleased to note that a number of respondents acknowledged our intention to consult openly. I am pleased, too, to report that the vast majority of the 165 consultation responses that were received from a wide range of consultees, including 23 of the 32 Scottish local authorities, were broadly supportive of the proposed amendments.

Various other issues were raised during the consultation process. Indeed, the consultation document sought comments on any issue that affected the implementation of the 2004 act. Although those issues are regarded as relevant, it is considered to be more appropriate to address them in secondary legislation or, as I have explained, by amending the code of practice that supports the 2004 act. I have said that we intend to consult on any changes that we propose to make to the code.

We are progressing a range of activities on which further action was identified as being required in Her Majesty’s Inspectorate of Education’s report of late 2007 on education authorities’ implementation of the 2004 act. I would be happy to update the committee on those issues if they arise during today’s considerations. If they do not, I could provide an update in writing to the committee clerk.

As I have said, the bill focuses on two issues: placing requests and the additional support needs tribunal. It is extremely important to stress that the bill does not seek to change the fundamental aspects of the 2004 act. I hope that members have found that short explanation helpful.

The Convener: Thank you very much for those comments.

You highlighted the Government’s commitment to consult in this area. Will you give the committee an indication of the main themes of the consultation responses? How has the Government responded to the concerns that were raised?

Robin McKendrick: As I said in my short introduction, the vast majority of comments were favourable. The consultation paper contained a proposal to introduce a legal penalty for those who break a restricted reporting order that the tribunal has issued. A number of respondents, including Scotland’s Commissioner for Children and Young People, thought that that was not the right course of action. It would plug a lacuna in the legislation, but the policy intention is not to penalise parents who are speaking on behalf of their children. In our response to the consultation, we indicated that we had decided to drop the proposal.

The vast majority of comments focused on the 13 questions that we asked. For example, we asked whether it was right that interauthority placing requests should be available to children with additional support needs, as they are to all other children; that was the original intention under the Education (Additional Support for Learning) (Scotland) Act 2004. About 77 per cent of respondents were in favour of the proposal, and it was a similar story with each of the questions that we asked.

As I indicated, comments were made on the use of the term “significant” and the challenges that we face in that regard. We were questioned about the number of co-ordinated support plans that are in place, as the HMIE report on the implementation of the 2004 act indicated that the number of plans introduced by authorities is below the identified target. Issues were raised regarding the implementation of transition to post-school arrangements. Youngsters with additional support needs, especially those with co-ordinated support plans, should get transitional support when they leave school—not just from schools, but from appropriate agencies such as further and higher education institutions, Careers Scotland and voluntary organisations that are involved with the post-school agenda.

Although a number of the issues that have been raised are relevant, we do not believe that it is appropriate to address them in primary legislation. We will seek in the code of practice to develop understanding of the term “significant”. The matter has been taken to the Court of Session and the inner house—not just the outer house—has ruled on the definition of the term. From their lordships’ ruling, which builds on what already appears in the code of practice, we can develop a better understanding of the issue.
The allied health professions have done a lot of work with education authorities to develop co-ordinated support plans. The City of Edinburgh Council has worked with Queen Margaret University on a circle approach, which is aimed at breaking down the barriers that sometimes exist between the language that is used by allied health professionals, on the one hand, and educationists, on the other. The Royal College of Speech and Language Therapists and the College of Occupational Therapists have signed off that approach, and we are looking to build an understanding of it.

I could go on for most of today about what we are doing in relation to the 2004 act. Suffice it to say that we have a way of addressing the vast majority of comments, although not all of them, as there are some with which we do not agree. Our aim is to benefit children—recognising the important role of education authorities and the good work that they are doing, on the whole, to implement the 2004 act—by improving implementation of the act, where we can.

The Convener: Organisations that represent parents and children and young people with additional support needs seem to be happy with what is proposed, with some caveats. Their concerns relate to what the bill does not include. You mentioned the definition of the term “significant”. Parents organisations have considerable concerns that that definition—or sometimes the lack of it—impedes their ability to access the protection that the legislation should offer. There are also some concerns about the number of co-ordinated support plans that are in place around the country, not in any one specific area.

Robin McKendrick: As I said, the Court of Session has ruled on the definition and we believe that we can develop understanding of it. I have asked—perhaps in an offhand moment—whether, if there was not an issue with the term “significant”, there would be an issue with the term “complex” or with how many non-complex factors make up multiple factors. There will always be something that there can be an argument about. The challenge is to broaden the understanding of the term and to develop an understanding that we are not talking about the old record of needs system or special educational needs in another guise. The 2004 act is a much broader concept and framework than that.

The system in Scotland is different from that in England, where a statement is the passport to services and money. In Scotland, being recognised as having additional support needs is the passport to services. The co-ordinated support plan exists because we recognise that, when there is significant input by health professionals and allied health professionals such as speech and language therapists, educational psychologists and perhaps social workers, that needs to be co-ordinated. The parent needs a key worker—a key part of the co-ordinated support plan—to help them to make sense of the myriad services that are involved in supporting a child.

That is one reason why a co-ordinated support plan is important. It also gives parents certain rights. If parents request that an authority prepare a co-ordinated support plan, they have an undeniable right to go to an additional support needs tribunal.

We acknowledge that not all parents know what their rights are under the 2004 act. We tried a pilot communication campaign in Dundee—with the support of Dundee City Council, our communications people and an outside agency—to raise awareness of the legislation. We asked parents to contact schools and to phone the advice line. The campaign was not a resounding success, which reflects the fact that the life of a family with a child with additional support needs—especially severe needs—is largely event driven. If an event does not happen during a campaign, the family may look to come back to it later.

The Scottish Government funds the national advice line, which is called Enquire. Susan Gilroy and I will meet representatives of Enquire next week, and although we are satisfied with the work that it does in providing advice to those who phone, we think that more could be done to seek out parents and engage actively with them. It is not enough to send information leaflets to all general practitioner surgeries and early years centres; it is important to ensure that the leaflets are received and put on display. We acknowledge and do not underestimate the challenge of getting the message over to parents.

When the HMIE report was published in November 2007, the Minister for Children and Early Years Adam Ingram wrote to all chief executives and directors of education to say that he was glad that the report recognised that good things were happening—good intervention in early years and interagency co-operation. However, the situation was not as good for transition, and the minister’s frank description of what was happening on co-ordinated support plans was that the number was just not good enough.

We have taken action to support the plans, and we recently secured agreement to form a short-term working group involving different local authorities, some of which have a reasonable number of co-ordinated support plans on their patch and some of which are at the other end of the scale. We want to discuss the challenges, what goes right and wrong, and what some authorities do that others do not, so that we can
learn the lessons. We intend to discuss the output from that group with Learning and Teaching Scotland to see what it can do with those lessons to consider continuing professional development and to publicise good advice and co-ordinated support plan exemplars.

10:30

One reason why we have not yet published an example of a good co-ordinated support plan is that people would say that, if something was not in the example, it could not possibly be in a CSP. In the code of practice, we published a list of those who could have additional support needs, including looked-after children and young carers, but people then said that, if someone was not on that list, they did not have additional support needs. That is the problem with publishing a list or an example. However, I believe that we can get round that.

We are determined to ensure that every child who requests a co-ordinated support plan has their request considered seriously by the education authority, and if the conditions are met, a plan should be put in place. The plan gives them rights, including the right to an annual review, and it also gives the parents rights. That is not to say that parents of children who do not have co-ordinated support plans do not have any rights. They have important rights to access mediation and dispute resolution and a right to appeal to Scottish ministers under section 70 of the Education (Scotland) Act 1980.

As I said, the Scottish Parliament recognised all that in 2004, when it passed the bill. We now need to see where we can strengthen the system.

The Convener: Thank you. When you talked about the complexity of the system, you pointed out that parents have the right to go to the tribunal. I do not want to stray into that issue because one of my colleagues will cover it, but a number of voluntary organisations to which I have spoken believe that far too many parents have to go to the tribunal to access a co-ordinated support plan, rather than being able to engage with local authorities at an earlier stage. I hope that the short-term working group that you mentioned will address that. Is there a timetable for the group? How will you ensure that its recommendations are quickly disseminated to all 32 local authorities?

Susan Gilroy (Scottish Government Schools Directorate): The first meeting of the group is scheduled to take place on 19 January. In the letters that we sent out to local authorities, we said that we envisage that the working group will meet over two or three months. LTS is a member of the working group, and we hope to work with it to take forward the group’s findings as soon as possible after the group concludes its work.

The Convener: Can you supply the committee with a full list of members of the working group?

Susan Gilroy: Absolutely—that is no problem.

The Convener: That would be great. Thank you.

Margaret Smith (Edinburgh West) (LD): Good morning, everybody. I have some questions about out-of-area placing requests. As has already been said, our general feeling is that the bill commands support. Many of the concerns that we have touched on are to do with things that are not in the bill. That said, why has the issue of out-of-area placing requests been handled in the way that it has? Instead of simply creating a duty and providing that out-of-area placing requests are allowed, the bill includes a number of components that alter definitions and responsibilities. The approach seems quite complex.

Will you talk us through how the process will work for parents who want to make an out-of-area placing request? Is the process different for those who have a CSP, those who are in the process of getting a CSP, and those who do not have a CSP?

Robin McKendrick: I will answer your final questions first. The process of making an out-of-area placing request should be the same for every child, regardless of whether they have additional support needs and a co-ordinated support plan.

When we look closely at the process of accepting a placing request and not just at the right to make a placing request, we ask what components make the system work. One element is a co-ordinated support plan. Regardless of whether a placing request has been made, when a child transfers from one authority to another, who has responsibility for the co-ordinated support plan is always an issue. That is because the responsibility lies originally with the home authority, although the child is educated in another authority’s area, perhaps many miles from the home authority. We are taking the opportunity to tidy the system, so the bill says that when a child transfers as the result of a parental placing request, the responsibility for the plan will transfer with them to the new authority.

The original code of practice recognised that mediation and dispute resolution could be accessed only through the home authority but said that it was reasonable for a host authority to extend access to those two avenues to a parent. We subsequently found that we should not have said that so, in amending the 2004 act, we are taking the opportunity to tidy the situation.
Louisa Walls (Scottish Government Legal Directorate): I will address Margaret Smith’s first question. The changes to out-of-area placing requests are necessary because of a recent decision of the inner house of the Court of Session in the case of WD v Glasgow City Council. That decision cast doubt on the original intention in the 2004 act to allow all children—including those with additional support needs—to make out-of-area placing requests, so the Scottish Government felt that it was necessary to clarify the position in the bill.

Section 1 deals with the changes that are necessary because of that decision. It permits the parents of children who have additional support needs, including those with a CSP, to make an out-of-area placing request. Parents make such a request directly to an authority other than that in whose area they live. Following on from that, a change was necessary to give parents the right to take a decision to refuse such a request to the additional support needs tribunal.

The other changes are necessary to give the host authority—the out-of-area authority that accepts a placing request—duties in relation to the CSP, so that the system works logically, as was always intended. Section 1 gives the host authority the duty to review a CSP that is transferred.

It was felt necessary to give parents and young people the right to access mediation and the alternative forms of dispute resolution that are available under the 2004 act in the host authority’s area. The cost of those services will not be recoverable from the home authority, because they will always relate to a dispute with the host authority. The bill allows for that.

The out-of-area placing request changes simply ensure that the logic of the 2004 act follows through for out-of-area placing requests.

Robin McKendrick: No bill—far less an amendment bill—is easy to understand. Complexities are involved, but we will have the opportunity to explain the position clearly and concisely in the revised code of practice. I make it clear that we will provide information to parents to ensure that they are clear about their rights. We will discuss with Enquire the issuing of one of its leaflets. I do not know whether members are aware that Enquire has published 16 excellent leaflets for parents and young people that explain simply what the 2004 act is about and what their rights are. It is certainly our intention and, I am sure, Enquire’s intention, to publish a leaflet on the bill.

What happens between authorities when they deal with placing requests has been commented on. As Louisa Walls mentioned, section 23 of the Education (Scotland) Act 1980 is the convention; it is the legislative opportunity by which authorities can claim money back from one another. However, we wanted to be sure about the issue so that we could clearly explain things to people.

I will give an example of what would happen, if I may. If 10 pupils move from schools in East Lothian to schools in Edinburgh, the next time that the school census data are used to calculate the local government settlement—the allocations will be in 2011 and 2012—those pupils will appear in Edinburgh’s pupil count. As a result, Edinburgh will get a slightly larger share of those grant-aided expenditure lines and East Lothian will get a slightly smaller share, all other things being equal. Moreover, the additionality for children with additional support needs—it is recognised that something additional is required—can be claimed back under section 23 of the 1980 act.

Lest anybody is concerned that that approach is a parents charter to visit placing requests on local authorities that have no power but to accept them, schedule 2 to the 2004 act specifically lists a number of grounds on which an education authority can refuse a placing request for a pupil, whether that is an out-of-area request or a request for a place within the same area. I do not want to go into details, but the schedule says that an authority could refuse a placing request if, for example, the school would require an extra teacher, or if unreasonable costs or anything else out of the ordinary were involved. We are simply saying that a parent has the right to make a placing request to their home authority or to another authority, and we are trying to clarify some of the supporting reasons for that.

Margaret Smith: I would like to progress through the process that involves parents going to a tribunal with a placing request and the tribunal deciding that that request should be accepted. As far as I understand it, there does not appear to be any power at the moment to state commencement dates, and it does not appear that there will be ongoing scrutiny of whether such decisions have been acted on. Obviously, such issues have been raised with us and with you; it is telling that they have also been raised in the submission from the additional support needs tribunals for Scotland. There is frustration with how the system works at the moment, and it is clear that you do not intend to deal with that in the bill. Do you intend the code of practice to deal with it?

Robin McKendrick: The president of the additional support needs tribunals for Scotland and one or two others have raised the issue of a tribunal being able to specify dates by which its decisions should be acted on, but on specific—

Margaret Smith: The issues of delays and the power to state commencement dates were raised with us in the joint submission that we received, to
which a number of key organisations have signed up, such as Govan Law Centre, Enable Scotland, Capability Scotland and the Royal National Institute of the Blind. Although they are few in number, they are significant players in the sector.

10:45

Robin McKendrick: Yes. We work closely with Govan Law Centre and a number of the other agencies that you mentioned on supporting implementation. You are right to say that the 2004 act does not specify that any decision of the tribunal should be acted on by an authority within a specified period of time. That was considered when the original bill was being drafted. I think I am right in saying that the thinking at the time was that an authority would be under a duty to deal with quite complex issues and to put arrangements in place, which might take some time, and that it was difficult to specify how that might apply in a rural authority, as opposed to a city authority.

Equally, when an education authority fails to take the action that is specified by the tribunal, although the legislation does not permit people to go back to the tribunal to complain about the issue, there is certainly the opportunity to complain through dispute resolution—although that might not be so relevant in such cases—or under section 70 of the Education (Scotland) Act 1980, or by seeking from Scottish ministers an order under section 27 of the 2004 act. If the tribunal has said that something should happen, but it has not happened, would a further decision of the tribunal make it happen, or would it be better to bring the matter to the Scottish ministers, which can be done under section 70 of the 1980 act, as a failure of an authority to make provision for the additional support needs of a child? We have not addressed the point in the bill as it stands. We would want to hear more about the issue before we considered it further.

Margaret Smith: How many parents have found it necessary to take the route that you have just suggested of going to Scottish ministers under section 70 of the 1980 act? Given everything that we have heard about parents’ views about tribunals and the complexity of the situation, and given what you have said, quite rightly, about the types of families that we are talking about, who have incredibly difficult lives, surely we should be making things as easy as possible for them. Most of us find that our work with such families is an increasing part of our case load. So many families seem to be put through the mill to get the services that they need for their children. Would it not be reasonable to have a catch-all timescale whereby if, by x months—let us say six months, which is a long time in a child’s life—something had not happened, the issue would come back to the tribunal? That would create a default position and it would be up to the tribunal to keep an on-going watch on whether its decisions were being implemented. If they were not being implemented, the onus would no longer be on the parents to take forward the matter; it would be for the tribunal to ensure that its decisions were acted on.

Robin McKendrick: We would want to give that further consideration. Perhaps the minister can give you a view on that when he comes back, if that is acceptable.

Margaret Smith: Thank you.

Elizabeth Smith (Mid Scotland and Fife) (Con): In the evidence that we took last week informally from many stakeholder groups and in some of the evidence that councils have submitted, the overriding concern is to ensure that the educational needs of the child are in balance with the needs that have a social dimension to them. If we are doing our jobs properly, that ought to be the outcome. Are there specific parts of the bill that you think will enhance that by taking a more holistic approach, or do you think the code of practice could be improved to address that?

Robin McKendrick: By strengthening parents’ rights, the holistic approach is supported. The changes proposed in the bill either clarify or strengthen the 2004 act. In doing so, I believe that they will support the broader objectives that you have outlined.

Now that we have a couple of years of experience, we can put down in words what we mean by additional support for learning, and we can perhaps describe the outcomes somewhat more clearly than we could back in 2004-05. However, it is the implementation that will be important. In light of the concordat, we have to co-operate with local authorities to ensure that not only this piece of legislation but broader children’s legislation can meet objectives and do what it says on the tin—improve life chances and opportunities for our children in line with the aims of the curriculum for excellence, the early years strategy and the getting it right for every child agenda. The bill is part of that agenda. It is important that we get the message across to professionals—health professionals, social services professionals and education professionals—that the child has to be at the centre of what we do. We want a joined-up approach to the support and the services that are offered to the child and the family.

Elizabeth Smith: In the evidence that you took before making the proposals in the bill, were there any tensions among stakeholder groups? Did they feel that not enough information was being shared about individual children?
Robin McKendrick: There were no specific tensions, but some issues remain to be resolved. I do not know whether this will answer your question; please correct me if I go off down the wrong track. There can be a tension between, on the one hand, social services, who say, “We’ve got getting it right for every child, which is the most important game in town,” and, on the other hand, education professionals who say, “Wait a minute. We’ve got the additional support for learning legislation, and that’s the most important game in town.” The truth is that neither is more important than the other.

We are aware of that possible tension for our colleagues who are working with the getting it right for every child agenda. Tensions exist all over society, but the tension here is important because implementation will affect individual children.

At a recent conference on inclusion, run by the Association of Headteachers and Deputies in Scotland at Our Dynamic Earth in Edinburgh, we took the opportunity of publishing a leaflet. If you like, it was a starter for 10 that sought to tease out some of the issues in “Getting it right for every child”, in the Education (Additional Support for Learning) Act 2004, in the curriculum for excellence and in the early years strategy. We wanted to explain where the interfaces are—where they all join up. The different ideas are not contradictory. People ask how a co-ordinated support plan can link with a single plan. Understanding how a modular plan can exist does not require an understanding of rocket science, but explanation is required from the centre to practitioners.

We attend meetings of the association of support for learning officers. The association comprises quality improvement officers, so they are fairly senior players in education authorities. The issues between “Getting it right for every child” and the 2004 act come up repeatedly. We are trying to explain the issues to professionals and, importantly, to parents, so that they can make sense of them.

Elizabeth Smith: Are you confident that the proposals in the bill will make the lines of responsibility clear?

Robin McKendrick: The code of practice can help to explain not the lines, but the symmetry between them; where the policies join up and interface; and the holistic approach. As I said earlier, the code of practice is the place to put the legislation on additional support for learning in context with the getting it right for every child agenda, the early years strategy, the curriculum for excellence, and health initiatives as well.

Elizabeth Smith: Are you in the business of disseminating best practice? In the code of practice, you obviously use examples that have worked very well. What are the timescales for putting everything together?

Robin McKendrick: The timescales depend very much on the progress of the bill. As I am sure you realise, the code of practice contains exemplars in which we set out the situation for a child in position A, B C and so on. The LTS inclusive education website has some good examples of the situation three years down the line and, just over a year ago, we ran a seminar on building best practice and understanding. Equally, we seek to ensure that any professional who is struggling with an issue knows where to go to get good advice. The Enquire service gives education professionals, including teaching staff, access to best practice information, as does LTS, through its glow programme.

Christina McKelvie (Central Scotland) (SNP): I will pick up on some of the issues that my colleague Elizabeth Smith explored. We heard interesting evidence last week from stakeholders on taking a holistic approach to looked-after young people who are being accommodated away from home and Traveller children, and the social work engagement in all of that.

The issue with Traveller children is the inconsistent approach that is taken to co-ordinated support plans as they move from school to school or authority to authority. The issue with looked-after children who are accommodated away from home is the conflict of interest that arises if the corporate parent goes to the tribunal to support the young person against the authority that is itself the corporate parent. Do you know what I mean?

Robin McKendrick: Yes.

Christina McKelvie: Another issue that arose in last week’s evidence relates to impacts on the children’s hearings system. We heard that educational and support needs are sometimes put on the back burner as a result of behavioural issues or other social issues in the family circle taking precedence.

Robin McKendrick: I go back to “Getting it right for every child”, which set out the holistic approach that should be taken by the children’s hearings system. There are signs that the educational needs of the child have been overlooked. The message in the 2004 act was that those needs should never be overlooked and that they can be accommodated, no matter the situation in which the child finds him or herself.

For example, in drafting the bill, we made it absolutely clear that the co-ordinated support plan should reflect the fact that a child at school A is taken into residential care because of behavioural issues. The first, rudimentary change to the CSP should be that the child’s nominated school is no
longer the local school. The educational objectives need also to be considered if we are to address the issues that cause a child’s offending behaviour. Unless education is considered, any plan that the children’s hearings system comes up with for a child will not be as full as it might be. I think and hope that we are addressing the issue through the getting it right for every child agenda.

I turn to the issue of Traveller children and the different approaches that they may face. We have funded and continue to fund the Scottish Traveller education programme—indeed, my branch has responsibility for working with STEP. We have done quite a lot in that regard. In the last wee while, we funded STEP to develop a rapid initial assessment tool that could be used when a Traveller child first arrived at a school. We wanted the teacher to have a tool with which they could rapidly assess the child beside their classroom peers. We are continuing to work with STEP.

Service children also move from school to school. We discussed the matter with the Ministry of Defence and hope to hold a short seminar—through the good offices of the Convention of Scottish Local Authorities—with the Scottish Government, the MOD and education authorities that have service bases in their locality. In that way, we can start to discuss the issues for children who face interrupted learning.

The 2004 act considers such issues in a holistic way, and further attempts are being made to address such matters through developments to do with the personal support that is available to children. We have no pat answers to give the committee, but we are aware of the issues, which are on the agenda, and we are trying to develop good practice in that regard.

It is fair to say that in the context of the 2004 act the interests of looked-after children concern the minister more than almost anything else does. There is not a complete lack of co-ordinated support plans for looked-after and accommodated children, but the number of plans is low, which is simply not good enough, as the minister said when he wrote to chief executives and directors of education.

As recently as last week we met the Equality and Human Rights Commission, which signalled its intention to consider the provisions for looked-after children, as is the commission’s right under the Equality Act 2006. The commission acknowledged that the situation in Scotland is different from the situation in England and Wales, because we have the 2004 act. The commission is interested in considering the matter and we are interested in working with it.

We can ensure that our colleagues who have responsibility for that policy area write to the clerk to give an indication of the range of activity in which they have been involved—members will forgive me if my memory is a bit patchy on that. A range of developmental material was published recently on the position of looked-after children in relation to peer support, socialisation, access to education, transition arrangements and so on. There has also been recent work on the corporate parent. There are issues to do with how the corporate parent caters for looked-after children through co-ordinated support plans—although such issues are not necessarily for the bill.

HMIE also considers the issue. The more it highlights the plight of children who are looked after and accommodated, the better. It is not that children are not being properly looked after; it is about ensuring that a child’s right to a co-ordinated support plan is properly acknowledged, if a plan is appropriate for the child.

It is important to stress that we are not saying—nor does the 2004 act say—that every child who is looked after or accommodated, every young carer and every child in circumstances A, B, C or D has additional support needs and should have a co-ordinated support plan. The 2004 act sets up a broad framework in which what is important is the needs of the individual child.

I hope that my response addresses some of the points that members made. We will ensure that colleagues send the clerk an update on action that has been taken.

Christina McKelvie: That would be helpful.

Claire Baker (Mid Scotland and Fife) (Lab): My questions are about changes to the tribunal system. First, will you give us the rationale for changes in the approach to transfers between education appeal committees and the tribunal or sheriffs and say what you hope to achieve by making the changes? Can you give examples of situations that parents have found themselves in?

Robin McKendrick: I can tell you about the case that led to Lady Dorrian’s ruling. The parent made a placing request, which was refused, and was advised that they had a right of appeal to an education appeal committee, and that ultimately the case could go to a sheriff. Two weeks later, the authority told the parent, “We’ve changed our mind. We’re going to prepare a co-ordinated support plan for your child, and you can take the case to the tribunal.” Off the parent went to the tribunal. However, as the 2004 act stands, a person can go to the tribunal only if the placing request is refused after the authority has indicated that a co-ordinated support plan is being prepared.

In that case, the placing request was made before the CSP. If it had been the other way
round, the matter would have gone to the tribunal. Because it was how I described it, it should have gone to a sheriff, but it went to the tribunal, which ruled on it. That ruling was appealed and the case went to the Court of Session. Lady Dorrian said that the case should never have gone to the tribunal. Our counsel argued that, although the 2004 act did not specifically say so, when a CSP was on the agenda and there was a placing request, it should go to the tribunal—it was like the elephant in the corner, and everybody knew it. As Lady Dorrian said, if the Scottish Parliament intended that to be the case, it should have said so in the legislation. The fact is that the legislation does not say that.

In the bill, we are trying to make it clear that if, at any time, a co-ordinated support plan pops its head above the parapet before the sheriff court has made a final determination on a placing request, the matter should go to the additional support needs tribunal. The co-ordinated support plan is arguably as important as the placing request and will play an important part in provision for the child. The school is the setting for that provision, not simply something separate from it; it is plugged into the provision that would be made for the child under a co-ordinated support plan, so it is important.

It has been suggested that parents could make a vexatious request for a co-ordinated support plan just because they did not want to go to a sheriff and the case could start pinging and pinging between the sheriff and the additional support needs tribunal. We think that the bill will prevent that ping-pong and ensure that the child’s interests are paramount.

If a case about whether a co-ordinated support plan should be opened and in which a placing request had been made was referred to a tribunal—even erroneously—and the tribunal ultimately said that the authority was right that no co-ordinated support plan should be prepared, that tribunal would be left deciding a placing request for a child with additional support needs tribunal. We think that the bill will prevent that ping-pong and ensure that the child’s interests are paramount.

I sympathise with your difficulty in trying to make sense of the bill. We tried to address that in the explanatory note, but the code of practice will have to make it absolutely clear to everybody what the issue is. We talked before about the placing request leaflet that we were going to ask Enquire—the Scottish advice service for additional support for learning—to produce for parents to clarify the matter. The code of practice will have to address what happens when parents request a co-ordinated support plan. There will be guidance to try to clarify this highly technical issue for professionals and parents.

Claire Baker: That is helpful. My other question is on the new ground for referral to the tribunal, when the timescale has been breached. In such cases, the appeal will be heard only by the convener of the tribunal. Although the stakeholders with whom we met supported the new ground, they sounded some notes of caution on the idea of the convener hearing cases alone. Why was that decision made and what will its benefits be?

Robin McKendrick: Speed. An individual hearing a case alone can make a decision far more quickly than if we had to try to get a date for the three tribunal members to get together. Such a case would be an expedited reference and we therefore thought that the convener could meet alone. Basically, the facts would be such that it would not take three people to decide whether the timescale had been breached—it would have been breached or it would not. The case would be black and white; there would be no in-between and no judgment to be made. That is why we felt that a convener sitting alone would be the best and quickest way to proceed. We could have said any tribunal member, but we think that the convener has the necessary legal standing to make the determination on his or her own.

Claire Baker: The bill also proposes that the tribunal can review its own decisions. You commented on that previously, but can you say more about the kind of issues that might be dealt with, who would do the review and how it relates to appeals to the Court of Session?

Robin McKendrick: As I said previously, the Administrative Justice and Tribunals Council publishes guidelines for tribunals, which state that there should be a review when the issue is a point of law, but it also gives other examples. The bill states that the tribunal can review decisions, but we will have to specify what the tribunal can review when we revise and amend the tribunal rules and procedures in secondary legislation. When we do so, we will consult the Administrative Justice and Tribunals Council, as we are required to do.
We have not yet made a decision on when reviews should take place. We discussed the issue at the consultation seminars. Some people said there should be reviews only on points of law and others said that there should be reviews when there has been an error and the tribunal may have reached the wrong decision. With administrative errors, the tribunal can already conduct a review under the tribunal rules and procedures. As with most things in life, it is fair to say that there were a variety of views on the best course of action.

We will reach a decision only after we have consulted and people have been able to see the whites of our eyes when we say, “That is what we are proposing. What do you think about it?” No doubt we will come before the committee at some point in the future to discuss the revised rules and procedures so that we can hear what you think about them.

Claire Baker: That is helpful. The issue was raised in our discussion with stakeholders. There was caution about the tribunal reviewing its own decisions, so I am sure that those stakeholders will take part in the consultation.

Robin McKendrick: It is not uncommon for tribunals to be able to review their own decisions. The only other way to review a tribunal decision at the moment is to go to the Court of Session. If the person concerned does not get legal aid, that is not easy.

Kenneth Gibson: I was about to touch on that issue. Neither parents nor children currently have rights to assistance to secure legal representation to take their case forward. What plans do you have to redress the balance?

Robin McKendrick: The plan is that there should not be a balance to redress. The issue is that education authorities have recently begun to show up with fairly senior legal representation, while on the other side is the parent and ISEA or Govan Law Centre. I remember that a senior solicitor from London who spoke at a Central Law Training workshop just after the Education (Additional Support for Learning) (Scotland) Act 2004 had come into force was aghast that a piece of legislation referred to ethos, level playing fields and ensuring that the parent is comfortable at a tribunal, rather than having an agreed bundle of documents rather than a big bundle here and a big bundle there, because the current situation means that, when people go to the tribunal, the facts of the case have not been agreed, because one bundle says one thing is happening and the other bundle says something else. The Govan Law Centre and ISEA will speak for themselves, but, believe me, we think that they see the logic in doing something about that and either having an agreed bundle or extending the current period of 30 days between someone receiving the bundle and their having to respond to it. A longer period would allow people to reflect more on what is being said.

Another issue that the committee might wish to raise with the president of the tribunal—ultimately, she can issue directions about how the tribunal operates—is the practice of party A asking party B direct questions. That is certainly not how the legislation envisaged the tribunal would operate. Rather, the view was that tribunal members would have a clear understanding of the agreed grounds of the parties and would seek to identify what was required to make a decision on the referral. That would make the education authority’s Queen’s counsel redundant, because the tribunal would ask the professionals about X and the parents about Y.

It would not be the best approach to seek to equalise the situation by having solicitors on both sides; instead, we should try to neutralise the situation to make the tribunal work as the rules and procedures envisaged it would. We will return to the issue of the tribunal’s operation when we consider the secondary legislation on the tribunal rules and procedures.

Kenneth Gibson: I imagine that, for many parents, the tribunal process is onerous and they would not want to go through it unless they absolutely had to. What support is provided to parents and children before they get to that stage? Clearly, parents have to go up against what they might see as the power of the council and its resources. There is concern that, although parents have rights, they do not have access to resources
such as mediation and advocacy before the tribunal stage. How do we ensure that, when parents must go to the tribunal, the balance that you talked about when you referred to strengthening parents' rights becomes a reality?

Robin McKendrick: We stress in the code of practice and all our guidelines that, although the Education (Additional Support for Learning) (Scotland) Act 2004 puts in place an appeals route for parents, we hope and expect that issues will be resolved at the lowest level possible. We believe that the best place to try to resolve issues is in school with the teacher or headteacher. However, we realise that not every issue can be resolved at that level.

I draw the committee's attention to the fact that, recently, the Government announced that it had stepped in to safeguard the advocacy service for parents with children with additional support needs by providing funding to ISEA. Its principal funding sources had dried up, it was in the process of closing its office in Dalkeith and it was no longer able to support parents. Although people know that ISEA represents parents at the additional support needs tribunal, that is just the tip of the iceberg—it provides support and advocacy to parents on a much broader basis. Given that, and although we recognised that most local authorities were doing an excellent job in meeting the needs of children with additional support needs and were providing adequate support to parents, we stepped in to fund ISEA, at least to the end of this financial year.

In the meantime, we recognised that there was a need to re-examine advocacy services in and around the Education (Additional Support for Learning) (Scotland) Act 2004. To that end, we commissioned the Govan Law Centre to undertake some developmental work. It has contacted a number of volunteer advocacy organisations, including the National Autistic Society, and is running a suite of development courses for them to build knowledge about the 2004 act and the skills that are necessary to advocate on behalf of families and children under it, and to gain the necessary experience by going along to tribunals to see how they operate. We have asked the Govan Law Centre to reply to us by the end of January, at which time we will take a decision about whether we should take further steps to provide advocacy services for parents under the legislation.

As the minister said, the funding that has been announced today will allow such services to develop support and provision. In the longer term, we are considering carefully how we can further improve advocacy support to parents, although the decision about what advocacy service will be provided has not been finalised.

We met ISEA last week to discuss how things are going. Since funding was provided to it on 27 October, it has taken 94 calls, taken on 19 new cases and made six referrals to the additional support needs tribunal, one of which was upheld. Importantly, as other stakeholders have said to the committee, the one appeal that the tribunal upheld overturned an education authority's decision—which was based on Lord Wheatley's decision—not to prepare a co-ordinated support plan. The provision of co-ordinated support plans and support services from social services were called into question, at least by some, as a result of Lord Wheatley's decision.

You will hear many people say of ISEA, "All they're interested in is going to the tribunal. They don't seek to resolve the issue with authorities and advocate on parents' behalf." However, it was clear in the grant offer to ISEA that we expect it to provide an advocacy service to any parent who approaches it and to seek to resolve issues with education authorities before the matter goes to a tribunal or dispute resolution. Of the 19 new cases that ISEA has taken on, there have been only six referrals, which means that it is involved in 13 cases that are not getting the same attention as the six that are going to the tribunal.

I hope that we are getting it right there, but equally, as the minister said, many education authorities are doing the right thing by their parents. For example, although I will not name them, several education authorities have service level agreements with the Parent to Parent service, which provides advocacy services for children and parents under the 2004 act. We spoke to that service, and although it is true that no one has taken a case to the additional support needs tribunal, it confirmed that if a case existed, it would take it to the tribunal on behalf of the parent. However, it has managed to resolve all the issues that have arisen without the need to go to the tribunal. I am not saying that that is right or wrong—it just happens to be the right outcome for those parents in those cases.

We still have some way to travel, not just on advocacy but on ensuring that parents know what their rights are. When they know their rights, they can make a decision about whether they want to do something about a situation.

An encouraging number of cases have been resolved through mediation. I am sure that the Govan Law Centre would say—although I do not want to put words into its mouth—that it is a fan of independent adjudication, and not just because of the process itself, but because sometimes the fact that a parent has lodged a complaint with an authority means that the authority re-examines the issue and comes to an arrangement with the parent about making provision for their child,
which avoids the need for an independent adjudicator to make a recommendation.

A lot of work is going on below the surface. Education authorities are doing the right thing in supporting parents and ensuring that information is available and that decision-making processes are open and transparent. Unfortunately, a few authorities are not doing as well as others, which gives rise to problems—cases go to the Court of Session and there is fallout from that. On the whole, however, we can tell a positive story about advocacy. We will never do everything that children in Scotland want from advocacy services, but I believe that we are doing quite a lot.

Kenneth Gibson: You are doing something, but it is a concern that, given its caseload, ISEA has funding only until the end of this financial year. I hope that when the report is published in January, the Scottish Government will seek to put advocacy services on a much sounder footing, because they are required in the long term.

Robin McKendrick: I hope that the Minister for Children and Early Years might be in a position to say something further on that when he appears before the committee in January.

Kenneth Gibson: Many local authorities act in the spirit of the 2004 act, but it is a concern when others do not. The problem is about rights and duties. There is an issue around trying to ensure that measures are carried out because there is a duty to do so rather than through the enforcement of rights. Parents have responsibilities, but they sometimes feel that the spirit of the 2004 act is not being followed, which is why we are in the current situation.

Robin McKendrick: I am a parent myself—my child is disabled, and I had to tell the school workforce what her rights were under the 2004 act. I recognise that I am in a fairly unique position, and that not all parents know how to address the issues. I am sure committee members agree that there is no silver bullet—the issue is about ensuring the availability of information and access. Authorities are under a duty to publicise information for parents, but not all 32 local authorities are doing so in the best way, and some are perhaps not doing it at all.

It is a simple point, but the issue is to ensure that when the Scottish Government becomes aware that something is not happening, we bring it to the attention of the district HMIE inspector. They are the people who review authorities, and they can bring the issue to the attention of the appropriate senior people in the authority who do not know that X has happened or that Y has not happened, or that a decision has been taken in a certain way.

Kenneth Gibson: In its submission, Afasic Scotland states:

“While Section 11A of the ASL Act gives both parents and children the right to support/advocacy there is no duty on anyone to provide or fund such a service ... A right which carries no matching responsibility is meaningless.”

The issue is about delivery on the ground. Everyone wants those parents who are least able to make their case for financial or other reasons to be able to fulfil their duty to their child and have access to those support mechanisms.

11:30

Robin McKendrick: I am sorry, I did not catch who said that.

Kenneth Gibson: Afasic Scotland.

Robin McKendrick: As I have said, we are taking certain steps. We have taken action to fund ISEA, because its service would not have been available if we had not done so. Comic Relief and the Big Lottery Fund withdrew funding and the Scottish Government stepped in. The Minister for Children and Early Years will probably be able to update you on that when he appears before the committee towards the end of January.

In addition, we fund Govan Law Centre to provide advice and advocacy services on additional support for learning. It is no benefit to parents who are not in their areas, but several authorities have taken action to provide advocacy services through Parent to Parent and other organisations, such as the children in the Highlands information point in Inverness. We are addressing the issue.

Aileen Campbell (South of Scotland) (SNP): Before I start on my line of questions, I will ask you about something that was brought up in an informal session. It was suggested that local authorities often pursue legal routes because they are a bit frightened that some of the issues that are raised might be a slight on them and they are a bit risk averse. Do you accept that view?

Robin McKendrick: I do not know how to answer that. Are local authorities in Scotland risk averse? The benefit of the 2004 act is that others are there to help the decision makers in the education authority to come to the right decision about provision for a child or young person. Although the old-fashioned view is that education authorities and professionals working in them are risk averse, the vast majority are not.

We are funding the University of Aberdeen over a number of years to look at inclusive practice in initial teacher education, so that when the next cohort of young teachers goes into the profession, they might be more aware than many who are already in the profession of children’s needs for
and rights to additional support for learning. In fact, the First Minister has been involved with the deans of initial teacher education faculties in Scottish universities, and the cabinet secretary recently spoke at the launch of an HMIE report on dyslexia to draw attention to the fact that the deans are working on an inclusive approach that will be integrated into initial teacher education programmes. There will be an announcement to that effect in April next year. That is another indication of the work that is being done in support of the inclusive ethos of the 2004 act.

Aileen Campbell: In your opening remarks, you said that you foresee changes to the code of practice and subordinate legislation. What changes to subordinate legislation might arise from the bill?

Robin McKendrick: We will certainly need to address the co-ordinated support plan regulations because we will need to specify certain issues. Susan Gilroy can say a little bit more about that. I am not trying to teach my granny to suck eggs here, but primary legislation has a certain function, and secondary legislation is more detailed, so it will give the detail stipulated by the bill.

Specifically, the bill will require the co-ordinated support plan regulations and the tribunal rules and procedures to be amended to clarify, for example, what is meant by the tribunal reviewing its own decision. The regulations will specify what the circumstances would be for that. It is not proper for an act to reflect that; it needs to be reflected in secondary legislation.

We have had two and a half years of working with the code of practice. At the risk of being put up against a wall and shot, I say that we recognise that there are areas where it might be improved, for example in the language that is used. We did not have two and a half years of experience when we wrote the code of practice. We can make it better than it is, not only by explaining parents’ rights and the duties on education authorities but by making it clear what the procedures are for placing requests, and what happens when someone requests a co-ordinated support plan and makes a placing request at the same time. That process has been introduced as a result of the legislation. There are issues that go from primary legislation to secondary legislation and through to the code of practice. I cannot predict what else stakeholders will say when we discuss with them the tribunal rules and procedures, and whether they will say, “You should be changing this. You should be changing that.” There will be a consultation on that.

None of this can be consulted on until after you have passed the bill at stage 3. We need to wait until then before we can publish anything relating to secondary legislation or the code of practice. After stage 3, when we know what the bill says before it goes to royal assent, we can publish secondary legislation. As I have said, it is our intention that the secondary legislation will relate to the CSP regulations and the tribunal rules and procedures. There is also the code of practice. It is required by statute—in the 2004 act—that we consult on that. That is all part of the work that we will do in secondary legislation. I am not dictating the timetable for the bill, but I think that we will be in a position in the early autumn to consult on the secondary legislation. Hopefully, the legislation, having passed the consultation phase and parliamentary scrutiny, will commence towards the end of 2009. The secondary legislation represents a related but separate process. Does that help?

Aileen Campbell: Yes, that was a very full answer. It covered many of the supplementary questions that I wanted to ask.

We heard a lot from the stakeholders about the code of practice. We felt that it could be strengthened regarding the transition from pre-school to primary school and the period that goes beyond school education. Are those issues that you will be considering when you revise the code of practice?

Robin McKendrick: We will be re-emphasising what the code of practice already says. We will give symmetry to the early years strategy and will reflect that in the code of practice.

On the transition to post-school, we recognise that more needs to be done to spread the message. During the consultation, a few people lamented the passing of the future needs assessment as if it were the only lighthouse—the only planning mechanism for children and young people moving on to post-school life. We had to explain to them that the 2004 act put that on a completely different level. No longer will there be one planning meeting in the last year of the child’s education. Planning should start as early as second or third year and should be concluded before the young person or child enters the final year of their school experience. There is a link between additional support for learning and the children and young people on whom the more choices, more chances strategy is focused. With colleagues who are involved in that initiative, we will interview this Friday for a development officer position that will be funded by the schools and lifelong learning directorates. The officer will work not only with schools but with stakeholders in further and higher education, Careers Scotland and other agencies that are involved in transitions. They will be based in LTS and will try to build up exemplars of good practice in transitions to post-school provision.

According to the HMIE report, too often no planning has taken place when children leave
school. The 2004 act includes provisions relating to additional support needs. More choices, more chances is a policy agenda that the Government is pursuing. Hopefully, the development officer will bring the two issues together, to ensure that there is effective planning for children who require that to support them into their post-school lives. In the code of practice, we talk about appropriate agencies rather than other local authorities, because all areas—not just education—are under a duty to be involved, as partners, in transition planning for children and young people before they leave school. Housing and social services may have a role to play in a young person's life when they leave school or home. The development officer's job is to build capacity and understanding and to identify examples of good practice across Scotland.

**Aileen Campbell:** Many people think that the code of practice does not possess enough teeth and that it would be preferable to use legislation to bring about the changes that they regard as necessary. What is your response to that view? How can you assure people that changes to the code of practice will be sufficient to ensure that problems do not arise to the extent that they have in the past?

**Robin McKendrick:** When the inner house of the Court of Session considers referrals on a matter relating to the 2004 act, it refers to the code of practice. The act makes clear that authorities are required to “have regard to” the code. That does not mean that they are stuck with what the code says—they can make alternative provision—but they cannot ignore it; successive rulings of both the inner house and the outer house of the Court of Session have made that absolutely clear. If any education authority or stakeholder is in doubt, I suggest that they look at what their lordships have said regarding the code of practice.

**Ken Macintosh (Eastwood) (Lab):** Issues that were flagged up in the consultation include the contrast between the expected uptake of CSPs when the Education (Additional Support for Learning) (Scotland) Bill was passed in 2004 and the actual number of plans. There are just under 2,000 CSPs, but there were expected to be 12,000, 13,000 or 14,000. Is that a concern for the Government? If so, do you expect the bill to address it?

**The Convener:** I remind you that questions to officials should not relate to policy. Your question might be better put to the minister, although I think that Mr McKendrick has already answered it at various points today when responding to other questions.

11:45

**Ken Macintosh:** In general, are you able to give us a steer on your attitude to amendments to address more fundamental concerns to do with the operation of the 2004 act—for example, the concern that the process is too legalistic or confrontational despite the best intentions of the act?

**Robin McKendrick:** We will consider each proposed amendment individually and judge it on its merits.

**Ken Macintosh:** Many people have flagged up a concern about the funding for additional support for learning and the transfer of any costs between local authorities. There is nothing about that in the bill. Did I hear you say that the issue will be addressed in the code of practice?

**Robin McKendrick:** Sorry?

**Ken Macintosh:** The transfer of resources for additional support for learning between local authorities is an issue of great concern. There is currently a lack of clarity about who is responsible for which costs. Do you intend to address that issue?

**Robin McKendrick:** As I have said, we will clarify section 29(3), which makes it clear that, when arrangements are entered into by two local authorities—for example, East Lothian Council and City of Edinburgh Council—

**Ken Macintosh:** Sorry, but where will you clarify that?

**Robin McKendrick:** We are clarifying it in the bill.

**Ken Macintosh:** The bill will clarify—

**Robin McKendrick:** As I said, the amendment to section 29(3) clarifies that, when arrangements are entered into by two authorities—East Lothian Council and City of Edinburgh Council, for example, with East Lothian being the home authority and Edinburgh being the host authority—in respect of the school education of a child, the home authority to which the young person belongs will always be responsible. However, if a parent in East Lothian asks that their child attend a school in Edinburgh—not an independent school but a school that is run by the Edinburgh education authority—it is up to City of Edinburgh Council to decide whether it accepts that placing request. Schedule 2 to the 2004 act specifies the reasons why City of Edinburgh Council could refuse such a placing request.

If the council grants that placing request and one pupil transfers from East Lothian to Edinburgh, as I explained when I talked about 10 pupils, the child will be captured in the school census data as attending a school in Edinburgh and, when the
school census data are used to calculate the local government settlement, City of Edinburgh Council will have plus one and East Lothian Council will have minus one, so City of Edinburgh Council will be funded for that place. In terms of any additionality that comes with the individual child, City of Edinburgh Council could claim back from East Lothian Council under section 23(4) the portion that is additional to the schooling of the child.

We believe that is already clear in the legislation. However, given the comments that have been made by education authorities regarding the matter and the questions that we have been asked by principal psychologists at some of the consultation meetings, there seems to be a misunderstanding of the process. We could describe ourselves as anoraks because we know the details of it. However, when we clarify the situation regarding arrangements that are made between authorities in clarifying section 29(3), we need to clarify the situation regarding the arrangements between authorities when a parent makes a placement request outwith an authority. We can certainly clarify that in the code of practice when we publish that. The committee will see the code of practice, and there will be 40 days to consult on it—it will be an affirmative rather than a negative instrument. There will be a full discussion about it.

Ken Macintosh: I will come on to the code of practice in a second, but have there been any occasions on which the Executive has been asked to adjudicate on a dispute between authorities about costs and an authority has not abided by the Executive’s decision?

Robin McKendrick: There is a case involving two authorities in which the Scottish ministers’ decision is being considered at the Court of Session. I do not believe that it would be appropriate for me to comment further on that at this stage, other than to say that a number of cases involving the same two authorities have been referred to us. We want to meet those authorities early in January to discuss the issue with them.

Ken Macintosh: I will put it another way. Has the Executive made any successful adjudications in cases in which there has been a dispute between local authorities?

Robin McKendrick: I am not aware of any adjudication by the Executive that predates those that are being considered at the Court of Session, but I could certainly look into that and write to the clerk, if that would be helpful.

Ken Macintosh: You mentioned a mechanism by which such disputes can be resolved, but the mechanism has been tested and so far it has been found wanting, in that it has not been used successfully, as far as I am aware.

Robin McKendrick: Any mechanism involves rights. If we come down on the side of one party, the other has a right to go to the Court of Session. As I understand the situation, that is what has happened.

Ken Macintosh: So an authority can go to court—that is fine.

How will the provisions on out-of-authority transfers be interpreted? Some local authorities have suggested that if a parent appeals to a host authority to accept an out-of-authority transfer, the home authority’s responsibility for costs will be bypassed. They have flagged up that they are worried that, in such a case, they will have no say in a decision on whether or not a child is accepted into another authority’s school but will be liable for the costs.

Robin McKendrick: All parents have that right. What is being suggested—it has been suggested in the responses to the consultation—is that, out of all the parents of children in Scottish schools, those who have children with additional support needs should not have the same rights as other parents to make a request to another authority to place their child in a particular school.

The costs that can be claimed back relate to the proportion of additionality, but that will take us into the section 23 argument again. Any child who is accepted into the school of another authority—this is true of all children who are the subject of placing requests between authorities, not just those with additional support needs—will, in time, be identified as a pupil, whether primary or secondary, in the lines of that other authority. To return to the example that I gave earlier, rather than appearing in East Lothian’s count, the child from East Lothian will appear in Edinburgh’s count for the following three years, even if they go back to East Lothian. That is the roundabout in that respect.

I do not think that the proposals put an exporting authority at a disadvantage, nor do I think that they put an importing authority at a disadvantage. As I have said, schedule 2 to the 2004 act gives the host authority the ability to refuse a placing request. At the moment, if a parent wants to make a placing request to an independent school such as a grant-aided school that is outwith the authority area or to an independent school such as New Struan or Daldorch House school, which are schools for pupils with autism, they go through their home authority. That is because, in those cases, the home authority pays.

When the placing request is merely for a school, whether it be a special school or a mainstream school with good provision for autism, it will go to the host authority. In that case, the home authority does not pay for the school education. Indeed, it
can be argued that it benefits from the situation; even though the child has moved to another authority, it still receives money for him or her because the funding predates the move. That said, the host authority will in time catch up and get the funding.

Given that some people who have commented at consultation events or who have written on behalf of national bodies seem to have misunderstood the existing arrangements, it is incumbent on us to address the issue and provide all concerned parties with a more adequate explanation of the different circumstances and funding arrangements that apply both to placing requests and to what happens when a child is placed as a result of an arrangement by a local authority.

Ken Macintosh: As you have said, some local authorities have suggested that the existing mechanism for independent special schools be used. Have you considered that?

Robin McKendrick: Yes. The point was made in the consultation responses. However, we believe that such a move would put young people with additional support needs and their parents on a different playing field. That was not the intention behind the 2004 act or indeed the original bill, both of which sought to ensure that those parents and children would have the same rights in making placing requests for local authority schools in particular as every other parent or child who wanted to make such a request. That is only fair and equitable.

On the other hand, if a parent wants to send a child to an independent school, the decision has to go to the home education authority because it is responsible for funding places at, say, New Struan, Daldorch House, Corseford school, Stanmore House school, Donaldson’s school, the Royal Blind school and so on.

Ken Macintosh: I whole-heartedly agree that children with special needs should be treated exactly the same and have exactly the same rights as other pupils. However, my concern, which was raised in last week’s informal evidence session and has been expressed in other evidence, is that the issue of resources remains unspoken in far too many decisions. Although local authorities are not allowed to take resources into account, we suspect that, in practice, they form part of their decision. Indeed, authorities have openly argued that, as their provision has to meet the needs of all the children in the area, decisions will be based on the number of children with additional support needs that they have planned for. If those children go elsewhere, that affects not only their planning but provision for everyone.

However, as I say, the real concern—and the unspoken barrier—that lies hidden in many of the decisions that affect children with additional support needs is cost. I am not saying that the Government is ignoring the issue, but we could do far more to get it out in the open. Making it absolutely clear who was responsible for costs in every case would help parents to assert their rights and, indeed, help local authorities to assert those rights by making them responsible for their own duties. Do you agree that such clarification is desirable, if not necessary?

Robin McKendrick: I always agree that it is helpful to clarify areas of doubt.

Ken Macintosh: If as a result, say, of an influx of 10 children with additional support needs from East Lothian to Edinburgh, the City of Edinburgh Council felt that it needed to employ an additional child psychologist, how would the cost be recouped?

Robin McKendrick: That is provided for under section 23 of the Education (Scotland) Act 1980, which has been around for nearly 30 years. The City of Edinburgh Council could claim back the additionality if it had to employ an additional educational psychologist specifically to meet the needs of those children. One might argue, however, that if the 10 children who were moving into Edinburgh from East Lothian needed an educational psychologist, East Lothian would be able to find the money as it would not need that position itself.

12:00

Given that it is covered by section 23 of the 1980 act, the ability of a child with what were formerly known as special needs but are now called additional support needs or, indeed, with a co-ordinated support plan to make a placing request is not a new concept. If clarity is required, however, it might be better for us to reflect on the matter when we put together the code of practice than to respond to individual points this morning.

Ken Macintosh: I am very concerned about the effect on children applying to independent special schools. If the bill means that a greater number of children will transfer into and out of authorities, greater clarity will be required. I am certainly not reassured to hear that the legislation currently governing the situation has never been used successfully.

You said earlier that “significant” will be defined in the code of practice. Will you be able to provide us with some idea of the thinking behind the definition or perhaps even the wording that you will use? The same might apply to other issues addressed in the code.
Authorities have a duty to publish the revised code of practice before the bill reached stage 3. [Interruption.] Louisa Walls has helpfully reminded me of the decision by the inner house of the Court of Session on the meaning of "significant". I referred to it earlier, and we think that it succinctly sums up the position. Indeed, I might even say that it risks resembling plain English and being easy to understand. If it is possible—and I do not know whether it is—we will certainly look for some opportunity to run the reworded section past the committee. I have no objection to being as open as possible with the committee about our intentions, but I do not want to break parliamentary privacy. We are clearly not going to publish the inner court decision but, again, it would be helpful to have advance sight of the Government's thinking on this issue. At last week's informal evidence session, the committee was interested to hear that most local authorities were already using and were quite comfortable with a practical, working definition of "significant" that had evolved over time. I am not sure that that definition is the same as that set out in the inner court decision but, again, it would be helpful to have advance sight of the Government's thinking on the issue.

The same applies to other issues in the code of practice. Unlike the bill and other primary legislation, the code cannot be amended by the committee, so we need to be reassured that it will address contentious issues. I am not suggesting that you are fobbing us off, but the fact is that such issues are sometimes taken out of legislation and addressed in a code. We do not think that issues such as the definition of "significant" should necessarily be covered in primary legislation, but it is quite important that contentious issues, including guidance on interauthority cost transfers, be brought to us at an early stage. That would be welcome.

Kenneth Gibson suggested that we could place a duty on local authorities to reinforce parents' rights. I might again be straying into the territory of ministers rather than of officials in saying this, but Children in Scotland and Afasic Scotland suggested a couple of amendments. Children in Scotland said that the Government should

"Strengthen the duty to provide information about the ASL Act by requiring governmental agencies to actively promote easily understood ... age appropriate, genuinely accessible information to all eligible pupils and their mothers/fathers/carers", and that it should

"Couple the existing right to 'advocacy' and 'support' in the ASL Act with a new duty on government to support independent support/advocacy."

Are you still considering such approaches? Given that they are not provided for in the bill, have you ruled them out? I will not repeat the arguments for them, which Kenneth Gibson made well.

Robin McKendrick: Authorities have a duty to publish information. The 2004 act clearly sets out what must be published—indeed, regulations amended it to provide that local authorities must publish details of health boards and other contacts.

Children in Scotland is best placed to know the situation, because we fund it to run the Enquire advice and information service. As I said, we are keen for Enquire to develop its performance on taking the message of the 2004 act to professionals and parents. Enquire must ensure that it has an aggressive and not a passive marketing policy, so that rather than being just a one-stop shop it offers sustained support. I will not comment further on that.

I am sure that Children in Scotland would love us to resume funding for it to provide advocacy services. We provided it with such funding a couple of years ago, but the approach was not successful. We made it clear that we were providing short-term, pump-priming funding. The charity asked for additional support, which the Government at the time provided, again making it clear that other sources of funding would be required. However, Children in Scotland singularly failed to attract support, even from the local authorities with which it was working.

Parent to Parent and other organisations have managed to put in place service level agreements with local authorities to provide advocacy support to parents and young people. Those organisations have done that independently and without Government funding. It is unfortunate that there is not blanket provision throughout Scotland, but I hope that by the time the minister gives evidence to the committee in a few weeks' time we will have had a letter from ISEA that explains the situation and we will be able to inform the committee of the Government's plans in that regard and advise you on plans to roll out an advocacy service throughout Scotland.

Ken Macintosh: To be fair to Children in Scotland and groups that support its position, I should say that I do not think that it was asking for money for itself; it was making the point that local authorities would be far more likely to support advocacy services if a statutory duty were placed on them in that regard.
The argument was forcefully made that we do not want to divert resources from additional support for learning into fighting legal battles in the tribunal or other hearings at which QCs and solicitors are employed at a cost of thousands of pounds. Children in Scotland thought that placing more emphasis on support, advocacy and information up front would be the best way of ensuring equality of representation and preventing tribunals from becoming ever-more complicated, bureaucratic and legalistic.

Robin McKendrick: You will hear no argument from us about diverting money to a specific advocacy service or supporting the development of good practice—providing information early to parents and sharing information. I am sure that Children in Scotland brought to the committee’s attention the work that it did for North Ayrshire Council. Several messages emerge from that, but one of the strongest is that early communication and discussion with parents are key to a lasting partnership. The earlier discussion takes place, the better it is and the deeper will be the roots that sustain a child throughout their school life.

Ken Macintosh: Children in Scotland was very critical of the idea of relying on good practice; the whole point of the legislation was to create a statutory duty.

The joint submission from Govan Law Centre, which was much quoted earlier, made a series of practical suggestions. Have you had the chance to consider them?

Robin McKendrick: Not in detail.

Ken Macintosh: I will not go through the suggestions individually but, in principle—I return to my first question—do you object to such amendments, which would extend the bill’s limited scope?

Robin McKendrick: As I said, I have not examined Govan Law Centre’s proposals in detail, so I honestly cannot comment.

Ken Macintosh: I can describe the proposals briefly. One is to remove the word “educational” from references to additional support needs, so that it is clear that not just additional support needs in an educational context are being referred to. One suggestion is about transition arrangements. One proposal is to extend to all parents and not just those who are applying for a co-ordinated support plan the right to demand and receive an assessment. Other issues are also raised. I suggest that the proposed amendments are designed to address more fundamental concerns about the operation of the 2004 act.

Robin McKendrick: It is obvious that I will have to look at the submission. Does Govan Law Centre mean removing education from the act, so that it is just the additional support for learning (Scotland) act and not an education act?

Ken Macintosh: I am sorry—I do not want to spring the suggestions on you.

The Convener: I remind you, Mr Gibson, that in relation to amendments—

Kenneth Gibson: Mr Macintosh.

The Convener: I am sorry, Mr Gibson.

I remind Mr Macintosh that the decision on the admissibility of amendments rests with the convener. Whether amendments are admissible is not a matter for Government officials or the Government; the decision rests with me. At the appropriate time, the Government can say whether it supports the amendments, if they are considered admissible. I appreciate that you are attempting to raise issues and to assess the Government’s support, but the purpose of today’s session is to scrutinise the bill as introduced. Any questions about policy changes should be addressed to the minister.

Ken Macintosh: I say with respect to Mr McKendrick that I am certainly not asking his permission for amendments. The question is more whether the Government has considered such proposals. I am still not entirely sure why the bill is relatively narrowly drafted. I am trying to get a feel for that and for what battle we might have in broadening the bill’s scope.

I thank Mr McKendrick.

The Convener: That concludes our extensive questioning of Mr McKendrick. I thank him and the other witnesses for their attendance.

On the committee’s behalf, I say thank you to Andrew Proudfoot, who is one of the committee’s clerks. He has worked with the committee for more than a year, but he is moving on to support the Justice Committee. I am sure that our loss will be its gain and I wish him well in his work with that committee.

Members: Hear, hear.

12:14

Meeting continued in private until 12:25.
Scottish Parliament

Education, Lifelong Learning and Culture Committee

Wednesday 10 December 2008

[The Convener opened the meeting at 10:00]

Education (Additional Support for Learning) (Scotland) Bill: Stage 1

The Convener (Karen Whitefield): Good morning. I open the 30th meeting in 2008 of the Education, Lifelong Learning and Culture Committee. I remind all those present that mobile phones and BlackBerrys should be switched off for the duration of the meeting.

We have received apologies from Kenny Gibson, who is unable to attend the meeting. He has been replaced by Bill Kidd, whom I am pleased to welcome. Alex Neil is visiting the committee for the first agenda item. I understand that Margaret Smith and Liz Smith are running late; they hope to join us shortly.

The first agenda item is to take evidence on the Education (Additional Support for Learning) (Scotland) Bill at stage 1. I am pleased to welcome Jessica Burns, who is president of the Additional Support Needs Tribunals for Scotland, and Lesley Maguire, who is the secretary of that organisation. I thank them for joining us. I understand that Ms Burns wishes to make an opening statement.

Jessica M Burns (Additional Support Needs Tribunals for Scotland): I thought that it would be helpful to make some introductory comments to explain a little bit about the Additional Support Needs Tribunals for Scotland. We operate very much at the severe end of additional support needs, and it may be helpful to members to understand what our respective roles are in the organisation's work.

Lesley Maguire has been the secretary of the Additional Support Needs Tribunals for Scotland since 2007. Prior to that, she was the deputy secretary. She has been present in the organisation since its inception in 2005. She heads up a very small, modest secretariat team, which consists of her, two case officers, an office manager and an administrative assistant.

I am appointed for 50 days a year on a seconded basis—my main appointment is as a regional tribunal judge in social security tribunals. At the Additional Support Needs Tribunals for Scotland, I head up a team of nine conveners, who are the legally qualified chairmen of the tribunals, and 22 members, who are appointed on the basis of their knowledge of additional support needs—they have backgrounds in education, health and social work. In my role, I have so far produced three annual reports for Scottish ministers on the operation of the tribunals.

I have read all the written evidence that the committee has received, in which there seems to be a misperception that the tribunals are more active than they actually are. Since April 2008, we have received only 28 references. In the previous reporting year—2007-08—there were only 76 references, which resulted in only 18 oral hearings. That means that only around a quarter of the references that were received in that year proceeded to a hearing. I highlight that, because the figures indicate that the tribunal process is successful in resolving disputes without cases needing to go to oral hearings. Many cases are withdrawn or dismissed as a result of parties coming together, focusing on the dispute and reaching an amicable outcome. In addition, virtually all cases that are to proceed to a hearing, a telephone case conference will be held around two weeks before the date of the hearing, which results in many more cases being settled—one could say with the convener’s intervention, pointing out to the parties their legal obligations.

We appreciate that some of the written evidence that the committee has received sought to address substantive legal issues, such as the definition of the word “significant” in the context of meeting the co-ordinated support plan threshold. The correction of the judicial interpretation of fact is to be considered in determining the need for additional support, to enable a more holistic approach to be taken to a child’s overall day-to-day care rather than just their education, and the role of other agencies in informing the need for a co-ordinated support plan has been clarified.

We have tried to confine our evidence to aspects that are directly related to the tribunals’ function and how the procedures might be changed to render the process more user friendly and fit for purpose and more able to deliver the policy intention of the Education (Additional Support for Learning) (Scotland) Act 2004. We are happy to answer questions on all issues.

The Convener: Thank you for your helpful comments. I am sure that members will seek your views on a number of matters.

Ken Macintosh (Eastwood) (Lab): I thank the witnesses for attending the meeting.

You have suggested that it might help to resolve some of the complexity in the choices that parents and local authorities face as they go through the system if all placing request appeals that related to
special schools were reserved to the tribunal. Would that be the only option for parents? Would you deal only with references involving special schools? Would you deal with appeals involving mainstream schools?

**Jessica M Burns:** All the placing request appeals that we have received have related to special schools, because the children who come within the ambit of the tribunal are those who have or are likely to have a co-ordinated support plan. As you probably know, the number of such children is very small. There are fewer than 2,000 such children in Scotland, according to most recent reports.

I am sure that you are aware that the complexity of the routes of redress and remedy for parents has been criticised. To make the system as clear as possible we propose a clear route, whereby if the school that is sought is a special school the issue will go before a body that is composed of members who have expertise in dealing with such issues, such as the tribunal.

We have heard anecdotal reports from education appeal committees that committee members have felt disempowered when they have dealt with issues that relate to specialist areas. Our proposed approach would perhaps not only give parents a direct route but relieve education appeal committees, which deal only occasionally with specialist appeals.

**Ken Macintosh:** Your suggestion might receive support.

The number of CSPs and applications for CSPs is far smaller than was envisaged. Will that always be the case, or will the predicted number of CSPs be reached, which would mean a several-fold increase on the current number?

**Jessica M Burns:** I think that the number of CSPs will continue to be modest. You might be aware that a reason for the great disparity in the number of CSPs in different local authorities seems to be to do with how additional support is delivered to children in schools. If additional support from other agencies is employed by the school through the education system—in-house speech and language therapists, for example—it is argued that there is no need for co-ordination and therefore no need for a CSP, even though professionals from areas other than education are assisting the child.

It is ironic that few children in special schools end up with a CSP, which is the opposite of what we might expect. We would expect almost all children in special schools to be supported by services other than education.

A number of headteachers of special schools have told me that they have no experience of putting together co-ordinated support plans because they already employ social workers or provide the whole range of therapies in their schools. I think that there will always be a disparity in the number of such plans; they are more likely to be used by the smaller authorities, which have to contract for and buy in provision in mainstream schools.

I accept, therefore, that the number of placing requests is linked not to whether the children in question have co-ordinated support plans but to whether the parents are arguing that their children’s needs really warrant a special school education.

**Ken Macintosh:** You have half addressed my next question, which was an expansion of my original question. All the cases that you have highlighted so far relate to special schools; however, quite a few appeals involving mainstream schools might also be unsuccessful. Do you expect those cases to come before your tribunal?

**Jessica M Burns:** Only if co-ordinated support plans are involved.

**Ken Macintosh:** So this is not just about special schools. Are you saying that, although you have not yet dealt with such cases, you expect parents who have applied unsuccessfully for a place at a mainstream school to continue to have the option to take their case to the tribunal?

**Jessica M Burns:** Only if their child meets the current criteria for a co-ordinated support plan.

**Ken Macintosh:** As you have pointed out, many children who go to special schools—indeed, many of those who apply unsuccessfully and then have their appeals turned down—do not have, and have never even been considered for, a co-ordinated support plan. As a result, even though they have additional support needs, they do not meet the current criteria for appealing to the tribunal. Should that group also have those rights of appeal?

**Jessica M Burns:** We have not recommended that in our submission. I have to say that we are hampered in that respect by a lack of real data and information on the groups that might be involved or the issues that might be raised.

The low take-up of mediation and the low number of appeals might suggest that parents are broadly satisfied with the situation; on the other hand, the figures might suggest that parents are quite intimidated by the complexity of the various remedies and the arena for challenging decisions about their children’s education. The question is whether giving every child with additional support needs in a mainstream school the right of appeal to the tribunal on every related issue is a proportionate response; I feel that it is
disproportionate. After all, the process of appealing, with all the evidence gathering and so on that is required, is actually a very big step for parents to take, and I would hope that the authorities in Scotland might be more amenable to taking active mediation measures to resolve issues.

Ken Macintosh: The committee will no doubt consider the other issues in the round, but I simply wanted to pin down that specific point. I will stop there, because other members will return to some of these matters later.

Claire Baker (Mid Scotland and Fife) (Lab): Jessica Burns referred to parents’ ability to challenge decisions. Stakeholders at a round-table evidence session that we held expressed caution about proposals in the bill giving the tribunal the ability to review its own decisions. At last week’s meeting, however, the bill team argued that the practice was quite common. What are your views on the proposal? How would it work? Do you know of any other tribunals that have a similar mechanism?

10:15

Jessica M Burns: Since 1999, what I call my primary jurisdiction, or my salaried jurisdiction, which is social security, has had the right to review its own decisions. In situations in which there is a palpable error in law, or a matter that has been overlooked, the social security tribunal will go back and address the point. In one or two cases involving additional support needs, the tribunal has clearly erred in application. At the moment, the only remedy for a parent or an authority that seeks to have such a decision overturned is to go to the Court of Session. That is a disproportionate approach, given that the tribunal is supposed to be family friendly and enabling.

I am not arguing that we should try to head off every appeal that might go to the Court of Session, because it is clearly important for the interpretation of the legislation, and helpful for the tribunal, to have guidance on legal issues that are unclear, and most of the decisions have been helpful to us. However, one or two issues have been problematic. For instance, if a tribunal decision is not clear enough for the education authority to implement it, it will need to be clarified. A good example of that involves amendments to the terms of the co-ordinated support plan. In the case that I have in mind, the tribunal directed the education authority to go away and amend the plan in the light of evidence that had been heard by the tribunal, but the directions were not sufficiently specific to address the issues that the parent had raised—as you can imagine, the plan document can be quite complicated. There was no way that the tribunal could get back into that decision at that point, however. If it had the power to review such decisions, it could have done so quite speedily, probably without the need for a further oral hearing. In the case that I am discussing, the parent, who was unrepresented, probably would not have qualified for legal aid if they had taken the case to the Court of Session.

Giving the tribunal the right to review its own decisions would make the process more user friendly and responsive. Having read the submissions to the committee and the responses to the consultation, I know that there is a fear that that might be a retrograde step. However, most tribunals—including our sister tribunal in England and Wales, the special educational needs and disability tribunal—have the power to review their own decisions. Such reviews are rare, but when they happen, they offer a cheap, speedy, user-friendly response.

Claire Baker: Govan Law Centre raised concerns about whether local authorities would have an advantage in a tribunal situation and noted that that might have an adverse effect on the way in which a review would be carried out. However, one of my colleagues will pick up on the adversarial nature of tribunals later.

Alex Neil (Central Scotland) (SNP): One reason why the bill has become necessary is a result of certain decisions that were made in sheriff courts and other courts—they were made there either because the previous legislation had not yet become active or because, for one reason or another, the cases did not go down the tribunal route, even though the legislation had become active. Clearly, one of the purposes of the bill is to remove from the process much of the legalism and deal with as much as possible through the tribunal.

In many cases that have gone to the sheriff court, a decision was made on a point of law rather than being based on the needs of the child. Should the tribunal have the power to consider such cases? For example, I am dealing with a case involving an extremely deaf child. There was a dispute between the parents and the local authority about whether the child could go to a specialist school south of the border. The council refused to pay for that and the case ended up in the sheriff court, where, on a point of law, the sheriff had to find in favour of the council. However, he said that, had he had any option in law, he would have found in favour of the parents. That child still has six years to go in secondary school. I would like the legislation to enable such cases to be referred to the tribunal so that it can consider them in terms of the needs of the child. Would you be happy to have such a power?

Jessica M Burns: The tribunal is governed by the same law that applies to the education authority, the sheriff and the Court of Session. The
The resource issue is being more parent friendly. The meeting was about the placement request, which was appealed to the sheriff. The issue of such cases going to the tribunal is just the point that I was making to Mr Macintosh. I do not know the judgment in that case, but if you wanted the legislation to be more child-centred in relation to placing requests, it would probably require an amendment to give recognition to special conditions and to make additional support needs issues more parent friendly.

As I tried to say in my introduction, there has been some criticism that cases in the tribunal have taken longer than had been anticipated. Most of our appeals are cleared within a day, but there have been a number of complex cases that have gone on for three, four, five, or even nine, days. Those cases are exceptional. Cases in the sheriff court take a similar length of time. However, our advantage is that we tend to be more responsive. We put cases down for a continuous hearing rather than putting them down for two days and then continuing them. We are clearing cases a lot more quickly.

**Alex Neil:** The other issue is that when parents go to a tribunal, they do not incur huge legal costs. If they go to a sheriff court, they incur their own legal costs. Further, in the case that I mentioned, the local authority threatened to recover its costs from the parents. It did not actually recover them, but the result was a gagging order on the parents. The situation was weighted against the parents. Part of the purpose of the bill is to try to redress the balance.

You mentioned the low number of references to the tribunal. I was encouraged to hear about the percentage that ends up in mediation rather than in a full hearing. It shows that the process is working. Why is the number of references relatively low? My view is that parents often do not know about their right to take an issue to the tribunal, but what do you think?

**Jessica M Burns:** The issue is access to justice. The legislation is complex and emotionally charged. Parents who have a child with additional support needs feel vulnerable, and the idea of going into a formal process over the child’s rights is quite intimidating, even when we try to make the process user friendly. I commented in my annual report that letters in which education authorities issue decisions are not always clear about the routes of redress, so parents are not being informed at the right time. Some letters simply refer to leaflets that have been sent previously, which is not a helpful way of trying to steer a parent towards the correct remedy. My colleague Lesley Maguire met Enable this week and might want to comment on parents’ access to justice.

**Lesley Maguire (Additional Support Needs Tribunals for Scotland):** The meeting was actually with an official from the National Autistic Society Scotland. She told me that the society is set up in a way that empowers parents to represent themselves, rather than operating in a framework in which the society steps in, takes over the case and presents it for the parents. She said that over the past year, she has been approached by more than 20 parents who had a legitimate claim to go to a tribunal. However, none of those parents could be convinced that they were able enough to present their own case, even with the training and support that the NAS offered. They all found it far too overwhelming.

A lot of that goes back to the issues that Jessica Burns raised—the situation is incredibly emotionally charged for a parent. We often find that when a parent presents their own case at a tribunal, it overwhelms them, and it is up to the tribunal convener to use their skills to help the parent get their point across.

**Alex Neil:** Is there anything that we can do in the bill to try to ease that problem and facilitate a system that meets the parents’ needs? Assistance from an advocacy service is a possibility, but, from your experience, are there ways in which we can make it easier for parents to access the tribunal—and make the process easier for them once they get to the tribunal? Is it a resource issue?

**Lesley Maguire:** The resource issue is being addressed by the Scottish Government to an extent. There is more training for advocacy groups, but that will take time to feed through. Word of mouth is a big thing: one parent telling another parent that going to the tribunal is not as bad as they think it is going to be is more valuable than almost anything else.

**Jessica M Burns:** If I may correct something that Alex Neil said, when I indicated that a large number of cases settle before the hearing, I did not mean that that is due to the mediation process under the legislation. The cases are settled because there has been a case conference and there is a convener-directed settlement or agreement. The tribunal is not informed about whether parties have engaged in mediation prior to the hearing.

I asked the Scottish Mediation Network whether we could have information about the mediation process, but it indicated that it regarded the process as so utterly confidential that the information cannot be given to us. Therefore, I cannot say how many cases have been to mediation before they come to the tribunal, and whether that mediation has failed.
# Aileen Campbell (South of Scotland) (SNP):

Alex Neil has asked questions about the adversarial nature of the process, and I would like to talk about that a bit more. We have heard anecdotal evidence that local authorities that are armed with teams of lawyers have been pitted against a parent who might not have the same legal back-up. Do you know how many times local authorities have been represented against a parent who has not been represented?

**Jessica M Burns:** From the latest ASNTS annual report, I see that, in the last reporting year, 17 parents out of 76 had no representation at all. That is quite a modest number. Compared with the figures for the special educational needs and disability tribunal, in which more than half the appellants are unrepresented, a very small number—less than a quarter of the total—are unrepresented in Scotland.

The parents have mostly been represented by Independent Special Education Advice (Scotland), which represented parents in 51 cases last year. There was legal representation, including by Govan Law Centre, in seven cases. Most of the parents whose cases have gone to hearing at tribunal have had representation.

I have suggested that the tribunal should have the power, in limited circumstances, to indicate that legal representation for the parent is appropriate, particularly when a case involves issues of statutory interpretation. Of the cases that we have dealt with, there have been two or three that could have come into that category and in which a parent should perhaps have had legal representation.

**Aileen Campbell:** Did you say that there were 17 cases without representation?

**Jessica M Burns:** There were 17 cases in which the parents brought a reference and were not represented, but most of those did not proceed to an oral hearing. In fact, there were only two oral hearings in which the parents represented themselves last year. In 17 cases, parents brought a reference, but most of those settled in another way and only two proceeded to a hearing.

**Aileen Campbell:** I understand. You said that the environment was often not an enabling one. How could it be changed so that it is less confrontational from the outset?

**Jessica M Burns:** We have probably gone as far as we can in creating an enabling atmosphere for the tribunal hearings. We try to use premises where parents have their own rooms. We provide lunch and sandwiches, and we have breaks during the hearings so that parents can have a coffee. They can bring supporters with them. We liaise closely with them about the times of hearings so that they can get home to collect children or attend to child care arrangements. We also have an active secretariat, which does its utmost to support parents and tell them about the process. We have produced a DVD, and we have information on our website to tell parents what to expect at a hearing. Our members do a lot of the questioning, which they conduct in as supportive a way as possible.

In general, we have done well on delivering an enabling environment, but the reality is that parents must confront education authorities that they regard as being in a position of power over them and with which they have been in dispute. In many cases that come to a hearing, it is clear that there is a history, but we do not always hear the full history of the difficulties that a parent has had with the school or education authority. We can address only the issue that is within the tribunal’s jurisdiction, which sometimes makes the environment quite emotionally charged. Sometimes a resolution is achieved that enables both parties to walk away from the hearing with dignity, but sometimes the parent who is unsuccessful has a sense of grievance and feels more disempowered. Lesley Maguire might comment on that from the case officer’s perspective.
Lesley Maguire: The parent deals with only one official throughout the lifetime of the reference. The case officer is in constant touch with the parent about arrangements and is with the parent on the day of the hearing. We hold hearings as close as possible to the parent’s home, so that the parent does not have to travel far. We travel to them, to maximise the time that they can spend at the hearing before they must go home to the kids. The case officers are well trained—I do not think that there is cause for concern on that front.

Aileen Campbell: When the bill team gave evidence to us last week, it suggested that the tribunal president could issue practice directions, to prevent parties from directly questioning each other and to make it clear that the focus is on the convener, who questions and gathers information from both parties. Do you agree with the suggestion?

Jessica M Burns: I have issued practice directions to that effect. I have issued a number of practice directions, which are listed in my annual reports. The directions have not always been applied, because parties who come to a hearing with counsel or a solicitor have sometimes insisted on their right to examine, cross-examine and re-examine the appellant or other party, which is not a helpful approach.

I can only issue practice directions. However, tribunals are increasingly confident about setting out exactly how they want evidence to be taken and asking witnesses the bulk of the questions. An exception to that approach is that, as part of our enabling role, when a parent is represented, we always allow the representative to question the parent first, because in general they have done some preparation. The tribunal normally picks up on other issues when it questions the parent later. The parent is always given the opportunity to have their evidence taken last, so that they have the benefit of being able to take on board everything that they have heard from witnesses.

I do not know what more I can say about our attempts to provide an enabling environment. I have tried to promote such a culture in the tribunal.

Margaret Smith (Edinburgh West) (LD): I apologise for my late arrival.

You have suggested that on a limited number of occasions parents should be able to access legal representation. How would that work in practice? Would it be for a member of the tribunal to unlock the door to that avenue? Secondly, there are some cases in which there are points of law. What access would the convener of the tribunal have to legal advice? If the tribunal convener listened to a Queen’s Counsel making points of law and the parents could not match that with their own legal representation, could the tribunal decide to take independent legal advice and take a bit more time over the case?

Jessica M Burns: I do not think that we could do that, because the tribunal is acting in a judicial capacity in making its decisions. Hopefully, I have been able to support the tribunal legally through intensive training.

I have taken counsel’s opinion on two issues relating to the operation of the tribunal, but both were procedural, or preliminary, issues. We have a very small budget for taking counsel’s opinion, but it would not be normal practice. In fact, it would be quite improper. There is no procedural way for the tribunal to say, “We’ve taken counsel’s opinion and this is what he says,” because we have to listen to arguments from both parties.

It is in the nature of the proceedings for the tribunal to be issued with the papers in advance and for the convener who has been identified to chair any hearing to manage the case almost from the outset. For example, a preliminary legal issue could be dealt with in a case conference call preliminary debate or in a short oral hearing. That means that when we come to take evidence, the parent will not have to sit through legal arguments feeling that the tribunal is not interested in their child and that it wants only to talk about dates and legal technicalities. That is one way in which we have addressed the issue.

The legislation has produced some challenges and it is not as clear as it could be. Cases that have been demanding for the tribunal and have gone up to the Court of Session have been subject to quite a degree of argument in the outer house. More recently, one went straight to the inner house for argument. I do not think that we can do anything else to support conveners legally. I am happy that the conveners who have been appointed have good legal qualifications. Some also sit in other jurisdictions in a judicial capacity.

Claire Baker: I want to pick up on your evidence about the number of cases. You said that, last year, there were 10 cases where the local authority brought along a legal team because they were about placing requests, which involve a significant cost to the council. That seems to be a significant area in which councils consider bringing in legal teams. The bill seeks to extend the right of appeal for placing requests. Will that lead to more councils taking such an approach? In your experience of the 10 cases that you mentioned, are certain councils that have specialist skills or expertise carrying the burden?

Jessica M Burns: As I say in my annual report, the incidence of references varies widely among authorities. Edinburgh figured largely; it made 24 references last year, which was a third of the
overall number and therefore a high proportion. I do not think that that necessarily indicates bad practice on the part of the City of Edinburgh Council. It probably has more to do with the fact that Edinburgh has the largest choice of different schools—and, possibly, that the parents in the city are very articulate and are prepared to take cases to a reference. Authorities—and the authority in Edinburgh, in particular—have begun to feel that a large number of successful placing requests will take a lot of money out of their education budget, and one can understand their motivation in seeking to protect their budgets.

10:45

Ken Macintosh: Aileen Campbell and Margaret Smith have already asked about the proposal to give the tribunal the power to appoint legal representation for parents in a very limited number of cases. Have you established any criteria that might be applied in that respect? How much would the proposal cost? Was the suggestion made to the Government when it was drawing up the bill or are you proposing it now?

Jessica M Burns: I have been asked about this on two or three occasions, and I have to say that I am pleased not to be the one responsible for the final decision on what is a very vexed question.

Simply making legal aid available for such cases would be a retrograde step that I think would undermine the tribunal’s ethos. After all, most authorities still do not instruct legal representation. They might, however, instruct the education department to attend and, indeed, as they gain in confidence, more and more of those people will do so.

It should be up to the tribunal to certify cases as being complex enough to warrant the appointment of legal representation to parents. It has been suggested that the authority should have to indicate whether it will instruct counsel and that, in such cases, the parent should be able to access legal representation. An overriding objective in the rules is that the tribunal should try to ensure equality of arms; that said, however enabling we might be, we do not have the power to appoint legal representatives to the parent.

Under the current legal aid parameters, many middle-income families who will nevertheless find it very difficult to afford representation will not qualify for such support. The tribunal has a notional budget of £5,000 for legal advice and, in cases involving complex issues, it might decide to pay for representation to argue a particular legal point at a hearing because, otherwise, the parent might be disadvantaged. I do not know whether £5,000 will cover that for the year; I think that £10,000, which represents a very small part of the budget, might. Moreover, if legal representation were to be assigned to the parent early on, certain issues could be resolved more speedily and at less cost.

Ken Macintosh: So, you have not actually made that suggestion formally to Government.

Jessica M Burns: I have made the suggestion to the division in question, but I am not sure where it has gone.

Ken Macintosh: That is okay.

One of the key things that we are trying to establish is whether a system that was clearly not supposed to be adversarial is turning out to be so and what we can do about that. It is quite clear that you do not want the system to be adversarial.

I want to check a few figures. I am not sure whether it is helpful to think of cases as being won or lost but, in the two cases that have gone to oral hearings in which the parents have not had representation, did they win or lose? In how many cases in which parents were supported by an advocate such as ISEA did the parents win? In how many cases in which local authorities were represented by QCs or solicitors did they win?

Jessica M Burns: I will put that to the ASNTS secretary, as she is more experienced at the number crunching than I am.

Ken Macintosh: You might not be able to answer that question today.

Jessica M Burns: Do you want us to give you a written answer? The figures in our annual report go only up to April, so we could provide you in writing with figures that are more up to date.

Ken Macintosh: It is not so much about up-to-date figures. I would like to get to the bottom of whether having representation offers an unfair advantage. It is quite clear that the tribunal supports a non-adversarial approach but, although you are trying to impose that approach, I wonder whether it is built into the system that those who appoint solicitors and QCs win their cases.

Jessica M Burns: We will give you a written response to that question, but I can state categorically that education authorities have not been successful in all the cases in which they have been represented by counsel. Having counsel does not invariably lead to the authority resisting the appeal.

Ken Macintosh: I have a final question on your suggestion that you should deal with all cases that involve placing requests to special schools. Am I right to think that the cases that go straight to the sheriff court instead of going through the tribunal are more adversarial?
Jessica M Burns: In a sense, those cases have had two hearings, because those that are heard by the sheriff have already been heard at an education appeal committee. It has, therefore, already become a two-stage process for the parent, whereas if the case came straight to the tribunal following the education authority’s decision, it would involve just one step. There is always the prospect that an appeal will go to the Court of Session, but in most cases that does not happen.

Ken Macintosh: The advantage of your solution is that the parents would bypass the education appeal committee. Are you suggesting that their right to go to the sheriff court should be taken away?

Jessica M Burns: Yes. Under the legislation, there is no appeal from the tribunal to the sheriff court. The case goes straight to the Court of Session.

Ken Macintosh: But parents currently have a choice, in that they can go to the tribunal or to the sheriff. Is that correct?

Jessica M Burns: No—they do not have a choice. They have to come to us if there is a co-ordinated support plan, and when they reach a certain stage in that plan. If there is not such a plan in place, the case goes to an education appeal committee.

Ken Macintosh: I am getting confused.

Jessica M Burns: The case does not come to us at all if it goes to the education appeal committee, unless—this is quite complicated—a reference is started on a co-ordinated support plan while there is an on-going appeal to an education appeal committee. There is then a remit from the committee to ASNTS.

The complexity arises from the fact that if the tribunal finds that the criteria for a co-ordinated support plan are not met, it has to remit the placing request back to the education appeal committee. The bill tries to address that by suggesting that if the case is remitted to the tribunal, the tribunal should have the option of taking that placing request to a conclusion, even though the criteria for a co-ordinated support plan have not been met. However, the bill does not say that the tribunal must take the request to a conclusion, so there would still have to be some debate between the parties about whether there is a strong argument for passing it back to the education appeal committee. Whatever happens, the net result for the parent is an unacceptable delay. Even a few weeks’ delay can mean a whole term of a child’s education, which can be critical.

On the issue of time awareness, if there is a straight appeal to one body that can hear it quickly and deal with it efficiently, the service is bound to be better and clearer for users.

Ken Macintosh: I would like you to clarify one point, because I want to be sure that I am not confused about it. Are you suggesting that there will be no change to the criteria, and that the cases that do not involve a CSP will still go to the EAC and then on to the sheriff?

Jessica M Burns: I am talking about cases that do not involve a special school or additional support needs and which involve a co-ordinated support plan.

Ken Macintosh: At the moment, a CSP has to be involved for a case to come to you.

Jessica M Burns: Either a CSP has been issued or the parent is saying that they think that their child needs a co-ordinated support plan.

One of the consultation responses indicated that there was the potential for parents to raise the spectre of a co-ordinated support plan, even if they could not nearly meet the criteria, simply in order to get their placing request heard by an additional support needs tribunal. I am saying that you would reduce that possibility if you grouped together all the cases that related to special schools. That would limit the number of cases that education authorities might worry were going to come to the tribunal.

Ken Macintosh: I thought that, in response to an earlier question, you said that all of the cases involving placement requests for a special school for a child who has special additional needs would come to you. Is that correct? You said—

Jessica M Burns: Not at the moment.

Ken Macintosh: Not at the moment, but would that be the case under your proposal?

Jessica M Burns: Yes. Under the bill—

Ken Macintosh: So, sorry, but—

Jessica M Burns: Under the bill, that would not be the case, but it would be the case if the proposal that we are suggesting were to be accepted.

Ken Macintosh: I totally misunderstood your earlier answer. You are saying that, under your amendment, the cases of all children with additional support needs who put in a request for a placement in a special school would come to the tribunal.

Jessica M Burns: Yes.

Ken Macintosh: And that the cases of those with special needs—whether or not they have a CSP—who put in a request to go to a mainstream school would not come to you, but would instead be dealt with by EACs and sheriff courts.
Jessica M Burns: Yes, except where children in a mainstream school also have a co-ordinated support plan—

Ken Macintosh: Yes, the CSPs would remain. However, we would have two tracks, in a sense. On one track, there would be children with additional support needs who want to go to a special school, who would get their cases dealt with by you; and, on the other track, there would be children who wish to go to a mainstream school, who would have their appeal dealt with separately.

Jessica M Burns: The track that leads to us is justified on the basis that the children with co-ordinated support plans or who go to a special school have the highest degree of special needs and their cases deserve to be heard by a tribunal whose members have particular expertise in relevant therapies and the education of children with additional support needs.

The Convener: Before I ask Margaret Smith to ask what I hope will be a brief follow-up question—I think that we have had a good stab at the issue of the adversarial nature of tribunals—I want to remind members that they should not cut off witnesses’ responses. Members will be given an opportunity to ask supplementary questions. I also remind the visitors to the committee that they should not just jump in because they want something clarified. All remarks should be made through the convener.

Margaret Smith: Ms Burns, you said that the justification for your proposal—I am not saying that I agree or disagree with it—is that the children who have CSPs are the children with the greatest need. However, a concern has been raised that the number of children with CSPs and the number of children with additional support needs and special needs do not marry up, because there are children who fail to get access to a CSP even though they should have one. In a perfect world, the system that you propose would work, but how does it work against a background of concerns about the number of CSPs that are being denied to people?

11:00

Jessica M Burns: I repeat that, if a special school is involved, even though most children in special schools in Scotland do not have CSPs the children are clearly at the extreme end of need. However, on the question whether there should be more co-ordinated support plans, we should remember that a CSP does not reflect the degree of disability. It reflects the degree of complexity in involving agencies other than education agencies in delivering education.

In reality, a lot of work is now done to enable teachers, schools and parents to administer and try different therapies, rather than constantly bringing in professionals. For instance, many children have short speech and language therapy sessions with professionals and then teachers and teaching support assistants are enabled to use the strategies. That is often why the figures for CSPs show a patchy picture compared with the number of people that one would expect to have a co-ordinated support plan.

Christina McKelvie (Central Scotland) (SNP): I want to move on to the new ground of missed deadlines. The bill proposes two new grounds for taking a case to a tribunal, the first being when a local authority fails to say whether it will comply with a request to establish whether a CSP is required, and the second being when a local authority fails to prepare a CSP in the required timescale. We heard a lot during the round-table meeting with stakeholders about timescales and missed deadlines. Do you believe that bringing cases to tribunal would be an effective way of dealing with that problem?

Jessica M Burns: It is a question of proportionality. It is disappointing when education authorities do not meet timescales, but we have to ask what benefit there is to a parent in bringing a case to tribunal on that ground. It would highlight that the legislation was not being complied with, but there would be no compensation. We sometimes have the sense that authorities wait until the last minute to concede that they have no defence to a reference and are just buying time. Even if a tribunal decides that the authority has not met the timescale and should carry out an assessment or issue a co-ordinated support plan, we have no teeth to ensure that that is done within the timescale. We do not have any way of monitoring compliance with the directions that are given by tribunals.

As I have said previously, bringing a case to tribunal would be a way of ensuring that authorities could at least be named—perhaps “shamed” is too strong a word. Their deficiencies in delivering under the legislation could, at least, be highlighted in my annual report if we were aware of how many cases were involved.

It is clear that lots of authorities do not manage to meet timescales, but we have to ask whether that is because the timescales are unreasonable, because authorities do not have the resources or because they are not prioritising the cases. I am sure that, at tribunal, we see only a tiny fraction of the cases in which timescales are not met.

Christina McKelvie: Would the prospect of such cases being brought to tribunal be enough to ensure awareness among local authorities of the responsibility to act within a timescale?
Jessica M Burns: I hope so, but I am not sure that the evidence from cases bears that out.

Lesley Maguire: There have been a great many dismissals. Typically, after a parent has submitted a reference about timescales not being met, the authority will just wait and then, as the hearing approaches, it will admit that it cannot oppose the matter and that the parent is correct. At that point, there is not a great deal that we can do. As Jessica Burns indicated, we do not have the teeth to pursue such matters.

Christina McKelvie: Some of our evidence suggests that local authorities would be better placed to deal with such issues through their normal complaints procedures. Do you agree?

Jessica M Burns: Parents complain by bringing references to the tribunal about timescales not being adhered to, but complaints are not always responded to appropriately. You might imagine that, if a reference is passed to the tribunal, the authority will immediately start the assessment process or issue a co-ordinated support plan: it is clear, however, that that does not always happen. The committee will hear evidence from other groups—I think that representative organisations would be better placed to comment on such cases.

Christina McKelvie: That is helpful. We have been speaking about two new grounds for reference. Do you envisage any changes, in particular in terms of increases or decreases in your case work? Are there any other issues that might impact on your team?

Lesley Maguire: I have given the matter some thought and I do not think that there will be a huge difference in the number of references with which we deal. The expedited process for timescales is to be welcomed. It can only bring about quicker decisions for parents who are waiting for finalised co-ordinated support plans for their children. I am pretty certain that it will work.

On the other grounds for reference, I do not think that there will be a huge difference arising out of cases in which an authority does not answer when a parent makes a request for a child to be assessed. The process could give parents a bit more clout, so authorities might get quicker at answering. In that sense, the proposals are to be welcomed, although I do not think that they will translate into references to us.

Christina McKelvie: You are pretty confident that you will be able to handle the two new aspects in the bill.

Lesley Maguire: I think so.

Margaret Smith: I want to continue in the same vein. You propose that you should be given a power to state when a placement will start. We have heard evidence from the bill team that there are all sorts of complicated reasons why that would be difficult to achieve. Councils will need to deal with certain issues in order to put things in place before a placement can be granted. You have suggested that you are able to provide for that. Is that because most of the evidence that has been presented to you gives you an understanding of how long the arrangements to set up a placement should take?

Jessica M Burns: That proposal sits very well with the power to review. When parents come to a tribunal, what they want most of all is some certainty about the outcome. There can be an issue if a place at a school is, in effect, promised. Parents might anticipate that the placement will start next term, next half-term or even the next week, but they will be left disappointed if the education authority tells them that it will not be able to arrange the placement for four months or whatever. At the moment, it is not really open to us even to discuss that issue, but it brings better closure if the matter can be raised at a hearing.

The tribunal has the power to review, so if the authority—if it has been unsuccessful in opposing the placing request, and if it is directed—is able to explain the reasons why the placement could not be granted, it can ask the tribunal to amend its decision in order to defer the placing request commencement for two months, for example. If the parties agree to that arrangement, there is no reason why the matter should not come back to the tribunal. Parents will get the idea that, if they get a decision from the tribunal, there is some force behind it.

Margaret Smith: Ms Maguire said earlier that the other parents are best advert to parents for going to the tribunal and not being put off. There is a sense that it is all very well that the tribunal has acted fairly and has come to a decision that a parent is fairly happy with but that, ultimately, the tribunal lacks teeth. Is that the sort of story that goes around among parents? Such stories might put other parents off going to the tribunal because they will think, “At the end of the day, the council will do what the council wants to do”.

Jessica M Burns: That could be an aspect, although everything that I have heard on that subject is anecdotal. Parents will phone up after tribunal decisions are issued to say that the tribunal said that something was going to happen in relation to the co-ordinated support plan or the placing request, but it has not happened. We have to tell those parents that we have no powers to monitor decisions or to give directions. There are provisions for directions from Scottish ministers in section 70 of the Education (Scotland) Act 1980, but there is quite a backlog of those. It can be a slow and dispiriting process for parents.
Margaret Smith: You have pre-empted one of my next questions. The bill team referred to section 70. The committee would find it useful to have your thoughts on how effective section 70 is as an alternative, and how difficult it is for parents to go down that route because it involves the Court of Session and, according to you, there is a backlog. Can you tell us a bit more about the volume of section 70 directions? Is there a suitable alternative to what you are suggesting, which is a sort of power of review and the power to state when a placement might start?

Jessica M Burns: We do not get information about section 70s because we do not have any way of collecting or collating it. Once the tribunal has made its decision, there is no post-hearing activity. Lesley Maguire may get telephone calls from parents about that.

Lesley Maguire: It is a fairly regular occurrence for a parent to call in and say that a tribunal decision has not been implemented: one current case probably highlights the issue. A parent came to tribunal with a placing request that had been refused by the authority. The tribunal upheld the parent's reference and granted the placing request. The parent and the tribunal were under the impression that the request would be put in place almost immediately, but the school is holding back. This happened before the autumn term. The authority has told the child that it will place them but that the very earliest it is able to do that is in the summer term next year. That is unacceptable—a big chunk of that child's education will have been lost.

Margaret Smith: Absolutely. I am very concerned by that unacceptable state of affairs. It is part of what we need to change.

You said that the power to review and monitor would be useful, and I have a great deal of sympathy with that. What resources—such as personnel and, ultimately, funding—might be required to do that effectively?

Jessica M Burns: We could do it within our present funding.

Margaret Smith: That is the right answer—it is the answer that we want to hear.

On section 70s, we will probably have to take the issue up again with the Government in order to get some idea of the numbers that we are talking about.

Finally, let us say that the amendment is passed and you have the power to review. If you think that you have the people and the experience to do it, such a power would probably be very much welcomed by parents throughout Scotland. Ultimately, would you have to have available to you a sanction to make councils do what they have said they will do? Once you had carried out the review and the monitoring, you might find out that the council was not acting as it should, on the basis of what you decided earlier. What could be put in place to make councils more likely to act in the right way in response to a second decision, when they had not acted on the first decision?

11:15

Jessica M Burns: There would have to be a reporting order. The tribunal would have to make a section 70 referral direct to the minister on the ground of failure to implement a judicial decision. That would act as a fast track. I could comment annually on the number of authorities that were simply not fulfilling their obligations under the legislation. Such recording can act as a behaviour modifier for authorities—it would, at least, be an embarrassment to them.

The Convener: Your written evidence to the committee highlights your concerns about looked-after and accommodated children. The Education (Additional Support for Learning) (Scotland) Act 2004 places a loose requirement on local authorities to make arrangements that they consider to be appropriate in identifying the needs of looked-after and accommodated children. You say that there should be an amendment to the bill to address that. Why is such an amendment necessary? Is your call based on your experience? What do you think the amendment would do? How would it help to support looked-after and accommodated children?

Jessica M Burns: The new part of the additional support needs legislation tries to address wider needs—beyond the standard disability model—for children who have social, emotional and behavioural problems. It is well documented that accommodated and looked-after children are very likely to come within that category and to have low educational attainment in school. If the legislation is not made more effective in addressing those needs, it will have failed to achieve one of its primary objectives.

With that in mind, I feel that the assessment of children who come into that category should be addressed more proactively. As members will be aware, such children each have a key worker, but there is a conflict between social work and education in that a number of authorities now have children's services departments, so everything is dealt with in the same department. They are unlikely to take a proactive approach without an external third party coming in to ask whether they can evidence the fact that the child has had its educational needs addressed properly. There ought to be a mechanism in legislation to do that. I appreciate that the issue was not raised in the consultation, but I know that it was highlighted by
Her Majesty’s Inspectorate of Education. There has been a notable absence of references involving children in that category and we have had none who are under any sort of supervision order or with any sort of criminal justice contact, although we know that many such children must need that sort of attention.

The Convener: I suppose that the cases you deal with by their very nature often involve parents who are determined not to give up, because they have their children’s interests at heart and want to resolve the issue. It is unfortunate that looked-after and accommodated children do not have a champion who will pursue such matters on their behalf. We must ensure that the legislation protects such children and ensures that they have a champion, as other children do. Would an amendment such as you propose ensure that there was such protection and that the tribunal could take decisions about CSPs for looked-after and accommodated children, if necessary?

Jessica M Burns: It is almost inevitable that a review of children in that category would lead to a rise in CSPs. I am sure that people who work with looked-after and accommodated children who have additional support needs do not have their antennae up about what should be in a CSP. Holistic consideration of such children’s needs is required. A review would at least help to raise the profile of, and support, such children. I am not sure that it would lead to many more appeals to the tribunal. This is the Cinderella area of the 2004 act’s operation—so many reports have concurred with that perspective that I thought it appropriate to mention the issue, even if it is not included in the bill.

Criticisms have been made about the multiplicity of plans. I do not want to say that every child should have a CSP. The getting it right for every child—GIRFEC—initiative involves different plans and supervision orders. I am not saying that plans are the answer for all looked-after and accommodated children, but a review would provide focus and an independent assessment of the children who are least likely to have someone to advocate on their behalf.

The Convener: Your suggestion is welcome and the committee will consider it.

Bill Kidd (Glasgow) (SNP): The 2004 act applies to young people up to the age of 18. ISEA and Children in Scotland said that they would like it to be extended to young people older than 18 who are still at school. Ms Burns has proposed that the tribunal’s jurisdiction should be extended to people who are receiving education at school or through school-college partnership arrangements. Exclusion appeals are currently heard by the EAC and the sheriff. You have proposed that the tribunal should have a remit to deal with exclusions that are a result of ASN issues.

By making those proposals, are you implying that the tribunal’s remit should be extended to include cases in which there is no CSP issue? Would your proposed approach to exclusion appeals require the same complicated provisions for transfer between the EAC and the tribunal as there are in relation to placing requests? Would an increase in workload result from the proposed extensions to the tribunal’s remit? The limited administrative resources for Ms Maguire’s caseload have been mentioned, so would you be able to deal with the additional workload?

Jessica M Burns: You have asked several questions. I will deal with extending the jurisdiction to include all school-age children or young people who are in analogous education.

The increase in the number of cases would be very modest. We highlighted that because we are aware that many parents are fairly content with what is happening within the school, but then suddenly realise that their child having a co-ordinated support plan would passport them to, or make them a priority for, transitional resources. By the time the parents realise that, the child is approaching the age of 18, so when the case comes before the tribunal, it will have lost jurisdiction to address that point. Surely all children at school should have equal access to the tribunal, where transitions are a large part of the code of practice that underpins the legislation.

Perhaps Lesley Maguire will talk about children in non-school education.

Lesley Maguire: I am aware of the fact that lots of young people in the school-college partnerships who are disaffected and are not engaging properly in school must have additional support needs. The concept of extending what we mean by school education to include those children would help to address where we fall down at transition.

When they come to the end of their school education and might be transferring to a proper college course, it would be so much better if the college was engaged because they have enjoyed their time in the school-college partnership. When a child moves from school into college, there is often a lack of information for that child, and the transition can be very difficult. If the child was involved at the stage at which the school-college partnership was being delivered while they were still in school education, the later transition would, I am sure, work far better.

Jessica M Burns: I will go on to deal with exclusions—a subject that is often linked to school-college partnerships. We included the issue while being aware that it was not raised in the consultation, which probably forces any
consideration of an amendment quite far out. However, we felt that it would be appropriate to sow the seeds of the matter. We know that England and Wales are considering whether to extend to exclusions the jurisdictions of their equivalent tribunals because research shows that many children who are excluded from school have additional support needs and behavioural issues that are regarded as discipline issues rather than as manifestations of conditions on the autistic spectrum or attention-deficit hyperactivity disorder, for example.

I thought that it would be useful to use the consultation as a vehicle to flag up the fact that exclusions are a rather hidden aspect of additional support needs. I have found it to be extremely difficult to get any statistical information on exclusions and how they are dealt with, how many are successful, and how many appeals are heard by education appeal committees. The lack of information causes me concern, but if the reason for a child’s exclusion is to do with additional support needs, and we are talking about keeping children within the education system to give them as much support as possible, we cannot ignore the significance of exclusions.

**Bill Kidd:** That makes perfect sense to me.

Do you believe that the resources that are available at the moment will be enough to give the necessary support? I know that you said that the numbers will be limited, but there will be some increase.

**Jessica M Burns:** There will be an increase and, to be honest, because of the lack of information about the numbers of appeals on exclusions that have gone to education appeal committees during the past two statistical years, I am afraid that I cannot answer that question.

**Elizabeth Smith (Mid Scotland and Fife) (Con):** In many of your responses you mentioned the importance of allowing parents to be more articulate in presenting their cases, which is absolutely right. It is encouraging to hear you talk about that because it means that the appeal process will be much better.

However, we must also ensure that the relevant information is available to all parties concerned. The bill proposes to extend that provision. What are your views on greater sharing of information and on involving, for example, health workers or social services workers in the process to ensure that those who help you make decisions have the information that they need?

11:30

**Jessica M Burns:** The question of how we get different agencies to speak to each other so that we have a full picture of what is happening is very topical. The tribunal is a bit concerned about that; in fact, the power for tribunals to convene other parties is on my wish list for secondary legislation.

It has not happened before, but with a number of cases this year, health agencies and health workers have expressed concern about not being involved in the tribunal process or not being aware of what was happening until the decision was issued. Such issues are dealt with by the education authority alone and tribunals have in good faith based their decisions on reports that were produced by health workers but which have been filtered through the education authority. Those health workers have felt that such material has been out of date or has not properly reflected their practice, and the tribunal has been denied access to those views.

As a result of that, the power for tribunals to call witnesses is also on the wish list that I mentioned earlier. At the moment, only parties in the case can call witnesses. If the tribunal has, for example, commissioned a specialist report, it can call the writer of that report to come and speak to it; however, they are not classed as witnesses. It would be helpful if all those who might have significant input in supporting the child could have their views heard by the tribunal, even if that meant providing an updated written statement. At least people would not be completely unsighted of the fact that a case was going to the tribunal for a decision, and would not have cause to be unhappy with us in that respect. At the moment, we simply have no power to ask for this or that report or to call a particular witness.

**Elizabeth Smith:** That is very encouraging. As some stakeholders told us in our round-table discussion, however, the other side of the coin is the huge variation in authorities’ abilities to cope with such information sharing. Although some are first class in how they bring together education, health, social work, planning and other departments, in other authorities departments just do not speak to each other. Even if we change the law, how confident are you that its application will improve in local authorities? After all, that will be key in delivering better services.

**Jessica M Burns:** This might be anecdotal, but I understand that a lot of work has been carried out on engaging health boards. A project on that is on-going. That approach seems to have worked well: I find it ironic that communication between education authorities and health boards seems to be more positive than communication between education and social work departments in the same authority. I suspect that that reflects the fact that social work departments have many statutory obligations that need to be prioritised and that sometimes it is more difficult to put pressure on
colleagues in the same organisation than to ask for support from external organisations such as health boards. However, I acknowledge the point about ensuring that the process is joined up.

**The Convener:** That concludes the committee’s questions. I thank the witnesses for their attendance this morning, for their written submission and for their willingness to engage with us. You have given a commitment to respond in writing to some of Mr Macintosh’s questions. That information will be helpful, so we look forward to receiving it when you have had an opportunity to put it together.

I suspend the meeting for five minutes.

11:35

*Meeting suspended.*
10 December (30th Meeting, 2008 (Session 3)) – Written Evidence

Additional Support Needs Tribunals for Scotland

10 December (30th Meeting, 2008 (Session 3)) – Supplementary Written Evidence

Additional Support Needs Tribunals for Scotland
On resuming—

Education (Additional Support for Learning) (Scotland) Bill: Stage 1

The Convener: I welcome Alex Neil, who has joined us for the second item on our agenda, which is stage 1 of the Education (Additional Support for Learning) (Scotland) Bill.

I also welcome Lorraine Dilworth, who is the advocacy manager with Independent Special Education Advice (Scotland), and Iain Nisbet, who is the head of the education law unit at the Govan Law Centre.

The witnesses will be aware that the bill allows for out-of-area placing requests to be made directly to local authorities. Are your organisations in favour of that? Is it a welcome change? Does the proposal strike the right balance?

Iain Nisbet (Govan Law Centre): The bill will do no more than put things back to how they were before the Education (Additional Support for Learning) (Scotland) Act 2004 came into effect. Under the old record of needs system, it was always assumed that an out-of-area placing request to the authority whose school someone sought to be placed in was competent. To revert to that position is only right and proper, as it gives the parents of pupils who have additional support needs the same rights as parents of pupils who do not.

Lorraine Dilworth (ISEA Scotland): I agree. Parents must have equality across the board, so they need to be able to make placing requests of other local authority areas.

The Convener: The bill proposes that, where a co-ordinated support plan is in place, a placing request appeal will be heard by the tribunal. Are you content with that suggestion?

Lorraine Dilworth: I agree. Parents must have equality across the board, so they need to be able to make placing requests of other local authority areas.

The Convener: The bill proposes that, where a co-ordinated support plan is in place, a placing request appeal will be heard by the tribunal. Are you content with that suggestion?

Lorraine Dilworth: Yes, because we have been involved in cases in which there has been doubt about whether the tribunal has been competent to deal with the matter at hand.

In my consultation response, I said—as Jessica Burns, the president of the Additional Support Needs Tribunals for Scotland, said to the committee last week—that any such case involving a child who has additional support needs should go before the tribunal because the process by which it is decided whether a case is dealt with by the local authority’s appeal committee, the sheriff court or the tribunal is complex. It would be much more streamlined and cost effective if parents simply went to the tribunal.
Iain Nisbet: I have concerns about using the CSP as the criterion for the decision about which appeals go to the tribunal and which go to the education appeal committees. The system is complex and is not well understood by anyone. In the Gordon case—which the committee has discussed at previous meetings and which has, I think, led to some amendments—the parent was wrongly advised about what was the best forum for the appeal. That wrong advice was given by the appeal committee, the tribunal and the authority: all those bodies had interpreted the law incorrectly and even now there is confusion. I dealt recently with a case in which the authority had initially indicated that there would be a CSP, but it changed its mind. The question was whether the appeal on the placing request would remain at the tribunal.

Confusion will remain under the proposed system and the proposed amendments would serve only to make the system much more complex. I read them on the train to Edinburgh today and I do not see the rationale behind the suggested dividing line. It would serve parents, pupils and authorities better if there were a simpler dividing line. Either we should move all additional support needs placing requests to the tribunal, or we should come up with a simpler dividing line. The Administrative Justice and Tribunals Council and the president of the additional support needs tribunal have suggested that it would be simpler if, for example, all placing requests for special schools were heard by the tribunal and other placing requests were heard by the appeal committee. That would be easy to administer and it uses a sensible criterion that is based on consideration of the likelihood of cases requiring the expertise of the tribunal.

The Convener: I am not asking you to second-guess the Government, and we will pursue this question with the minister, but can you think why the Government has drafted the amendments as it has rather than going for the much simpler approach that you are proposing, which appears to offer more transparency and be easier for parents to understand?

Iain Nisbet: There appears to be an idea that the tribunal should be focusing on CSP cases. Clearly, those who have drafted the bill have tried to ensure that all CSP cases in relation to which there are placing requests are heard by the tribunal. There seems to be an attempt to address the Gordon case’s surprising outcomes, which were not what Parliament had in mind when the bill was drafted.

However, the proposals might end up causing problems that we do not have at the moment because they will increase the complexity of the process. That is particularly true of the proposals that involve remitting forwards and backwards between sheriff courts, appeal committees and the tribunal. Under those proposals, a parent might be involved in a case that begins in one forum, switches to the tribunal and then switches back again. That would be unnecessary and would serve no-one’s interests. That is probably why we have ended up with the muddled position that is being presented to us. It is an attempt to get back to the original intention of having a body that deals with CSP cases. However, as it is called the additional support needs tribunal, I can see no reason why a different and simpler dividing line could not be applied.

Elizabeth Smith: When the committee heard from stakeholder groups, we were told that there could be some difficulty if two local authorities were involved in the process. Do you share that concern?

Lorraine Dilworth: I do. One problem involves the fact that health boards span authority boundaries, which can cause difficulties, and the other involves cost implications. When a parent makes a placement request to a host authority—we have put this in writing many times—the authority will consider how much extra it will cost for the child to be placed. The financial memorandum details the costs of dispute resolution, mediation and review of a CSP, the cost of which is, I think, £800. I cannot imagine that any local authority will not look at that and say, “This is going to end up costing a minimum of £800 a year, plus staff time.”

There is also an issue about the fact that taxpayers in one local authority area will be paying for the education of a child who comes from another area. I think that such children, and the parents who make the placement request, will be disadvantaged in making such requests to other local authority areas. It will be problematic. We have heard from parents who have been told by a potential host authority that it does not take placing requests from outwith its area, and from parents who have been told by their home authority that they cannot make a placing request to another authority. I foresee problems.

Elizabeth Smith: Local authorities have different special school provision and there might be transfers between Scotland and England. Will such issues exacerbate the problem?

Lorraine Dilworth: The approach that is taken in the bill to mediation and so on will exacerbate the problem, given the costs.

Elizabeth Smith: If a child’s best interests would be served by their attending a private school rather than a local authority school—irrespective of whether the school is north or south
of the border—do you foresee difficult negotiations with the private sector?

Elizabeth Smith: Can we do more to the bill to ensure that we minimise problems that occur when two local authorities are involved? Should we consider other issues?

Iain Nisbet: I am concerned that section 5, which attempts to clarify which authority bears responsibility, will not do the job that it is trying to do. I hope that problems to do with cross-boundary disputes in which authorities argue about who should bear the cost, which Lorraine Dilworth mentioned, will be resolved to some extent by last week’s court decision by Lord Penrose in East Renfrewshire Council v Glasgow City Council. The ruling should put at least some problems to bed.

There is a difficulty with section 5 of the bill, which refers to the authority being responsible for the child’s school education and links it to whichever authority is the “authority for the area to which the child or young person belongs”.

That concept of a child belonging to an authority comes from the Education (Scotland) Act 1980, and it depends on where the parent is resident. For children whose parents live in different local authority areas, a new confusing factor will be added by the bill because authorities will become involved that might hitherto have had no involvement with the child’s education. That probably needs to be reconsidered.

11:45

The Convener: Claire Baker had some questions about costs, which it might be best to pursue now.

Claire Baker: We have discussed the concern that a burden might be placed on certain authorities because of the types of schools in their areas. Concerns have also been expressed about the financial arrangements that will be made between two authorities. We asked the bill team about the matter, and they said that that will be dealt with under the code of practice to accompany the eventual legislation. Are you happy with that? You have just spoken about a need to reconsider section 5.

Iain Nisbet: The bill, with the clarification that is provided by the code of practice, spells out the current position fairly clearly. The home authority will need to bear the additional support needs costs of a child attending a school in a different authority. That is the decision that the court has come to. Section 23 of the Education (Scotland) Act 1980 act spells it out relatively clearly. There is probably no need for further legislative change in that respect, notwithstanding what I said about the need to clarify the provisions of section 5 of the bill.
The problem is probably one of practice. Where there is a prospect of additional costs, local authorities can be reticent about letting parents know that they have options in neighbouring local authority areas. In our casework, I have come across the problems to which Lorraine Dilworth referred. The host or receiving authorities can, for their part, be reticent about accepting placing requests from parents in other local authority areas, because they know that they might have a fight or an argument on their hands in trying to get the money from the other authority.

I do not know whether the code of practice is enough in itself. Section 23 of the 1980 act contains a dispute resolution mechanism for cases in which two authorities cannot agree how much money should be transferred between them. Such cases could go to the Scottish ministers to determine. Lorraine Dilworth and I are probably united in saying that we do not really mind what the arrangements behind the scenes are for two authorities arguing over who is paying what to whom, as long as that is not used as an excuse to delay or refuse placements that otherwise ought to be granted.

Claire Baker: Evidence that we have taken indicates that local authorities may refuse requests on the basis of cost. Could Lorraine Dilworth give us any examples? Is that a common complaint? Is that something that parents have to deal with?

Lorraine Dilworth: Placing requests that have been refused to parents who have approached us tend not to have been refused on the basis of cost alone. What is the wording, Iain?

Iain Nisbet: It is to do with the balance between cost and suitability.

Lorraine Dilworth: Yes—the grounds of “respective suitability” and “respective cost” are the argument that local authorities tend to use. The requests that we have been dealing with have been for independent and grant-aided special schools. In the case of a local authority school, the reasons are usually that there are no places, or the authority would have to employ another teacher, or are to do with the age, aptitude or ability of the child. When it comes to independent school places—for example for the Royal Blind school or Donaldson’s school for the deaf—authorities use the grounds of respective suitability and respective cost. Those two issues feature in the one reason that is given for refusal.

Alex Neil (Central Scotland) (SNP): The existing legislation refers to reasonable costs. In the case of Boyd v South Lanarkshire Council, which I know Iain Nisbet is familiar with, one of the council’s arguments was that it was beyond reasonable cost to locate the child or to agree to the application for a placement at a school south of the border, as it was in that case. Is there a need for a clearer definition in legislation of what constitutes reasonable cost?

Iain Nisbet: The 2004 legislation says that the court or tribunal should have “regard both to the respective suitability and to the respective cost”.

Only if it would be unreasonable to place the child in the school of the parents’ choice are they empowered to refuse the placing request.

There is a related issue in section 4 of the 2004 act, on the authority’s duty to “make adequate and efficient provision for such additional support as is required by that child”.

However, that duty does not extend to anything that would involve “unreasonable public expenditure being incurred.”

There are various points in the existing legislation where cost is brought in.

The code of practice already does a reasonably good job of explaining what is meant by “reasonable costs”. It also says that costs should not be the sole consideration, and that authorities should consider to what extent a resource or something else that carries a cost would benefit more than just the one child—it might be something that could have a wider benefit, and costs would be considered as part of a long-term view, too. Any initial cost should be considered if it might bring a benefit for a number of years. Given the wide variety of things that might involve costs, that is about as far as the code of practice could reasonably be expected to go.

Alex Neil: The code of practice has, at the moment, the status of guidelines. Is there a need to put it on a statutory footing?

Iain Nisbet: It is already on a statutory footing, to an extent. Not all Government guidance is mentioned in legislation. In this case, there is a requirement for tribunals, courts, authorities and appropriate agencies to “have regard to” the terms of the code. My experience has been that courts and tribunals accord it appropriate weighting.

Lorraine Dilworth: Yes—I have found that the tribunals pay a lot of attention to the code of practice. Officials have acknowledged that certain parts of the code of practice need to be rewritten, because they are so vague or are open to many different interpretations. I am not sure whether the code needs to be put on a statutory footing, but it certainly needs to be tightened up, with more explanation added to it.

Alex Neil: I return to the Boyd v South Lanarkshire case. One of the issues that arose in that case was the alleged disregarding of
elements of the code of practice by the council. That caused some of the problem, albeit not all of it. Are you saying that clearer definitions are required in parts of the code of practice?

Iain Nisbet: The code could certainly do with some redrafting. Parts of it perhaps do not go far enough, while other parts need to be redrafted because they are misleading with regard to some of the regulations. Overall, however, the code is a useful document, and I do not have any concerns that it is not being accorded appropriate weighting by tribunals and other decision-making bodies.

Alex Neil: I return again to the Boyd v South Lanarkshire case. And there are other cases like it. In that case, a sheriff court took a decision—on a legal point—not to award, or agree with, a placement. The child concerned still has five or six years of formal education to go. Would you agree that, in such cases, it would be appropriate to have the right to appeal to a tribunal, notwithstanding the decision that had been taken by a sheriff court? Should the bill make it possible to ask the tribunal to revisit decisions in such cases?

Iain Nisbet: It is certainly open for parents to make a fresh placing request at any time. The legislation states that, in relation to appeals of placing requests, a 12-month gap must be left, so in cases such as the one Alex Neil describes, in which the child still has five or six years of their education to go, it would be open for parents—

Alex Neil: You would need a CSP.

Iain Nisbet: To make a fresh placing request.

On who would decide the appeal, Alex Neil is right that it would go to the tribunal only if there was a CSP, unless Parliament were minded to change the criteria, as we have been discussing. The case that he mentioned involved a special school. If Parliament were to adopt the proposal by the president of ASNTS that all special schools cases be determined by the tribunal, that case and others like it would be determined in that forum.

Christina McKelvie: I turn your attention to who has responsibility for reviewing a CSP. The bill proposes that the host authority will take responsibility for reviewing the CSP and that the review should happen

"as soon as practicable after the date of transfer."

Are there any difficulties in sharing information and co-ordinating provision between local authorities, especially in cases in which there is an out-of-area placing request?

Iain Nisbet: When there is an out-of-area placing request, the home authority—the authority in which the family lives—no longer has any, or at least has very little, involvement in the child’s education. In such cases the provision of education tends to be relatively straightforward. That is probably a better system than the old record of needs system, in which one authority was responsible for things that happened at school, another authority was responsible for the educational psychology input and so on. That could sometimes get a bit difficult. When there is an out-of-area placing request, the authority in whose area the school is will take control. That is probably a good system and a better way of dealing with the situation.

When an authority has bought a place in a school in another authority’s area, or has reciprocal arrangements with another authority—as sometimes happens between neighbouring authorities—it is up to those authorities to ensure that whatever arrangements they agree to in respect of that external support work well. My experience is that when authorities have come to such arrangements themselves they tend to have fairly good arrangements. I do not have particular concerns about how sharing of information or co-ordination between authorities works in such circumstances.

Christina McKelvie: Does ISEA have any different experiences?

Lorraine Dilworth: I have a case in which a family has moved from one of the islands to a mainland town. The CSP was completed to the parents’ satisfaction on the island and was very detailed. The receiving authority has, in the parents’ opinion, ignored the CSP and is in the process of reviewing it—as is an authority’s right because the child has come in. As I have said to the parents, the process will take a long time because none of the professionals knows the child and they need to get to know them. In the interim, the child is not receiving what is currently in the CSP. We have suggested to the authority and to the school that they should contact the professionals on the island who have worked with the child, but a barrier has gone up and they have said, “No. We’ll do our own assessment.” In that case, there are particular problems.

Christina McKelvie: Do you think that the bill will address such problems?

Lorraine Dilworth: Time limits need to be placed in respect of by when reviews of CSPs should be done. It would be helpful to the children and the parents if the local authorities worked within such timescales.

Christina McKelvie: Yes—the bill currently just says “as soon as practicable”.

Lorraine Dilworth: Yes. The matter can be referred to the tribunal if authorities do not meet the timescales. A number of references that were made to the tribunal within the first and second
year were about local authorities not complying with the current timescales. It is black and white.

Christina McKelvie: Timescales are set for other provisions in the bill and that is something that you would welcome for this provision.

The issues that you have just described are quite different from those that the Govan Law Centre outlined, which says that it has not come across any particular problems. You have given an excellent anecdotal example of such problems. Will the provisions of the bill have a positive or a negative impact?

12:00

Lorraine Dilworth: I do not quite understand the question. Could you repeat it?

Christina McKelvie: The responsibility for reviewing CSPs will be with the host authority: that will address the anecdotal example that you gave. However, the Govan Law Centre remains to be convinced on that point. What would be the impact of the specific provision that is proposed?

Lorraine Dilworth: It is a difficult issue, because the bill will set up a two-tier system. If a local authority places a child in another authority’s school, the home authority is still responsible for everything. However, if the parent makes a placing request to the host authority, everything changes. We will be setting up another tiered system for parents. Either host authorities that accept placing requests from other authorities should take over all responsibility for the CSPs of the children concerned, or home authorities should remain responsible. When legislating in this area, we keep setting up different tiers for parents, which is confusing. All cases should be dealt with in one way—they should not be split up, as is the case at present.

Iain Nisbet: I do not see that as a problem. In practice, where there is a transfer of responsibility, authorities are reviewing CSPs. I am generally in favour of the proposed amendment, which provides a safeguard by obliging authorities to do what they are probably doing in most cases.

Christina McKelvie: Lorraine Dilworth gave the example of a family that obtained a CSP that was to its satisfaction. A huge amount of time, effort, money and commitment must have gone into getting to that stage. Parents are sometimes not absolutely happy with CSPs, so there has to be compromise. If the provision addresses the issue that has been identified, it is to be welcomed. It will be good if host authorities retain responsibility for reviewing CSPs. However, if people move to another authority area—as in Lorraine Dilworth’s example—and must go through the whole process again, the needs of the child are not being addressed in the best possible way. I do not understand why, if an extremely detailed CSP already exists, an authority would go to the expense of putting the same amount of work into another CSP, which may not be to the full satisfaction of the child’s parents.

Lorraine Dilworth: The quality of CSPs in the 32 local authorities in Scotland is variable. Some authorities produce excellent CSPs, but others produce one-liners. Why should people seek a CSP when what they get is a one-liner? We have seen that happen.

Iain Nisbet: That is certainly true.

Aileen Campbell: You touched on mediation and dispute resolution when speaking about section 23 of the 1980 act. In its written evidence, ISEA notes that about 75 per cent of parents are unaware of the fact that they can request mediation and that 80 per cent have no or poor information on their right to request dispute resolution. What do you see as the reasons for those high figures?

Lorraine Dilworth: The information comes from responses to a questionnaire that we sent to the 150 parents with whom we had dealt most recently. There is a lack of information. Some local authorities provide access to the 2004 act, their policy and so on through their website, but in other cases that information is not there.

Parents inform us—we have also seen it—that local authorities are still sending letters that do not give them the right of appeal or information about how they can access mediation and dispute resolution. Iain Nisbet may agree with me on that. Parents are struggling to find out how they can access dispute resolution, which is quite a complex issue. Our questionnaire showed that there is a lack of information for parents. They are happy to go to meetings, but they do not know that they have the right to get papers, agendas and reports. How can someone play a full part in discussions with professionals about their child’s education if they do not have the necessary information?

Iain Nisbet: I echo some of the points that Lorraine Dilworth made, which reflect our experience. We run an education law helpline that is funded by the Scottish Government and receives about 600 calls a year. If the course of action that we are recommending is dispute resolution, it is unusual for the parent concerned to have heard of that—it comes as news to most people. My impression is that mediation has a rather higher profile than dispute resolution. Part of the problem is that all but one of the dispute resolutions that the Scottish ministers have received have related to the failure to provide additional support. When the ground for dispute
resolution is a decision, there is a trigger that obliges authorities to bring the procedure to parents’ attention, but when the issue is not a specific decision but failure to provide support, there is no trigger—nothing obliges authorities to let parents know that they have the right to dispute resolution. That may be the reason for the lack of knowledge that has been identified.

We are undertaking a training process for a number of advocacy groups in Scotland. One of the points that we are trying to promote to them is that dispute resolution is available and, in my view, works well. We want more advocacy groups and parent groups to be aware of it and to know how to make use of it.

Lorraine Dilworth: We have flagged up the fact that, under current legislation, parents must write to the local authority to request dispute resolution—the local authority is the gatekeeper on the issue. We find that an increasing number of local authorities are writing back to parents to tell them that dispute resolution is not available. In such cases, we have to seek a section 70 order. Even when we write requesting dispute resolution on parents’ behalf, authorities do not pass cases on.

Aileen Campbell: That is concerning. You said that some local authorities are good, whereas others provide CSPs that are one-liners. I do not want you to name and shame particular authorities, but have you noticed a trend? Are there clear patterns that indicate where more best practice should be shared?

Lorraine Dilworth: There certainly are. Some local authorities have very good practice; unfortunately, quite a few do not.

Aileen Campbell: Is there enough sharing of good practice?

Lorraine Dilworth: We provide feedback to Scottish Government officials on a regular basis.

Aileen Campbell: Presumably, many of the parents who know how to ask for mediation or dispute resolution are more confident than others. Many parents who are lacking in confidence may need extra help to enable them to access those procedures. In an informal discussion, we heard about the situation of Gypsy Traveller children. Is there a definite need to do more to help those children’s families, given that they travel a lot and pass through many different local authority areas?

Lorraine Dilworth: We have identified a need in that area. Armed forces children are also on the move and spend only short periods in local authority areas. Your suggestion that some families are more able than others is interesting. The majority of the 150 families that took part in our survey had an income of £25,000 or more. The survey showed that those families were able to access our service, because we do not advertise. We are concerned about where the support is for low-income families. Families with an income of £25,000 and above require our assistance to attend meetings with them and so on. We have dealt with parents who are solicitors, but because they are so emotionally involved in their child’s case, they need someone to come in and support them.

Aileen Campbell: Are those problems best addressed in the bill or in the code of practice?

Lorraine Dilworth: A lot of work must be done to get the information out to parents. Parents are hard to find, because they come to us only when they are at crisis point because the child has been excluded and so on. I do not know whether Iain Nisbet finds that, but it is certainly the case for our service. Enquire is working on producing information, but the issue is getting it out to parents. The more that parents know about their rights and their children’s rights, the more CSPs we will see.

Iain Nisbet: Section 30 of the 2004 act said that for the first two years of implementation local authorities should pay particular attention to children and young people who had a record of needs. Local authorities were given a two-year period to ensure that all those children were being provided for and that consideration was given to a CSP. It is now time to do the same for the groups of children that Her Majesty's Inspectorate of Education’s report states are not being well catered for by the act. We would include in that bracket the families to which you have referred: looked after and accommodated children; young carers; and children and young people with mental health issues. Those three groups are identified by HMIE as being examples of groups for which local authorities are not catering well. The bill should state that we have had our two years when we have looked after children who had a record of needs and paid them particular attention and that we should now do the same for the groups that are being left behind.

Aileen Campbell: I am perhaps going back to the same issue again rather than asking you another question, but when you refer to local authorities being good at getting information out there, what are they doing? You mentioned that they have provided the opportunity to access information online, but are they doing more than that? Not everyone has access to information online.

Lorraine Dilworth: They also send leaflets and so on out to parents and the professionals are also providing parents with information.
Some parents who are teachers who have come to us did not know about the 2004 act. Even though they are teachers and have a child with additional support needs, they did not know what their rights are. They are teachers working in mainstream schools.

In local authorities where there is good practice the parents have received leaflets, they know how to access the authority's website and the information is easily accessible. However, for one local authority, which I will not name and shame, you could not even find the name of the director of education on its website.

Margaret Smith: Although you have a problem with some elements of the bill, it is coming through to us that, for the most part, most of the people from whom we have heard—formally or informally—are content with the general direction of the bill and what is in it. However, they feel that it does not go far enough and that this is a missed opportunity to look at a matter that, although we all agree with it in principle as set down by the Parliament, and it is something that we all want to happen, has in reality not been happening.

When the committee took evidence from the bill team, we asked about issues such as definitions, the timetable, the rights of parents to receive information and all sorts of matters. The response was often that those issues would be covered in the code of practice or in secondary legislation. I am quite uneasy about that, because we have reached the position that we are in despite having had primary legislation, secondary legislation, a code of practice and a historic concordat with local government, which one would think would mean that local government would do what the Government wants it to do on such issues. I am not making a party-political point. It is a fact that a lot of things have been in place, but it seems from what you are telling us that the system is in a pretty critical condition and is not delivering what the Parliament wanted it to deliver. Are you content that such issues should simply be covered in codes of practice, or should we put much more in the bill to ensure that people know what the law requires them to do?

Iain Nisbet: It is probably a little harsh to say that the state and operation of the bill are critical. I would not go that far. I will be fair to local authorities, which I do not like to do too often. I am always conscious that, in my work, I see only complaints or cases in which things are going wrong—It will be the same for Lorraine Dilworth. People rarely phone us to tell us what a good job their school is doing, but we know that there are plenty of examples of schools doing good jobs. That is an important point.

The legislation has taken a step forward from where it stood when we had the record of needs system. Things have improved overall. That said, things undoubtedly need to be done with the code of practice and subordinate legislation, and I agree that more needs to be put in the bill. If that is not done, Parliament will have missed the opportunity to address issues.

The point of the HMIE implementation review was to revisit the legislation. The bill does not cover serious and important recommendations that have been made, and I am concerned that subordinate legislation and the code of practice are not capable of addressing those recommendations.

Margaret Smith: Would you give us examples of what you mean?

Iain Nisbet: The five proposals made by the consortium of organisations in the joint response to the committee's call for evidence address the matter. As a group of organisations that work throughout Scotland with many thousands of families that the bill will affect, we tried to identify issues that HMIE picked up, or that arose as a result of court cases that required legislative responses. I have already mentioned the three groups that the bill needs to cater for. The definition of additional support needs to be reconsidered and transition questions, for example, need to be considered.

Lorraine Dilworth: I agree with much of what Iain Nisbet says. We deal with parents who are at crisis point. There is good practice out there, but we do not hear from a huge number of parents in the middle, such as Gypsy Travellers, who do not know their rights or who to turn to. We are especially concerned about looked-after children, a very low number of whom have co-ordinated support plans, because social workers are their guardians—and they work for local authorities. Something needs to be done about that.

When the 2004 act was being drafted, we made a number of recommendations and expressed concerns in written and oral evidence to Parliament. I am sorry to say that, over the past couple of years we have ticked off things that we said would happen as they happened. Some of the bill must be changed. It does not go far enough in tackling what is happening at the grass-roots level. We want the legislation to be successful. I am sure that every MSP who passed the 2004 act wanted to help the most disadvantaged children in our society. However, my organisation has done road shows throughout Scotland and spoken to parents in every local authority area, and it knows that the legislation is
not, unfortunately, delivering on the ground. We need to make changes in order to deliver on the ground.

Margaret Smith: I would like to ask about timescales. We heard from the president of the ASNTS that the tribunal had the ability and the resources to take on a fundamental role in monitoring whether its decisions had been implemented by local authorities within set timescales. It concerns me that, if parents are not happy about something, they are expected to deal with it themselves. A tribunal may have considered the issue and made recommendations, but if the tribunal has no powers to monitor the implementation of the recommendations, or to impose sanctions if they are not implemented, it will again be up to the parents to resolve the issue. Could we improve the situation by giving the tribunal more involvement, or by giving it the power to impose sanctions or take other measures?

Lorraine Dilworth: ISEA has dealt with quite a few tribunal cases. When the local authority has not implemented the tribunal’s decision, parents have sometimes had to find a lawyer and threaten to go to court to get the decision implemented.

I spent three days on one particular case, relating to the contents of a CSP. We rewrote it, the tribunal accepted it, and the local authority eventually accepted it. That child must now have one of the best CSPs in Scotland. However, the local authority has not implemented one thing within that CSP, and six months have now passed. We have had to resort to a section 70 complaint.

In another case, the local authority was told that it had four weeks in which to issue the CSP. Two months later, the local authority had not done it.

I therefore agree that the tribunal needs monitoring powers to ensure that its decisions are being carried out. If the tribunal does not have those powers, it will need some mechanism by which it can fine a local authority. Parents should not have to pay out of their own pockets or go through even more stress while trying to get a tribunal decision implemented.

Iain Nisbet: I would sound a note of caution on giving the tribunal monitoring powers. Unless you were also going down the route of giving the tribunal powers to attach financial penalties or something along those lines, I would be concerned about giving the tribunal a monitoring power. If the tribunal could call the matter back in, without there being any definite end point, it could disadvantage parents because it might prevent them from taking legal action—a judicial review action for the implementation of the statutory duty—because the court would say, “You can’t come to us just now, because there’s another remedy available to you.”

Giving the tribunal a monitoring power could mean that the legal option for parents would be delayed. If there were going to be some mechanism, I think that it would have to be at the level of a power to impose financial penalties. I am not sure how realistic that would be.

Issues certainly arise when a child has a CSP and it is not being put in place. There are remedies, but as Lorraine says, it then goes back to the parents to take the initiative.

Margaret Smith: Is there any way in which the tribunal could take the case to court? Could it be up to the tribunal, rather than the parent, to make the decision? I am not suggesting that that would happen in many cases; if the tribunal had the power, minds might be more focused on what should have been done—perhaps much sooner—on the back of the tribunal’s original decision.

Iain Nisbet: You would have to discuss with the tribunal how comfortable it would be with that idea. It might compromise the tribunal’s independence if it were seen to be acting directly on behalf of one party in a dispute—even after the dispute had been resolved.

Margaret Smith: I was taking advantage of the free legal advice while you are here.

Iain Nisbet: All our legal advice is free.

The issue needs to be considered, but remedies are available. I would be uncomfortable with giving the tribunal powers unless they were substantial.

Margaret Smith: Lorraine Dilworth mentioned section 70 requests. The bill team mentioned that measure to us as well. The committee is keen to get an idea of what going down that route means for parents. Is it successful? What stress levels are involved? Is it realistic for most parents to say that the final option is to go to court?

Iain Nisbet: I will defer to Lorraine Dilworth on that, because she probably has much more experience of it than I have.

Lorraine Dilworth: A section 70 request involves writing to the Government to say which part of the legislation the authority has failed on. How can most parents do that? When I worked on such cases many years ago, solicitors used to draft the letters, but ISEA does it now. We have lodged about five, I think. Such cases take time, so the stress levels for parents are sky high, as in the one that I mentioned on the CSP. It takes months to get to and go through the tribunal. Then we have to leave it for a couple of months before writing to the authority to say that it has not implemented the tribunal’s decision, after which we have to write to the Government to say that we are making a section 70 request. The Government then writes to the local authority, which then writes back and then a decision is taken. I think that we
started to lodge the requests in May. None of the five cases has concluded yet.

**Margaret Smith:** Is that the first time that you have used the procedure? We are trying to get a sense of whether it is successful for parents.

**Lorraine Dilworth:** We have not had any success yet.

**Margaret Smith:** You have not had any experience of a successful conclusion to a section 70 request.

**Lorraine Dilworth:** Not so far.

**Iain Nisbet:** Because the Govan Law Centre is a firm of solicitors, we would tend to take court action on the non-implementation of a CSP or something similar. Obviously, that has its own issues, such as whether legal aid is available depending on the parents' income. However, if the case is urgent, the process can be expedited, and the Court of Session is pretty good at prioritising cases that involve children with disabilities. The court approach can be effective. It is a big stick to use, and the issues are how comfortable parents are with the process and the financial implications of going to court if legal aid is not available.

**Claire Baker:** We explored with the bill team and witnesses from the Additional Support Needs Tribunals for Scotland the provision to allow a tribunal to review its own decision. The president of the ASNTS said that the provision would be useful if a decision required further clarity, and the bill team said that the subordinate legislation containing the details would have to be consulted on. When we took evidence from stakeholders in a round-table session, they expressed caution about the idea of a tribunal being able to review its own decisions. What are the witnesses’ views on the issue?

12:30

**Iain Nisbet:** It is a power that tribunals generally have. There is certainly an administrative use to it in cases in which there is an error that has not been picked up and on which both parties can agree. However, I have real concern about allowing parties to come back to the tribunal with new evidence or to request clarification of the detail of the tribunal's decision in light of new information.

Given the nature of the decisions that the tribunal takes, it is not like an employment tribunal, which considers whether a decision was fair at a fixed point in time. The additional support needs tribunal's decisions are, quite rightly, to do with a child’s stage of development and needs at the time of the hearing. There will always be new evidence. Therefore, I am concerned that it will be much easier for an authority to say, “An assessment that was carried out by our educational psychologist in the week after the tribunal has provided new information that the tribunal must consider.” There is the potential to undermine the security of a decision that is in favour of a parent.

I am not against a review power as such, but I would be very concerned if parties were allowed to revisit the content of the decision on the basis of new information.

**Claire Baker:** The bill team said that the detail of what could be reviewed would be dealt with in subordinate legislation. Is that the right approach? Will we be able to return to the issue at that stage?

**Iain Nisbet:** The issue is for subordinate legislation, which is where the rules of the tribunal are to be found. This committee, or another committee, will deal with the subordinate legislation. I have expressed my concerns about the power, as we did during the consultation. We remain concerned.

**Lorraine Dilworth:** I share those concerns. We find that many more local authorities are employing advocates to represent them at tribunals, along with their in-house solicitors and senior officials. We would be concerned if the tribunal had the power to review its decision on a point of law, because the parents whom I accompany to tribunals are not legally qualified—although I am learning quickly. A parent might be able to get legal aid for advice and assistance from a solicitor, but the solicitor would not attend the tribunal and could only view the decision. If an authority asks the tribunal to review a decision on a point of law, it will be represented by its advocate and senior solicitor, who can easily pick up on points of law, whereas the parent will be represented by me or Iain Nisbet—to whom I mean no disrespect.

Inequality of arms is a human rights issue and is increasingly a problem. I can understand why local authorities use advocates and senior solicitors to contest, for example, requests for a placement at Daldorch House school, which would cost an authority more than £100,000—although inequality of arms remains an issue in such cases. However, this week a local authority employed an advocate to contest a parent’s reference on the contents of a CSP. We were asking only for what the child was receiving, but the authority was represented by an advocate, senior officials and a senior solicitor.

The tribunal tries to be user friendly, but authorities are coming in heavy handed. That needs to be stopped. The officials who made the decision have all the information. Why cannot they represent the authority? Why do they need senior counsel? The approach is damaging the tribunal’s
ethos; the tribunal is no longer user friendly. I am often asked, “Mrs Dilworth, will you sum up your legal arguments?” I reply, “I’m not a lawyer, so it won’t be a legal argument.” However, the authorities are represented by people who can make the legal arguments.

Claire Baker: Why are some authorities taking such a heavy-handed approach?

Lorraine Dilworth: They want to win at all costs. As I said, authorities used to bring in senior counsel when the issue was a placing request, but now they are doing so to contest the contents of CSPs.

We got the tribunal to overturn a local authority decision not to open a CSP for a child, but the authority lodged its appeal with the Court of Session this week. I do not think that the parents who are involved qualify for legal aid, so they might not be able to defend the case in the Court of Session, whereas the local authority is using public money to take the case to that court.

Claire Baker: Will you tell us which council is involved?

Lorraine Dilworth: I do not know whether I am allowed to do that.

Iain Nisbet: The name is lodged in court.

Lorraine Dilworth: It is the City of Edinburgh Council.

Claire Baker: That information is helpful.

I understand that the equivalent tribunal in England has the power to review its decisions. Do you know or have experience of how the system operates there?

Lorraine Dilworth: We have a sister organisation in England, which has said nothing negative about the system, but I urge caution, because the English process does not last as long as our tribunals in Scotland—it works differently.

Claire Baker: That answer is helpful. Thank you.

Ken Macintosh: I will continue that line of questioning. What are your suggestions for reducing the use of the adversarial approach at tribunals?

Lorraine Dilworth: My solution is that the people who have made the decisions should be present to support them.

Ken Macintosh: Last week, the president of the tribunals gave evidence that, in most cases, the representatives were education officials. She did not say that no advocates were present; she said that they—or, more commonly, solicitors—were present occasionally. Usually, education officials are the representatives, but you think that a definite trend exists. Should we ban lawyers from tribunals? Could that be done? Could the role of lawyers be restricted at tribunals?

Lorraine Dilworth: The code of practice said that parents and local authorities would be discouraged from bringing solicitors and advocates. That part of the code is obviously not working. I think that I have attended more tribunals in Scotland than anybody else and I see a trend of authorities using solicitors and advocates more than officials. I believe that as officials make the decision, they should come and state their case. That would make the playing field more level.

Parents need support. As Iain Nisbet said, he is providing training to get more advocacy groups up and running. If many more advocacy groups were up and running, we could even do away with Iain Nisbet’s services for representing parents. However, we need a level playing field.

Iain Nisbet: I cannot speak with much authority on the issue, as I am a solicitor who appears at the additional support needs tribunal, so I have been only in situations in which both sides were legally represented. As Lorraine Dilworth said, we would like enough advocacy organisations throughout the country to be skilled and experienced so that we do not need to attend tribunals and can concentrate on the education law issues that require solicitors, such as appeals, sheriff court actions and discrimination cases. That is the direction in which we are moving. We are trying to do ourselves out of a job. Other than in exceptional cases, neither side should be legally represented. That is the appropriate way for tribunals to work.

Ken Macintosh: If the code of practice discourages legal representation, can the tribunal do more to discourage local authorities from bringing lawyers?

Lorraine Dilworth: I understand from conversations with Jessica Burns that she has no powers to do that.

Ken Macintosh: Ms Burns suggested last week that the tribunal could have not a power to grant legal aid, but a budget to appoint to families legal representation on a point of law.

Lorraine Dilworth: I disagree with that. That would create a two-tier system among parents. For example, if Argyll and Bute Council did not bring a solicitor, parents in that area would have to argue against the official and all their witnesses, whereas parents would obtain a solicitor in Edinburgh. Parents might move area to ensure that they have a solicitor if they must go to a tribunal.

Let us get back to the original idea, which is that the system should be user friendly and allow
parents to speak up. Parents have great difficulty at times. In two separate cases in which my colleague and I are involved, we cannot get teachers to appear as witnesses for the parents, and we now have to get citations for them. Health boards are not releasing records, and we have to apply for citations so that we can get the parents the records that they need to support their case at tribunal. Parents are expected to know how to apply to tribunal for citations.

Ken Macintosh: The committee has heard a lot of evidence, including at our stakeholder meeting, suggesting exactly that—that we put more support into advocacy and into mediation and dispute resolution before a case gets to tribunal. Can anything be done in the bill to support that work? I know that, for example, ISEA has recently received funding, but is it a case of funding advocacy support groups and services such as yours to a greater extent, or is there something that we can put into legislation?

Lorraine Dilworth: The code of practice and the 2004 act both refer to advocacy, but it would be useful if we made it a given right in the bill that parents and young people could have advocacy representation and could be given the information on how to access the service, if they wished to do so.

Iain Nisbet: That is the approach that is taken to mental health advocacy. There is a right to those services and an obligation on health boards to fund them, so a model already exists. It is principally an issue of funding and, to an extent, of experience and expertise, which we are trying to address through the training that is being funded by the Scottish Government. Ultimately, groups cannot spare members of staff indefinitely to do the work when there is no funding base for it. That issue needs to be addressed in some way.

Ken Macintosh: Are you saying that, to square that circle, we could include in the bill a right to advocacy for parents? Would that not increase the adversarial process? If the right depends on a funded service and the funding does not exist, is it a meaningless right?

Iain Nisbet: There is already a right to advocacy; people are entitled to be represented at meetings and at tribunal. What is being described is a model similar to that in the mental health processes, in which there is not only the right to the service but an obligation on health boards to fund it. That is one model. The other would be to put in the funding centrally so that the Government knew that it was there.

Ken Macintosh: We are looking at the bill, rather than the funding, but thank you.

Iain Nisbet: In the mental health model, there are provisions in the legislation. If you wanted to follow that route, it would require legislation.

The Convener: Thank you for that suggestion, Mr Nisbet.

Kenneth Gibson: You have spoken about some provisions that you would like to be added to the bill. Are there any issues that would be better progressed through subordinate legislation, the code of practice or the implementation of policy?

Iain Nisbet: Yes. We have already discussed the tribunal rules. Those rules are governed by subordinate legislation, which is the appropriate way to address any changes. When the president of the ASNTS gave evidence, there were questions about issues such as the length of time that some tribunals take and how the documentation is handled. Those issues will all be addressed through the rules in subordinate legislation. On the tribunals’ jurisdiction, powers are already available in delegated legislation to add to the cases that they can handle.

Similarly, the dispute resolution process is governed by subordinate legislation, so the changes to that would appropriately be effected by amendments to regulations. We talked earlier about issues on which the legislation already says what we want it to say but there is a question of getting authorities to comply with their duties or a question of ensuring that more parents are aware of their rights under the existing legislation. Those are issues for the code of practice and for policy.

Iain Nisbet: I do not know how realistic that suggestion is. As a concept, I am quite attracted to it, because I feel that some kind of punishment is merited on occasions. However, to be realistic, it is unusual for tribunals to have enforcement powers. At present, matters such as a failure to comply with a CSP can be dealt with by dispute resolution or through a section 70 order. We need to consider those processes and ensure that they can deliver the outcome that parents are looking for—swiftly.

Kenneth Gibson: We have talked about heavy-handed representation—for example, local authorities employing advocates—and whether neither side should be allowed a solicitor. Is there
a happy medium whereby only a certain element of legal representation should be allowed? No one wants the sort of escalation that we have heard about or a sledgehammer approach being taken, such as in the case in which the City of Edinburgh Council employed advocates. Do you think that, although legal representation should be allowed, there should be a limit to it?

Iain Nisbet: It would probably be difficult to introduce such a restriction. Given human rights legislation, I am not sure that we could tell an authority or a parent that they were not entitled to be represented legally. The best that we can do is to encourage and support non-legal representation. For example, in social security appeal tribunals, people are entitled to legal representation. For example, in social security appeal tribunals, people are entitled to legal representation, but they are much better off being represented by a welfare rights officer, because those officers know what they are talking about.

Lorraine Dilworth: The conveners of the tribunals are legal people—they are lawyers. Why is there a need for either side to have legal representation? It is the job of the tribunal members to interpret the legislation and to apply it to the individual child’s case. Why are we employing conveners who are lawyers if matters are being taken out of their hands because of a heavy-handed approach by local authorities?

Kenneth Gibson: You talked about the interminable process and the five cases that were presented in May and have still not been resolved. What can be done to expedite matters to ensure that the process is not dragged out in that way? You talked about the impact on parents and children. The approach that you described is almost a way of countering the spirit of the legislation.

Lorraine Dilworth: In fairness to the officials, there was a hiccup with the cases that I lodged in May, because of people leaving and so on. Parents need cases to be turned around quickly. I do not know whether this is possible, but if a time limit was set on the turnaround of section 70 cases, parents would know when the decision would be made. If they had a date to look forward to, that would certainly help.

Kenneth Gibson: So you would like such time limits to be in the bill.

Lorraine Dilworth: Yes.

Kenneth Gibson: If your proposals were incorporated in the bill, how many parents and children a year do you think would benefit?

Lorraine Dilworth: An awful lot—that is about the only answer I can give.

When the 2004 Act was going through Parliament, evidence was given about the number of children who should have CSPs, but we are well short of that number. The legislation must be changed so that more children can get CSPs. It must also be changed in the interests of the children who are classified as having additional support needs but who do not require CSPs, as those children often seem to be left out. They do not get review meetings and no work is done around transition. Those children need to be looked after, and the legislation must be changed to ensure that that happens.

The issue of the cut-off at 18 must also be addressed—I think that Jessica Burns talked about that. The problem usually arises with children who are at independent or grant-aided schools, to whom the local authority says, “Your CSP doesn’t apply after your 18th birthday, and, by the way, that’s the day you’re leaving school.” If a so-called normal 18-year-old’s birthday is in November, they will be allowed to stay on until June, so why should a child with a disability have to leave?

Iain Nisbet: If the changes that we suggest—even just the five changes that are suggested by the consortium—are incorporated in legislation, many thousands of pupils will benefit. As it stands, the bill will be of primary benefit only to those children who are the subject of cross-boundary placing requests.

Kenneth Gibson: So you are saying that there must be a fundamental change, and that the consortium’s five suggestions must be implemented if we are to avoid the need to revisit the issue in four or five years.

Iain Nisbet: Yes.

Margaret Smith: You have told us that thousands of pupils would be assisted if we were to take forward the five points that you have suggested. Those proposals have cost implications. Have you done any work on the financial consequences for local authorities and others of the incorporation of those changes?

Iain Nisbet: The five changes that we are proposing do not place any onerous new obligations on local authorities; they do no more than ensure that education authorities comply with duties that they are already supposed to be complying with. For example, we are suggesting that the legislation should put a particular emphasis on putting in place a mechanism to ensure that children who are looked after and accommodated, who are young carers, or who have mental health problems are prevented from slipping through the net, which can happen at the moment. However, local authorities already have a duty to prevent that from happening. Councils are being funded on the basis of the duties that are placed on them by the 2004 Act. That ought to
mean that they are already providing for those children.

Lorraine Dilworth: In my submission, I suggested that the financial memorandum should reflect the numbers that were given when the 2004 act was going through Parliament, rather than the number of children who currently have CSPs.

Margaret Smith: You talked about children who have special needs and require special support but who do not have CSPs. Could you give us some examples of the children you are talking about? You could write to us with the information, so that we do not prolong this session.

Lorraine Dilworth: We can do that.

The Convener: Thank you for your attendance and for your written submissions. The committee will reflect on the points that you have raised.

I wish everyone a happy Christmas. I hope you all have a very healthy new year.

Meeting closed at 12:55.
17 December (31st Meeting, 2008 (Session 3)) – Written Evidence

ISEA Scotland

Govan Law Centre

17 December (31st Meeting, 2008 (Session 3)) – Supplementary Written Evidence

ISEA Scotland
10:01

The Convener: The substantive item on our agenda is continued consideration of the Education (Additional Support for Learning) (Scotland) Bill. This morning, we have been joined by representatives of the Association of Directors of Education in Scotland and our local authorities. I am pleased to welcome Dr Ted Jeffries, principal psychologist at Argyll and Bute Council; Martin Vallely, service manager for professional services at the City of Edinburgh Council; Cameron Munro, senior solicitor for education at Glasgow City Council; and Bryan Kirkaldy, a representative of ADES. Thank you for providing written submissions to the committee in advance of the meeting.

We will move straight to questions. My first question is about the main policy thrust of the bill, which is to give parents of children with additional support needs the right to make placing requests. The majority of respondents to the consultation welcomed that new right. Although the majority of local authorities also welcomed it, some—especially our largest authorities—have raised concerns and expressed differing opinions on how it should operate. How do you see the right working?

Cameron Munro (Glasgow City Council): Good morning. I speak only for Glasgow City Council. It is unusual for me, as a lawyer, to be representing the council at the committee but, unfortunately, Margaret Doran was at the last minute unable to attend. Glasgow City Council will support whatever legislative change is made—that is not an issue—but we are concerned that any change should be in a child’s best interests. We would like the committee at least to consider the fact that there is already provision for a parent to make a request to have their child placed in another school in another authority area.

As my submission makes clear, the matter was considered by the inner house of the Court of Session. The important point is that any request should be made to the residential authority, which knows and has an on-going relationship with the child in question; that is the central tenet of Glasgow City Council’s approach. If the authority chooses to agree to the request, it places the child in the new school.

There is a distinction between a placement, during which time the council retains full responsibility for the child—as was envisaged under the Education (Additional Support for Learning) (Scotland) Bill: Stage 1
Learning) (Scotland) Act 2004—and the granting of a placing request. The purpose of that distinction is to ensure that the best needs of the child are met. The important point is that if a request is refused and the parent is unhappy—I accept that it is not a request within the terms of the act that affords a right of appeal to the appeal committee; the committee may think that the act is limited in that regard—the failure to adhere to the request gives the parent the right of redress. They can go to mediation—as they can on any matter—or, more important, they can go to dispute resolution. It is the residential authority that has to justify and explain itself.

As we outlined in our submission, we are asking the committee to consider the risk factor that is involved. For example, a parent could say that they want their child to go to a school in Aberdeen, even though all other support, from social work, other council departments and the health board, is based in the west of Scotland.

That is why we want to highlight that there is provision under the 2004 act to encourage the approach that I have outlined. It is somewhat disappointing that it has not been enhanced or highlighted enough for parents or considered enough by local authorities.

If the committee is not minded to consider that view and feels, as the Government does, that it wants to afford parents the right to deal directly with an authority that is not their residential authority—which is the distinction between the 2004 act and the bill—my council asks that safeguards be built into the bill to strengthen the process. Such safeguards should be similar to those for placing requests to independent schools. As the committee is aware, such requests are made to the residential authority and the independent school is not party to any appeal hearing. The principle is that the residential authority is responsible for ensuring that it does the best for the children in its area. I am sure that members will ask us to expand on those concerns later in the meeting.

Glasgow City Council does not wish to usurp the law; if the law changes, we will comply with it. However, we are asking the committee to consider that there is existing provision on this, which could be enhanced. If you decide not to go down that road, we ask for safeguards to be written into the bill. Our proposal is predicated on two principles: ensuring the welfare of children; and upholding the rights of parents. The current placing request legislation seeks to fulfil a policy commitment that was made back in 1981 to introduce rights for parents. It was perfectly correct and in order for that to be done. My council’s position is that that legislation is not fit for 2009, as it does not afford authorities the opportunity to discuss the broad needs of the child.

There is also the issue, which I am sure that we will move on to discuss, of the recovery of moneys from authorities and the confusion that that can cause. Again, the system is neither clear enough nor robust enough to withstand what may well be increased pressures between authorities. I am sure that my colleagues will expand on the matter.

Dr Ted Jeffries (Argyll and Bute Council): I support what Cameron Munro said on the principle that, by and large, the responsibility for a child’s education rests with the residential authority. Other panel members may focus on the financial aspects of the proposal, but my concern is about who is best placed to judge what is in the child’s best interests and who makes provision for all local children. The answer is the local authority.

In our submission, Argyll and Bute Council supported the proposition that Cameron Munro outlined, which is that applications for specialised provision in another local authority area should be treated as equivalent to applications to special independent schools. The first test is whether there is a place available in the school to which the parent wants to send their child. That test having been met, it is legitimate for the residential local authority to have a view on whether the child’s needs in the round can be better met by its own provision. That is a reasonable position for local authorities to take.

It would be hard to argue that parents should not have the right to make placing requests to schools in other areas. They should have that right, and I do not think that any council is arguing that they should not. The issue is the process. In our submission, we proposed treating such a request as equivalent to an application to an independent or independently funded school. A parent would make the placing request to their home local authority, which would apply the same legal test that applies in the case of an application to an independent special school. The crucial test for the authority would be whether it could make the same or better provision within its own system. There would be other tests, but if the authority could make the same or better provision, it would have a reason to refuse the placing request. If the parent did not agree with the refusal, the matter could be taken to independent arbitration or—our preference—to the additional support needs tribunal. There would be a system for arbitration.

Our key reason for taking such a view is not the financial implications but the implications for the local system. If parents opt out, even in relatively small numbers, there is an impact on the system that the local authority is running. I will give a concrete example. Learning support bases in secondary schools provide for children who have a
range of additional support needs. If two or three parents apply for a place across the water or up the road, the learning centre in the mainstream school will become depopulated. The next parent who comes along will not see a well-functioning, well-operating, integrated system and therefore might be inclined to seek specialised provision, which always seems to be a neater solution to the problem of providing for a child’s additional support needs.

There is then a drift away from the inclusive system. We are proud to have such a system, which enables the needs of the vast majority of children to be met in local schools and by local resources. Our major concern is therefore that allowing parents an unfettered entitlement to seek placements in special schools in other local authority areas—it is realistic to say that that is what parents will seek—would have an impact on our authority’s capacity to provide services.

I will give another example. These days, there are relatively few children with sensory impairments. Such children need to be supported by specialist teachers. If even two or three children go to specialist provision elsewhere, local provision is reduced and we cannot run specialist services as readily. The option of sending a child to specialist provision therefore appears more attractive to parents than keeping their child in the local community to be supported by an expert teacher.

Although the principle that parents should have the right to apply to any school in Scotland seems to be a no-brainer, it has hidden implications for our ability to run a system in which we can support children. We are keen to draw those implications to the committee’s attention and to support Glasgow City Council’s call for the role of the home authority to be given serious consideration.

**The Convener:** Should not the needs of the child, rather than the needs of the local authority, be paramount? A local authority might well aspire to deliver a service, but finding the best fit for the child should be paramount. In making legislation, we must be mindful of that.

10:15

**Dr Jeffries:** I could hardly disagree with what you said and I genuinely do not disagree with it. Argyll and Bute Council does not use children as a means to forge policy—I hope that most local authorities do not do that.

Children’s needs come first. Looking in the round at the picture of provision in our authority and in the area within reasonable travelling distance, we are genuinely convinced that if there is a better fit for a child’s needs in another authority, that child should be placed there. We would certainly want to continue to do that. After all, it makes a great deal of sense for a small local authority such as Argyll and Bute not to invest in buildings and infrastructure but, where children need such facilities, to use those that are available in contiguous local authority areas or from independent providers. The guiding principle, as I say, is that the child’s needs come first.

Local authorities perhaps feel that they always make the right decisions. Of course, that might not always be the case but, under the existing safeguards for parents and children, others can review our decisions and conclude whether they were made in the child’s best interests.

It always seems neater and simpler to find a special solution to a child’s needs, and sometimes it can prove more complicated to support a child in a mainstream school. There will always be a tension and a balance to be struck in that respect, but we should not use children to develop an inclusive policy. We should develop the policy and support first, and then bring the children into the system.

**Martin Valley (City of Edinburgh Council):** The City of Edinburgh Council’s concerns are very similar to those expressed by colleagues from other authorities. Although we support parents’ ability to make placing requests, the bill’s provisions contain a number of hidden problems. For a start, the bill focuses exclusively on the parent’s rights and does not take into account the authority’s wider duties and responsibilities not only to the child in question but to other children in its area. As has been pointed out, fundamental legal safeguards already exist; for example, the authority has a legal duty to ensure that its provision is adequate and efficient and that it makes appropriate provision for each and every child with an additional support need. Moreover, under existing legislation, we are obliged to promote the presumption of mainstreaming and to ensure that we co-ordinate support for children with significant needs who require the support of different services provided by or outwith the education authority.

We also have a lifelong responsibility to many children with additional support needs. The authority’s responsibility to children with disabilities starts when the disability is identified, which could be in the first weeks of life, and another concern relates to the fact that, under the current arrangements, the authority is responsible not only for the child throughout their life but for their transition into adult services. For people with complex disabilities, that process needs to be carefully planned over time. We are concerned that the bill might cut across that continuity and the authority’s accountability to that child and lead to a situation in which two authorities might be
responsible for a child who has been placed in another education authority as a result of an out-of-authority placing request. The first authority might be responsible for the child’s education, while the other might be responsible for every other aspect of the child’s needs, including forward planning for their future provision.

Alongside that potential break in accountability for the management of a child’s needs, we are concerned that, by dividing up responsibilities in this way, the bill might break the relationship between the authority in which the child is resident and the elected members in the authority.

We are also concerned that the bill could introduce perverse incentives. There could be a tendency under the arrangements for an authority that borders one that has well-developed provision to say, “If parents want to go to the neighbouring authority, that is well and good, as we will not have to take responsibility for paying for that provision or co-ordinating the child’s education.” In that case, the host authority would be faced with a financial burden. Section 23 makes provision for the host authority to seek to recover the costs, but there is no obligation on the home authority to pay those costs. We believe that that situation operates against the fundamental responsibility of each authority either to ensure that adequate and efficient provision is available in its area or to be responsible for securing and financing that provision through other means, whether through an independent school or by securing access to provision that is available in another local authority area.

The current provisions enable placements to be made in neighbouring authorities. Around 45 children from other authorities are being supported in special schools in Edinburgh, and those arrangements operate satisfactorily. We would like to build on that while retaining the integrity of the process and the accountability of the home authority.

**Bryan Kirkaldy (Association of Directors of Education in Scotland):** As I am representing the Association of Directors of Education in Scotland, and most of what I say echoes what others have just said, I will keep my contribution brief.

We have welcomed the quality of the consultation, and we think that the Government has taken due account of the feedback that has been given so far. We have been pleased with the thoughtfulness of its response. We are broadly sympathetic to the intentions of the amendments to the 2004 act that are proposed in the bill.

On the issue of placing requests, we think that the principle that the residential authority is the authority that is responsible for a child’s education is important. We all work to make provision according to the best interests of the child, but it is important that residential authorities are responsible and accountable for the provision that they make. For the past 20 years, we have been meeting the challenge of the presumption of mainstreaming by building capacity for inclusion in all our schools. However, we have also been working hard to develop the capacity for inclusion across our authorities. Our efforts have been quite successful, and the majority of parents and children who are involved in additional support needs provision in local authorities are satisfied with the provision that they get. It is important to say that because, sometimes, when we discuss these matters in a legislative context, there is a tendency to focus on dissatisfaction with the system.

As Martin Vallely said, a perverse incentive could be presented to local authorities if there is an untrammeled placing request option. If it were possible for parents to choose to go to another local authority for provision, there would be a perverse incentive for local authorities not to build their capacity to make effective provision for children with additional support needs. That needs to be taken into account, because I am sure that the last thing that the Scottish Government would want to do would be to introduce such a perverse incentive, which would be against the principle of the presumption in favour of mainstreaming, and would not be in the best interests of children with additional support needs.

The safeguard of the test of whether the residential authority can make provision locally is important. We can readily understand the wish of parents of children with additional support needs to have the same rights to make placing requests as other parents, but we believe that there is a need for a test to show whether effective provision can be made locally for that young person.

A second matter involves the cost implications, which ADES responded to in relation to the financial memorandum. One implication arises from placing requests across authority boundaries. If there is an uneven pattern of such placing requests, there will be an uneven cost distribution, which will not be reflected in the base funding that those authorities receive from the Government, so there will be a financial imbalance. Because the per capita costs of pupils with additional support needs are high, those placing requests are not equivalent to ordinary placing requests, for which one can assume a trade-off between youngsters moving across local authority borders.

The second implication arises from the usage of independent provision. We have seen a progressive increase in the number of requests for independent provision. Since the 2004 act came into effect, we have predicted that the independent
sector might be stimulated to develop further provision to cater for the population of youngsters with additional support needs, and we think that that has cost implications for local authorities as well. Although it might not be a direct consequence of the amendments to the 2004 act that the bill will make, a strengthening of parental rights to make placing request appeals, and the publicity that will be associated with that, is likely further to stimulate a trend that is already under way for parents to seek to make placing requests to independent schools.

The Convener: Your contributions have highlighted a number of areas that members of the committee will want to pursue with you, so I will not ask about issues to do with funding, appeals or the responsibilities of residential authorities. However, I have a specific question for City of Edinburgh Council about the proposal that it made in writing to the committee, as it highlights why there might be a need for the legislation.

The suggestion is that it would be appropriate for children who have “significant” additional support needs to qualify for the right to make out-of-area placement requests. How will the City of Edinburgh Council define what “significant” means? How can we ensure that children in the council’s area have exactly the same rights as children in every other local authority area in Scotland? Is it not right that the legislation should be applied equally and consistently across Scotland? I suggest that it is not good enough to say simply that there was a Court of Session ruling on the matter. We need to enshrine the right in legislation to ensure that there is some clarity.

10:30

Martin Vallely: My understanding of the Court of Session’s opinion is that it questioned whether there was a right for the parents of any child with additional support needs to make a placement request. In considering the proposals in the bill and the Court of Session’s opinion, we have suggested that we need to look differentially at various levels of additional support needs.

The definition in the 2004 act is broad and could include a large proportion of children in the population at some point in their school career. However, for most of those children, the additional support needs can be met in a mainstream school. When someone in one local authority area makes a request to another authority, the provision that is generally made in the neighbouring authority may be different from that in the home authority. Therefore, a child who has an additional support need in the home authority may not have one in the host authority, because of the different provision. Alternatively, the reverse could apply: a child may not have an additional support need in Edinburgh, but they may have one in another authority because the level of provision that is generally made in that authority is different from that in Edinburgh.

That issue is not within the control of the local authorities—it is to do with the definition of additional support needs in the legislation. We consider that, in general, when additional support needs can be met within mainstream schools, in so far as there are support structures in the schools, any placing request should be treated no differently from other placing requests. In any case, we cannot predict in advance whether a child has additional support needs. That can be established only in relation to a request to a particular authority. However, there are children who have significant additional support needs. As I said, we often know about those children from their early stages of life. We believe that, because continuity of responsibility is very important and in the best interests of those children, different provisions should apply in those circumstances. When there are significant additional support needs, different provisions should apply.

You rightly ask how we decide whether a child has significant additional support needs. We must do that with reference to the definition in the 2004 act and the code of practice, which provides guidance on that. The code states that if a child has a need for high levels of adult support in the course of the school day, they have significant additional support needs. All authorities would refer to the 2004 act and the code of practice in establishing whether a child has significant additional support needs, as we do already.

The Convener: You do that already, but my understanding is that, compared with other local authorities in Scotland, the City of Edinburgh Council has very few children who have co-ordinated support plans. I genuinely do not want to single out Edinburgh for a hard time, but the fact that a very small number of children in Edinburgh have co-ordinated support plans suggests to me that there is an issue about interpretation. The City of Edinburgh Council’s interpretation seems to be different from that in other authorities in Scotland that have similar challenges to meet.

Martin Vallely: Each authority must consider its own circumstances. In the City of Edinburgh, we have a relatively large sector of special schools and special classes. When children’s needs are accommodated in that provision, we are acknowledging that they have significant additional support needs. There is a distinction to be made. It is irrefutable that those children have additional support needs that require significant support from the education authority, but that is only part of the test for a co-ordinated support plan; another part is that the child should require significant additional
support from a different agency. Because of the nature of the provision that we have in Edinburgh, there is less requirement for significant additional support from other agencies.

We reviewed the cases of 1,000 children who have records of needs—which includes the vast majority of children who are in special schools—and found that only six were referred to the tribunal. Only six parents, therefore, have appealed the authority’s decision to refuse a record of need—and in five of those six cases the tribunal agreed with the authority. That suggests that there has been a very low level of appeal and that even when those cases have gone to appeal the tribunal has agreed that the authority was correct in its interpretation of the legislation.

I advise caution in interpreting the significance of the number of co-ordinated support plans with respect to the extent to which the authority acknowledges its responsibility to provide for children who require significant support in light of their additional support needs.

Bryan Kirkaldy: I will make a brief comment in support of what Martin Vallely said. In a local authority context, we consider the population of children with additional support needs to be something like 20 or 25 per cent of the school population—a large number. We believe that we should be held to account for our effectiveness in working with that population in terms of the outcomes that we achieve, which are principally defined in terms of the children’s life chances, which are often measured in terms of attainment and achievement and of future destinations, and their and their families’ satisfaction with the provision that we make while they are with us. We are keen, and pleased, to be held accountable for those outcomes, and we think that as leaders and managers in local authorities it is important that we are clear with all our staff and stakeholders about what the valued outcomes are and how we will hold everybody accountable for them.

There is a risk in using the rate of CSPs—which are essentially record-keeping devices—as a measure of effectiveness. It is misleading and we counsel strongly against it, just as we counselled against the use of the rate of records of needs as a measure of effectiveness. We want to work within the spirit of the concordat, which is about considering valued outcomes.

The Convener: I was not suggesting that we use co-ordinated support plans as a means of evaluating the legislation, but it strikes me as odd that when the legislation was originally introduced the then Government’s officials suggested that there would be far more co-ordinated support plans in place than is currently the case. Why did they get it so wrong?

Bryan Kirkaldy: I am not sure about that estimate. I was involved in the special educational needs advisory group that framed what became the Education (Additional Support for Learning) (Scotland) Act 2004, and I was present at all of its meetings. We always said—and it was always clear—that there should be, and would be, fewer CSPs than records of needs and that they should never be used as any kind of league table measure. We understand that that sometimes changes in the popular usage of the legislation, but it was always clear from my point of view.

The Convener: Dr Jefferies, do you have something to add on that point?

Dr Jefferies: Yes. I will illustrate that point. When we started out on this process, we did practice CSPs for a few children. I picked a few who it seemed obvious would have CSPs and we drew up drafts for them. In the case of the highest tariff child—the child who had the most extensive needs—the person who was going to write the CSP told me that the child would not have a CSP because there was no significant involvement by any other agency. The child was on an annual review from occupational therapy, speech and language therapy, and physiotherapy, but there was no more involvement than that by other agencies.

The factor that has militated against a large number of CSPs is the nature of the involvement of other agencies, which often does not meet even quite loose aims. We do not set a high bar for the involvement of another agency to be considered significant, partly because of our rural nature. Even then, the fact that the involvement of other agencies is crucial to the establishment of educational objectives has meant that most children who we would consider as definitely having complex needs are not assessed for a CSP. The reason for that has always been that the involvement of other agencies has not been at a level that would require a CSP to be opened.

Cameron Munro: The convener has touched on a central point. Obviously, you have your ear to the ground on these matters. Those of us who travel around the country realise that there is widespread confusion about what is meant by the term significant. How does it apply in one authority, never mind across agencies? It is unfortunate that although that is a pressing matter, it is one that the bill avoids. There is nothing in the bill to address the fact that there is a degree of confusion. The solution is certainly not to phrase it differently or to expand on it in the code of practice, as Scottish Government officials suggested to the committee. If it were not for the fact that you are seeking to allow tribunals to review their decisions, not to go to the Court of Session, such a suggestion would carry the sign,
Mr Macintosh makes a valid chip in—but it is not addressed by the bill. I should make it clear that neither I nor my colleagues deal day-to-day with these issues. While the range of agencies that might be involved with a child provide an immense amount of support, we should bear it in mind that the issue in a CSP is support for an educational objective. A range of issues may be being helped, but it is only once there are those objectives that support needs to be considered. That might explain why some of the matters are not directed as the committee would hope.

Ken Macintosh (Eastwood) (Lab): When the original act went through, it was recognised that far fewer children would get a CSP than had had a record of needs, but the number is far less—by a factor of 10, I think—than was estimated. It is not just that the estimate is way out, but that there is wide variation throughout the country. While some authorities do not have a large number of CSPs, they have significantly more than Edinburgh, for example—I am not picking on Edinburgh, but we are sitting here in the city. Why is there such a huge variation? Does it cause you concern? Should it cause the committee concern? Even if CSP rates are not league tables, they suggest that children are treated differently in different parts of the country even though the same legislation is being applied.

Bryan Kirkaldy: There are reasons to look into that. I suggest that we should be clear about the outcomes that the Government and local authorities wish to be accountable for in relation to children with additional support needs. I would much prefer effort to be put into how we systematically monitor the rate of satisfaction and dissatisfaction that is expressed by parents about the provision for their children. It would be interesting and healthy to publish data on those things and hold local authorities accountable for them. I am talking not only about rates of reference to the tribunal, but about more detailed measures of parental satisfaction. We should also be held accountable in detail for the life chances that we create for youngsters with additional support needs.

10:45

The reasons for differences in CSP rates are complex and varied. As Cameron Munro said, one reason is that there are ambiguities in the definition of eligibility in the legislation. Another reason is that demographic differences, particularly the landscape of specialised support services, have an impact. A key test or criterion for a CSP is whether a person requires sustained other agency involvement. Where that is already embedded in a system, there is no requirement for a device to achieve it.

I counsel the committee to focus on more robust and reliable measures of effectiveness than CSP rates, although I agree that it is interesting to consider the basis for the variations. I should say that ADES predicted the current rate.

Cameron Munro: Mr Macintosh makes a valid point. I think that my colleagues here would take on board the fact that considering the CSP rate is part of the authority’s general self-evaluation. It would be a concern if we found that children with CSPs were simply likely to have had records of needs—as opposed to coming under a wider definition of additional support needs—and that children with social, emotional and familial difficulties and environmental problems, or children who are looked after and accommodated, were not being represented. There is a serious requirement to monitor at the local authority level and take account of the more inclusive definition of additional support needs and ensure that not only a narrow band of children get CSPs. I share the view that we need to consider the broader range of need.

Kenneth Gibson (Cunninghame North) (SNP): I strongly support the comments that the convener and Mr Macintosh have made. A number of organisations have expressed concern to the committee, particularly in the informal discussions, that, taking into account demography, rurality, urbanisation and social class, the difference in CSP rates may result from whether local authorities are following the letter or the spirit of the law. There is a strong view that that is why there are quite substantial differences in how local authorities appear to be implementing the current legislation.

I want to talk about appeals on out-of-area placing requests. As you know, the bill proposes that appeals on placing requests should go to the tribunal where a CSP is an issue. I want to talk about Edinburgh first, but I would also like others to comment. Mr Vallelly, under the heading “Changes to rights to appeal”, you say in paragraph 22 of your very detailed submission:

“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.”

What are the advantages and disadvantages of the tribunal hearing all appeals relating to placing requests to special schools? Your colleagues can comment on the matter subsequently. Can panel members make suggestions on simplifying the appeals system?
Martin Vallely: I will speak about my concern on behalf of the City of Edinburgh Council.

I think that the circumstances for appeals on placing requests for individual children with additional support needs have been taken into account in the bill. In the vast majority of cases in which a CSP is involved, the likelihood is that we are talking about a special school. I do not envisage there being significant difficulties in such circumstances in making the appeal to the tribunal.

My concern is about when the local authority deals in parallel with a number of placing requests for popular, oversubscribed mainstream schools. In general, when parents make placing requests, there will be special pleading in every case. In a number of cases the request may be supported by a requirement for additional support needs, but the local authority must consider not only each individual request but the whole picture. If it makes an exception for one child, it must reconsider the case for every other child, to ensure fairness.

My concern is about when there are multiple requests for a particular school—we experience that; it is not hypothetical—and some parents make a request for a CSP. Generally, the level of need of children who require a CSP would be evident before the placing request was made, so the case would go straight to the tribunal, but if the issue of a CSP was raised in the course of considering multiple appeals for the same school, it could lead to the appeal committee considering all the cases initially, then the CSP case would go off to the tribunal. Meanwhile, the appeal committee would continue to consider the bulk of the cases. The tribunal might then say that the CSP request did not qualify and send the case back to the appeal committee. Although decisions on the other children may already have progressed, the CSP case would come back in and delay the process. Alternatively, the tribunal could proceed with considering the placing request with respect to the CSP, but there would not be a CSP at that point, so one would have to be written, leading to further delays in the process. The tribunal would then have to consider the placing request with regard to the content of the CSP. If the tribunal said that the child should be placed in the school, what would the local authority do with respect to the other requests that had been refused for that school?

To my mind, the process has not been thought through properly, because it could lead to confusion, delays, legal wrangling and parents feeling that the system is unfair. The parents of children with additional support needs but no CSP request could feel that preferential treatment had been given to a child with a CSP request.

There are circumstances in which parents want a particular school for their child for a reason that is nothing to do with the child’s additional support needs. Any of us might say that we prefer one school to another or feel that one school is more convenient for our family, our work or whatever. A case in which additional support needs were not material to the essence of the request could go to the tribunal. I feel that the process has not been thought through properly and that it must be reconsidered.

Kenneth Gibson: I am keen, given what you said, to hear your suggestions for how we might simplify the process. In paragraph 25 of your submission you say:

“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.”

Is there evidence that that is happening at the moment?

Martin Vallely: It could not happen at the moment because there are currently no such grounds, so there would be no advantage to be gained. I was suggesting that if such a provision were introduced some parents might think that there would be advantage to be gained and that in the fog of the process they might achieve what they hoped for.

Kenneth Gibson: Is there evidence that parents are jockeying for position under the current arrangements or that they would do so if the proposed changes were made?

Martin Vallely: There is a lot of evidence that parents make the best case possible to try to secure their preferred outcome for their child. There is a lot of evidence that parents are creative in the process, to the extent that—I will not go into detail.

Kenneth Gibson: All parents try to do the best for their children. You are almost suggesting that parents might try to undermine or cheat the system. Is that what you think?

Martin Vallely: Those are unfortunate terms to describe how parents might seek to use to best advantage whatever avenues are available to them. A potential consequence of parents’ doing that could be a ping-pong process, which might ultimately mean that consideration of other requests, which had been made to the same school at the same time, was disrupted or undermined by the duality in the system.

Kenneth Gibson: How can we take account of your concerns and improve the bill? How can we make the process more workable?

Martin Vallely: In my submission, I suggested that if we are to take account of the circumstances
that we are discussing we need to reconsider the law on placing requests in general, so that we can ensure that there is equality of treatment for all parents.

**Kenneth Gibson:** I read your proposal for a wider review of the legislation, which is in paragraph 27 of your submission, but what can we do in the context of the bill?

**Martin Vallely:** I suggested that if my fundamental argument about mainstream schooling is not accepted as a sufficient ground for progressing the proposals in the bill, some test or caveat will need to be introduced with respect to circumstances in which parents seek to initiate a CSP process. There would be a need to establish that a recent and significant change in circumstances justified such an approach, so that parents could not say, “There is a long-standing problem, which has not been raised before.” For argument’s sake, let us suppose that a child had had a serious illness or accident that had had a long-term effect on them or that there were significant changes in the family or social circumstances, which justified consideration of a CSP. If the bill progresses, it should be amended to include safeguards that make it clear that we envisage that the CSP process would arise mid-process only in exceptional circumstances.

11:00

**Kenneth Gibson:** Do other members of the panel wish to comment?

**Dr Jefferies:** I am keen to do so. My comments are based on our submission to the earlier consultation. Our perspective is that there are already two placing request routes. There is the one for independent special schools, for which the test is whether a child has additional support needs. The residential authority can deal with such placing requests in various ways. I think that that right is being extended to apply to the schools of another education authority, so the equivalent safeguards should apply—there should be a distinct process.

I could not do so now, but I think that an amendment to the bill could be drafted whereby placing requests that were made on the basis of a child’s additional support needs would go through system B, whereas the majority of placing requests go through system A, which is the standard system that applies to all children. I have not plucked that out of the air—such a distinction is already made when parents apply for a place for their child at an independent special school.

We are talking about applications that are made on a similar basis—when a parent says that they want their child to go to school X because their additional support needs will be better met there, as distinct from when a parent says that they want their child to go to school X because it would suit their family better and because they like that school more, which is a perfectly legitimate view for a parent to have. As we said in our submission, the important consequence of that—although the City of Edinburgh Council might differ with us slightly on this—is that such requests should go to the tribunal for arbitration.

We have faced such a situation in a small number of cases; matters have bounced between the tribunal, the local authority education appeal committee and, ultimately, the sheriff court. I will not go into specific cases, but the result has been really unacceptable delays, with people bouncing around the system.

I can think of one case that has been in the system for two years. That is not acceptable in a child’s school educational life; decisions need to be made more expeditiously than that. We might have a different perspective from the City of Edinburgh Council in that respect because we do not face the issue that it faces, but there is a distinction to be drawn between cases in which a parent makes a placing request because their child has additional support needs and cases in which they simply want their child to go to a different school. That distinction is already made in law. I do not imagine that our proposal would resolve everything, but it is one way of looking at the problem.

**Cameron Munro:** I will add to what Ted Jefferies and the deputy convener have said. If I may, I will slip into the role of lawyer, which is my day job, as there are several points to which I would like to alert the committee. I defend my council against challenges that go to the education appeal committee or the tribunal, and the first thing to say is that the number of such cases is incredibly small, even in a large authority such as Glasgow City Council.

I also have an observation that has been put to me by elected members on the education appeal committee. It should be borne in mind that that committee—which, in addition to elected members, comprises parents or laypeople—has a statutory role in relation to ASL. Members on that committee are concerned that they do not have enough advice on or experience and knowledge of some of the additional support needs that are referred to in the cases they deal with. I do not want to adopt too anecdotal an approach, but after hearing a case in which a parent said that they wanted their child to go to a particular school that had a good reputation because the child had a visual impairment called nystagmus, a councillor told me that they were extremely concerned about whether they were entitled to make a decision on
the case because they knew nothing about such issues.

I am tempted to say that it might be necessary to consider stating in section 1 of the bill that any placing request for a child with additional support needs should go to the tribunal on the ground that two members of the tribunal have experience of additional support needs. One option might be for all matters of that nature to go to the tribunal, as we are getting slightly hung up on the idea that the tribunal should deal only with CSP cases.

The second option would be to allow the education appeal committee to refer cases to the tribunal if it felt that they involved matters of complexity. I am concerned about that for two reasons. The first is the obvious concern about delay. The other concern relates to the advantage of going to the sheriff court, which is that parents can apply for legal aid. There is an issue with that route because we end up with a more litigious view, but—evidence is anecdotal rather than empirical—as a lawyer I am concerned that there is an inequality of arms in appeal committee hearings that does not do justice to the needs of the child or the rights and duties of the parent. The matter may be best dealt with elsewhere.

Martin Vallely: I realise that I did not answer the second part of the question, which Cameron Munro touched on. I appreciate the argument that referral to the tribunal may have advantages in placing requests for special schools, but there is a distinction to be made between those requests and requests for mainstream schools. In the latter case, as I outlined earlier, we can have multiple requests for any given school. Additional support needs will often be quoted in those circumstances, but those are the additional support needs that 20 to 25 per cent of the school population have. The vast majority of those needs can be met within mainstream schools even though they fulfil the definition of additional support needs.

With special schools, we are talking about significant additional support needs, and there is a case for considering those through a different route. I will make one qualification to that: from the feedback that I hear, the tribunal experience to date has not been positive for parents or professionals. I believe that the City of Edinburgh Council has had more referrals to the tribunal than any other authority—19 in total, although not all have gone to hearings. The tribunal has upheld more or less the same number of our decisions on placing requests as it has refused, but three out of six have gone to the Court of Session. To be blunt, I observe that, in some instances, the ground for those decisions going to the Court of Session has been the quality of the tribunal’s decision making.

If we are to extend the tribunal’s remit, we need to improve its efficiency and people’s experience of it and cut the amount of time that it takes, which is sometimes six or seven days. We also need improvements over time in the tribunal’s ability to reach sound judgments, so the proposed provisions on review are welcome. I do not want to be too critical of Additional Support Needs Tribunals for Scotland because, as a new body, it is moving into new territory, but it needs the opportunity to step back and say, “Whoa! We made a mistake,” provided that that does not go on indefinitely—there would need to be time limits on the review.

With those caveats, I would say that there is merit in considering whether placing requests for children who require significant additional support—in particular, the support of a special school—should go to the tribunal.

The Convener: I am conscious that we still have a number of matters to go through. I do not want to curtail the witnesses’ contributions but I note that Mr Kirkaldy and Dr Jefferies both have something to add and I ask them to make points that have not already been made. If the witnesses keep their answers as concise and to the point as possible, committee members will, I hope, ensure that their questions are equally concise and to the point.

Bryan Kirkaldy: I will be brief. Mr Gibson’s question has opened up an area where there is not full consensus among the local authority representatives. That is probably helpful to the committee as it may help us to move forward.

I come from an authority that has not had any references heard by an ASN tribunal since the introduction of the 2004 act, so I am at the inexperienced end of the continuum, but I am pleased to be there because I regard that as an indicator of our success in Fife in achieving parental satisfaction. The feedback that ADES receives about the quality of the tribunals has varied, but on balance we see an advantage in the expertise and experience that the tribunal can bring to bear, given the legal context in which these cases have to be heard and the complex personal issues that are sometimes involved. On balance, the ADES view is that tribunals have a more effective role to play.

I take Martin Vallely’s point about how we define the appropriate population to be heard by a tribunal. If it is not pupils with a CSP, who is it? It will be an arbitrary decision in the end, because I do not think that it can be the 25 per cent of pupils in the school system who have additional support needs. That is a conundrum.

Dr Jefferies: Given that Argyll and Bute Council is a very small local authority, the fact that we are second in the league table of references to the tribunal is perhaps more surprising than the City of
Edinburgh Council’s position. Local circumstances have led to that situation—I will not go into why, but under the previous system we had almost no appeals to the Scottish ministers so I am clear that it is a creature of the 2004 act. It means, though, that I have quite a lot of experience of tribunals.

As Martin Vallely said, the experience is mixed, but I am not necessarily surprised by that—it is what you would expect with a new body. We have also had experience in the sheriff court—when we were unlucky with the sheriff that we got—of having to start from scratch and explain what a school is and what additional support needs are. It is important that we act in the best interests of children, and an expert body seems to be the way to achieve that.

I do not know whether the issue can be addressed by the bill, but our authority’s view is that the criterion of having a CSP being the route of access to the tribunal is wrong and not a measure of the complexity of a child’s needs. There are other ways in which we could approach the matter, but I do not have a simple answer to that question.

Claire Baker (Mid Scotland and Fife) (Lab): I will ask questions about home authority responsibility, although the witnesses have touched on the matter and raised concerns about the financial implications and the impact that it would have on education in their own authorities.

The written submissions from the City of Edinburgh Council and Glasgow City Council refer to the difficulty of co-ordinating education services with social work services and health services in the authority. Independent Special Education Advice (Scotland) highlighted in its evidence that the proposal would create a two-tier system in respect of which authority would have responsibility if there were a placing request. We have identified the concerns about the responsibility being shifted to the host authority. Are there any positives as a result of the proposal in the bill? Would there be any advantages in responsibility being shifted, or is the proposal fairly problematic?

Martin Vallely: The superficial advantage is that it makes the situation neat and tidy. It looks as if the same principle applies to children with additional support needs as applies to any other child, but the difficulties that the proposal creates are far more significant than any nominal advantage that is gained.

11:15

Cameron Munro: I share that view. As I started by saying, the 2004 act set out to support children through their residential authority—I cannot stress that enough. My concern is that the proposed amendment to section 1 of the 2004 act will not simply change the portion that relates to placing requests but make a wholesale change to different parts of that act, such as how we define additional support needs and do mediation. Even that does not go far enough. We must bear it in mind that section 23(5) of the act says that if we, Glasgow City Council, have any powers—not just in education services but in anything—that we think can help a child, we must use them. That is a powerful indicator that the act is as close as we can be to getting it right for every child, although it is not that type of act.

Ultimately, our concern is that, if a child receives support from one part of the council and the health board in their residential area but is schooled in another area, co-ordination difficulties will arise. More important, what if a child’s change in circumstances concerns the break-up of a marriage, the end of a tenancy or another problem that means that they are decanted? A range of relevant matters might be in the remit and gift of only the residential authority while the responsibility for the child’s school education rests elsewhere. The bill does not get to the nub of that confusion. An analogy might be drawn with knocking down a lump in a carpet. It seems straightforward, but—perhaps I just lack the ability to lay carpets—as they say in Glasgow, you always need a flair for it. Somebody will explain that joke to Martin Vallely later, because it does not work with Edinburgh headteachers.

The important point is that the degree of co-ordination is a concern. When a child’s circumstances change, what responsibility will the old residential authority have to exchange information once responsibility rests elsewhere? That needs to be addressed.

Claire Baker: Is leaving the responsibility with the residential authority the only way to address that issue? Could we promote better working relationships? You talked about co-ordination—I appreciate that the issue is not just financial. Could co-ordination difficulties be solved by improved working relationships and more joint working between authorities?

Cameron Munro: You are absolutely right—other legislation requires local authorities to exchange and share information. That point is important, but what is involved must be specified clearly in detail. I agree that authorities must be prepared to engage with other authorities in a child’s best interests, but the bill does not provide the detail of that. If we take out the money considerations, the fact is that the Parliament is trying to change completely an act that concerns the residential authority. We should be cautious and examine the detail before we do that.
Co-ordination is important and will be significant for high-tariff children, but a key feature of the 2004 act is the importance of transition planning, which the other witnesses deal with more often. That is a key theme in the act and was an element of the policy. The Parliament legislated to set timescales for changing a child’s school education and to require an exchange of information, to which Claire Baker referred.

The difficulty with granting a placing request is that it almost usurps such transition planning to ensure that a child’s needs are met. The placing-request legislation is restrictive, unlike that for the children’s hearings system, in which the child’s welfare is paramount and a decision must be based on a statutory ground of refusal and must be appropriate in all the circumstances. Under the pacing-request legislation, if a child leaves Glasgow and goes elsewhere, the potential host authority does not have the information that the phrase “in all the circumstances” covers on which to base a decision. My council’s concern is that planning for change, which is a central element of the 2004 act, is at risk of being usurped. If the bill dealt with that, Parliament would have to address that concern to its satisfaction.

Aileen Campbell (South of Scotland) (SNP): Good morning. I will move on to mediation, dispute resolution and, in particular, awareness of parents’ rights. We have received evidence from ISEA (Scotland), which notes that about 75 per cent of parents are unaware that they can request mediation, and that 80 per cent have no or poor information on their right to request dispute resolution. I am interested to know what each local authority does to ensure that the parents to whom they cater are aware of their rights to access dispute resolution or mediation.

Martin Vallely: We have put information in every school, carried out briefing sessions for staff in our establishment and in the national health service, and offered workshops for parents. We also have a website and a parent information and support service. When there is any question of a child needing a CSP, or when any such matter is brought to our attention at the local authority headquarters, we would include in the correspondence specific information about mediation and dispute resolution. In cases that have been referred to the tribunal, we have explicitly offered parents mediation, which has been taken up in only a minority of cases.

It is clear that there are questions around mediation, but in our experience parents prefer something more informal. I know that mediation is supposed to be informal, but they prefer something that is yet more informal. We have funded a parents organisation to provide advice and information as well as advocacy to parents, and we find that parents make more ready use of that more informal service than they do of the mediation that is provided under the 2004 act. That tells us something about what parents feel comfortable with.

Dr Jefferies: We are in a similar situation. We have published information in print and on our website, and any correspondence on CSPs in particular contains information about parents’ rights to all forms of dispute resolution. Schools have information in their handbooks and in the school itself, but it is difficult to highlight that information for all parents and to say, “Please get into dispute with us and use this system to do so.” That is not a line that we readily promote to parents.

The issue is about targeting and supporting parents when they raise concerns. Our schools vary in size from about 1,400 pupils to around 3 pupils, but we hope that parents’ first port of call is always the school and the teachers who are working with the child, and that their concern does not escalate up the system. We have provided training—certainly for senior staff—in all our schools on managing disputes and dispute resolution.

ISEA’s point may be valid in the sense that we do not have big posters in all our schools that say, “You can access dispute resolution about additional support needs by using this service.” However, I am not sure, to be honest, that we really want that to be the flavour in our schools. It is about making the information available when it is relevant, and that means relying on the local authority to do so.

Bryan Kirkaldy: Our stated aim is to maximise satisfaction and minimise dispute. If a parent has to go to dispute resolution, that indicates a failure on our part to achieve satisfaction; that is the principle to which we work. We avoid the tendency of some of the lobby groups to use more of an adversarial approach, as such an approach is not in the best interests of children and their families.

However, we make clear to families that they have rights to pursue, including in the areas of appeals and disputes. We also make the routes of mediation clear, if families wish to seek mediation. We prefer mediation to take place at the lowest possible level and at the earliest possible point in the process—ideally, in the school that the family is dealing with.

Cameron Munro: I observe tension more than I deal with it. However, as I see it, part of the tension lies in the fact that schools in the modern era often try to partner parents and to engage with them. Engagement is all about establishing informal and trusting links. Many parents feel vulnerable when coming to a school; they are not
especially comfortable, and the human element of engagement can be very important. As committee members will be only too aware, parents are not a homogeneous group, and it is difficult to take a one-size-fits-all approach. I will be candid—perhaps to the annoyance of my colleagues—and say that we often get caught up in a fudgey, marshmallowy discussion with parents that does not get to the nub of the issue. As Dr Jefferies pointed out, it can be difficult in the middle of all that to say, “Oh, by the way, you’ve got a right, and here’s the formal letter to go with it.” There can be tension between the informality—which schools usually do very well—and the formality.

Dispute resolution is the underused resource in the 2004 act. It is one of the most significant changes in the law: for the first time, a parent who is asking for support has a statutory means of saying, “I think my child’s got support needs that aren’t being met, and I don’t like the name you’re giving it”—a specific learning difficulty—“because I think it’s called dyslexia.” Such rights did not have a legal basis before.

Notwithstanding the points that my colleagues have made about the need for informal mechanisms, that is a very significant change in the law, and it is seriously underused. If there is one element that should be developed further, it is the opportunity to enhance that kind of discussion in order to find resolutions to problems. That idea could be built into a mechanism that—as my colleagues have suggested—is about trying to partner parents and engage positively with them.

Aileen Campbell: I accept the point that everyone is making about not wanting to go down that route and trying instead to solve problems before they reach that stage. However, we have heard evidence from Govan Law Centre that dispute resolution is not triggered when a local authority fails to provide support; it is triggered only when the ground for seeking dispute resolution is a contested decision. The onus is on the parents to say that they want to seek dispute resolution. Is it a problem if parents do not know that that avenue is open to them?

Cameron Munro: As you suggest, there is no obligation on people to point out to families all the rights that they have. The assumption is that families will find out their rights by themselves.

Aileen Campbell: We have also heard about problems faced by parents who are Gypsy Travellers or are in the Army and who travel across different local authority areas, and by parents who are on a low income. Such parents may not know all their rights and may not be able to access them. Do you try to target those particular groups?

Martin Vallely: That is certainly a priority for the Special Needs Information Point, which is a parents organisation that provides advice, support and advocacy services for parents in the City of Edinburgh Council area. SNIP has taken steps to make its services available to families who might not otherwise have ready access to support. It is a continuing challenge for the organisation, and for all of us, to ensure that we keep avenues open so that people feel that there are services that they can use. We accept that the onus is on us to take responsibility for ensuring equity of access to support when there are difficulties.

11:30

Dr Jefferies: We have a parent support officer, who is commissioned by the council but is not a council employee, who works with parents who are experiencing difficulty with getting into the system.

We recognise that parents, particularly in the early stages of their contact with the system, can sometimes find it bewildering. Dealing with their child’s issues and with the system can be tough for parents, so we are keen to support them.

There is a general awareness that there is a need to respond differently to people such as Gypsy Travellers, who might be there one week but not the next, and who might have cultural traditions that have a bearing on their children’s school education. However, that is about a level of awareness rather than about specifically commissioning someone in the council to deal with Gypsy Travellers. As Cameron Munro said, there is an awareness that one size does not fit all in this area. We have to tailor our responses to individual needs.

Bryan Kirkaldy: The point about low-income families is a big issue for us all, especially given the correlation between additional support needs and poverty. Many families in that category have a real struggle to access information, including written information, that is relevant to the legislation, let alone understand the rights and processes that are implied in what is a very complex bureaucracy. There are massive issues for us to deal with there.

One of the arguments that we want to lead nationally—it is not for the bill—is that we should move to simplified arrangements to meet additional support needs. If any serious analysis was done of access by families on low incomes or living in poverty to the rights that the bill will bring, we would find it very uneven indeed.

Cameron Munro: The other aspect to mediation and dispute resolution that is of concern to my council is the position of looked-after and accommodated children, the notion of the
The issue that Bryan Kirkaldy outlined is critical to the question. When we reviewed records of need, we found the timescales demanding when several cases were being considered simultaneously. Delays can also arise when further discussions need to be held with parents who have made assessment requests and there are difficulties in contacting them. The key to all of this is to ensure that it is made clear that other agencies are accountable for meeting the requirements in the bill.

Christina McKelvie: The issue that Bryan Kirkaldy outlined is critical to the question. When we reviewed records of need, we found the timescales demanding when several cases were being considered simultaneously. Delays can also arise when further discussions need to be held with parents who have made assessment requests and there are difficulties in contacting them. The key to all of this is to ensure that it is made clear that other agencies are accountable for meeting the requirements in the bill.

Christina McKelvie: That is correct.

Notwithstanding some of the things that have been said about CSPs, such as whether they should be in place and whether they should be used as a measure of success, one of the proposals involves the timescales that are afforded to local authorities to put a CSP in place. Is it appropriate to refer a case to the tribunal because the authority has missed the deadline? I would like to hear your views on that.

Bryan Kirkaldy: The ADES view is that it is reasonable that local authorities should be held to account for the timescales that are applied. However, the legislation applies only to the council and not to the partner agencies that contribute to the council's meeting the timescale. For example, if Fife Council is opening a CSP for a youngster, it will often depend on national health service speech and language therapists and perhaps colleagues in other agencies to make that commitment happen. Therefore, there is a dislocation of power and responsibility. If a local authority is accountable for achieving an outcome that is dependent on the NHS, there is a dislocation that will be difficult to manage. The solution is to apply the duty equally to the NHS and other agencies.

Dr Jefferies: In our submission, we said that we agree that the issue of timescales is a matter for the tribunal. Instead of holding oral hearings into missed deadlines, having a written process is an eminently sensible route to take. Missing an agreed timescale is a matter of fact, and a written process allows authorities to give reasons such as those that Bryan Kirkaldy outlined. The matter would need to be documented, but if another agency has caused the hold-up for an authority, that is therefore the reason for the delay, and the tribunal will note that.

It may be difficult to engage with a parent, although not necessarily because the parent is being unhelpful. For example, a parent may be unable to make meetings or may be available only at certain times, and that may draw out the process. Again, all that can be explained. However, I agree that, if we fail to meet timescales we should be held to account for that.

Cameron Munro: I agree.

Martin Vallely: I agree, too.

Christina McKelvie: That was short.

Obviously, panel members agree that the proposals should be put in place. However, in their responses to the Government consultation, some local authorities said that the proposals were inappropriate. What is the best way in which to ensure that local authorities implement the decisions of the tribunal on issues such as timescales?

Martin Vallely: The issue that Bryan Kirkaldy outlined is critical to the question. When we reviewed records of need, we found the timescales demanding when several cases were being considered simultaneously. Delays can also arise when further discussions need to be held with parents who have made assessment requests and there are difficulties in contacting them. The key to all of this is to ensure that it is made clear that other agencies are accountable for meeting the requirements in the bill.

Christina McKelvie: The bill addresses the situation in which a council fails to apply a CSP. Obviously, for some authorities, that is a bone of contention. If a council fails to apply a CSP that results from a tribunal decision, what is the best way in which to proceed?

Martin Vallely: I can refer only to the situation in which the timescale for a placing request is not met and the placing request is deemed to have been refused, which can be appealed. The measure seems the most straightforward way in which to deal with the circumstances in which the timescale for a CSP is not met.

Christina McKelvie: Is the tribunal the place to deal with such issues, or should local authorities deal with them?

Martin Vallely: The best solution would be for local authorities to deal with them. That said, provision also has to be made to ensure that parents can appeal and that authorities are held to account when they have failed to meet statutory requirements.

Dr Jefferies: Any procedure has to have a system of accountability. I understand that, in the past, a parent could appeal against an authority's decision under section 70 of the Education (Scotland) Act 1980—which is not a realistic procedure—or they could appeal to Scottish ministers on certain matters. Although the system
will make life harder for local authorities, it is better to put in place a system that has clear accountability and a clear appeal process that is simple for parents to use.

I can speak only on behalf of my authority, but if we are subject to a tribunal decision, we treat it extremely seriously. We do not set aside the matter or say, “We are not happy with that.” We accept a tribunal decision as the equivalent of a court decision that must be implemented. It is not optional, whatever our view of it; it is something that we must do.

Christina McKelvie: I am glad to hear that.

Bryan Kirkaldy: In general, all local authorities would consider a tribunal decision to be binding. The general principle is that, ideally, local authorities should resolve matters internally and minimise the rate at which the tribunal procedure is invoked.

Ken Macintosh: We have already addressed the issue of how adversarial the process is and how that could be mitigated through mediation, dispute resolution and front-loading the system. Do the witnesses have any suggestions about how the tribunal itself could be made less adversarial?

Cameron Munro: The policy aim was to make tribunals parent friendly. However, the road to hell is paved with good intentions, and it was unlikely that that aim would be achieved. Perhaps the focus should have been on getting the most effective return for children. We appear to want a process that should not be adversarial and should not involve lawyers and other people. However, that almost takes us back to a quasi paper exercise for dispute resolution, in which one party is not encouraged to ask the other party anything and there is no cross-examination. We do not want to make the process into something like that, because that would inevitably bring people such as me into the process. My concern as a lawyer is that there would be no equality of arms in that process.

I have been involved in tribunal matters in which my colleague Mr Nisbet appeared for the other side, so there was parity. However, my concern is that the tribunal rules and procedures are simply not clear enough to allow us to say, for example, whether the onus is on the local authority. If I defend an exclusion appeal in Glasgow sheriff court, the burden of proof rests with Glasgow City Council and the standard of proof is that of the balance of probability. I am not clear where there is any burden on anything in a tribunal; it is simply a case of giving out information and allowing somebody else to question us.

I will let others come in on the back of that, but my view is that, rather than simply having a set of rules, there is a serious need to look more carefully at what the tribunal’s procedures should be.

Dr Jefferies: My direct experience is that the tribunal is less adversarial if it is well framed and clearly organised to be that way. A great deal comes down to the person who convenes the tribunal being explicit about what will happen. The issue has become less important to me as somebody who has been to two or three tribunals. However, it is important for a parent to know what will happen and how the decision will be reached, and that they will get the opportunity to speak as freely as possible.

I do not think that the tribunal will ever be an informal arena. I cannot imagine how being faced with a panel of people can be informal. However, it is important that effort is made to give the parents the opportunity to give the fullest information that they can. The best tribunals undoubtedly offer parents the space to give their information. Whatever I personally think about the parents’ information, they have the opportunity to give it.

The important aspect is how the tribunal is run. Perhaps Cameron Munro is right that there are legal elements to that. However, I think that it is very much about the additional support needs tribunals evolving and recognising that they are perhaps a bit different from other tribunals. The exemplar is usually employment tribunals, which have been running for a long time. However, an ASN tribunal has a different flavour because it is about children and young people. The issue is how the tribunal is framed: it should be explicit and clear, and the sequence should be explained to parents as it goes along. Parents should not just be given a piece of paper at the start. The tribunals can be done well.

11:45

Ken Macintosh: Before Mr Kirkaldy and Mr Vallely respond, I will outline two suggestions that have been put to us. The first is that we increase support for advocacy services for parents, and the second, which was made by the president of the Additional Support Needs Tribunals for Scotland, is that limited legal aid be made available to parents, at the tribunal’s discretion—not generally, but for specific points of law. I do not know whether Dr Jefferies wants to come back in, but perhaps, based on their experience, Mr Kirkaldy and Mr Vallely can comment on how to reduce the confrontation that appears to take place.

Martin Vallely: We must recognise that the legislation is complex. Given that the inner house of the Court of Session has had to produce lengthy opinions on the interpretation of the 2004 act, we must acknowledge that the beast is not one that readily lends itself to informality. I can see
merit in suggestions about the availability of legal aid, advocacy and so on, but I wonder whether that approach would put in the investment at the wrong end, because all that it would enable is a better rammy.

Perhaps the tribunal needs more expert legal support so that it can better equip and prepare itself to deal with the complexity of the legislation that relates to the individual cases before it. In my experience, the better tribunal hearings are those in which the convener is clear about what the points of law are, about what has been taken from the evidence that has been submitted in advance and about what information and opinion it would be helpful to have from the parents and the local authority. That suggests that the best outcome would be achieved by considering the front end of the process and asking how we can ensure that the tribunal is well informed and well prepared so that it can get the best value over the shortest period of time. By contrast, the worst tribunal hearings are those that have everything thrown at them, and thrown at them again, and which go on for six or seven days. I hope that such hearings can be avoided.

Bryan Kirkaldy: I am not sure that I can offer any comment on the specific suggestions that Ken Macintosh mentioned—I do not feel competent to do so.

It is early days in respect of our experience with the tribunals, which deal with a relatively small number of cases. In the wider context that I mentioned earlier, the cases that they deal with involve a tiny fraction of the population of families that have children with additional support needs. We are talking about disputes that have been impossible to resolve by other means and which therefore require to go to the highest point of resolution. That is the tribunal, which turns on legal matters, so the tribunal hearing is bound to be formal. There is no escaping that conclusion, and the intention to make the tribunals family friendly was probably misguided, given what was going to be possible.

I reiterate the importance of building up all that we do below the tip of the dispute pyramid to ensure that families are satisfied with the provision that we make and thereby minimise the use of the formal mechanisms, because they cannot be family friendly and do not always achieve the best outcome for the youngster. That applies even to the process that the family and the youngster have to go through to get to the tribunal.

Ken Macintosh: I will return, if I may, convener, to the issue of home authority and host authority responsibility. We have touched on costs. Mr Kirkaldy mentions, in his submission on behalf of Fife Council, that the financial memorandum perhaps underestimates the cost to some authorities. Do you think that it is right for the costs to be met by the host authority rather than by the home authority? Does the mechanism for resolving any dispute between home authority and host authority need to be improved?

Bryan Kirkaldy: As the bill is framed, there is ambiguity about where responsibility for the costs would lie. My preference, and that of Fife Council and ADES, is for the costs to be met by the residential authority and for it to be responsible for brokering the placing request; otherwise, there is a risk of a perverse incentive being introduced and of there being a dislocation between responsibility and power. If that does not happen, a set of problems will be generated that will require work across local authorities to manage the consequences of the dislocation.

On the financial memorandum, I made a specific point on behalf of Fife Council and ADES about placing requests to the independent sector, the rate of which has been growing slowly in the years since the introduction of the legislation. That trend has cost implications—they are not massive, but for a local authority the size of Fife Council, there can be two or three placing requests a year involving independent school fees, the cost of which can range from £200,000 down to £50,000. Such schools have a wide range of fee scales. We can therefore put some figures on that trend. I have not done systematic work for other local authorities on that question, but ADES, the Convention of Scottish Local Authorities and the Scottish Government should collectively pay attention to it.

Ken Macintosh: Perhaps the representatives of other local authorities will comment, beginning with Mr Vallely. We discussed the issue at the stakeholders’ event, and some parent bodies felt that cost implications influenced local government decisions—that was parents’ suspicion or anxiety. What do you think of the way in which the bill deals with the home and host responsibility for costs and the mechanism for resolving any disputes?

Martin Vallely: There are some difficulties with the bill’s proposals. An authority should be responsible for the residents in its area whether the provision is secured through another authority or through an independent school. That position supports best value, good governance and good management in relation to the continuity and coherence of provision for children. The arguments are massively in favour of responsibility being retained with the home authority.

On the question of how costs influence decisions, the legislation makes it clear that the first consideration should be not the costs but the needs of the child, and that adequate provision should be ensured. Equally, though, the local
authority has a responsibility to ensure adequate and efficient provision for its area and, in evaluating efficiency, cost is only one part of the equation. The local authority is also under a duty to secure best value. The legislation says that nothing in it should lead a local authority to have unreasonable costs. In that philosophical context, therefore, cost is a factor. However, provision for the individual child should be driven not by cost, but by need. Indeed, it is not legal to refuse a placement request on the ground of cost.

Cost is only one part of a four-part test with regard to independent schools. It becomes a factor only when a cost benefit analysis is done and an authority is secure in the knowledge that any additional costs cannot be justified on the ground of additional benefits; only then is an authority entitled to refuse a request on that ground. The law is clear on that, but the bill includes proposals that will make that less clear. We addressed those aspects of the bill in our submission.

Dr Jefferies: I do not want to prolong the discussion, but as the bill stands, I agree that a slightly unclear situation has been made even less clear. Under section 23 of the Education (Scotland) Act 1980, the operating principle for authorities is that, whether the child is placed in another authority’s school by means of a placing request or by the authority, we mutually recover the costs involved. My authority does that in terms of placements with neighbouring authorities. Not only does the residential authority retain responsibility for the child, but the system works successfully; it is not difficult to administer.

We can debate who is responsible for what. As the bill stands, I suspect that more such debates will take place; people will say, “We don’t think this is our responsibility” or “We don’t accept those costs.” Such situations will multiply and that is not a welcome position for any of us.

I turn to the point about costs driving provision. As guardians of the public purse, local authorities must be able to justify their expenditure. In this context, the first point of assessment is always the child’s needs. Thereafter, we have to justify whether the expenditure is reasonable. It is fair to say that advocacy organisations look at children solely as individuals, whereas local authorities have to make provision for the range of children that they encounter. The inescapable fact of life is that authorities have to make such judgments.

Cameron Munro: Given my council’s position, Mr Macintosh will expect me to have a view on the subject. I will declare my interest if he declares his.

As Mr Macintosh knows only too well, the conundrum is how to square two extremes. On the one hand, the authority that receives a child says, “Why should we be out of pocket for making provision for a child who does not live in our area?” On the other hand, the residential authority says, “Hang on a minute. Under the law as it stands, authority X can run up a range of provisions for a child who lives in our area, but we are not party to the discussion, involved in any assessment or consulted on any matter.” The matter is of particular concern to my council.

The question is whether the mechanism is sound enough to enable mediation. As we said in our submission and as I outlined in my opening statement, we believe that that is not the case. The situation is unclear. Section 23 of the 1980 act makes reference to an authority recovering “from that other authority such contributions in respect of such provision as may be agreed by the authorities concerned”, but how do we define “provision”? If my authority has to employ an extra 1.5 full-time equivalent educational psychologists, can it recover the costs of doing that? Do costs have to be directly related to the support that is made available for a child under a plan or by other means? As part of a broad consultation on the bill, we need to look seriously at the meaning of section 23. Authorities will have a view on that.

Another situation with which Mr Macintosh is familiar is that of the child who moves from one authority to another on a placing request, but whose additional support needs are not known at the point at which they make the move. Last week and this week, the authorities that my colleagues on the panel represent will have enrolled into primary 1 classes children who start school at this later stage, some of whom will be found to have additional support needs. Does that alter the issue in any way? That is another conundrum.

Glasgow City Council is concerned that we may run up bills without any consultation having been undertaken or agreement put in place—in other words, without our participation. The first thing that the committee should do is to reconsider section 23. The 1980 act provides that if a child is schooled in another authority area, they are deemed to belong to that authority. More creative consideration of that might be needed. I have given my council’s view.

12:00

Elizabeth Smith (Mid Scotland and Fife) (Con): In two previous evidence sessions, it has been put to us that one great difficulty is hearing the child’s view. Do you have suggestions for improving that in the placing request process and particularly at tribunals?
Cameron Munro: The tribunal affords the child the right to express a view to it. You touch on a point with which I would sympathise and empathise in my day job. A child who is 12 or older can instruct a solicitor, appeal an exclusion independently and obtain an order from the sheriff court that says that they have been discriminated against, but they cannot say, “I need a CSP,” or, “I’ve got additional support needs that have to be addressed.” More important, they cannot have their views on those matters heard.

An important point is that section 12 of the 2004 act compels an authority not just to have regard to a child’s views—the Children (Scotland) Act 1995 and section 2(2) of the Standards in Scotland’s Schools etc Act 2000 required that—but to “seek and take account” of views. That threshold is much higher. The caveat is that section 12 applies to children to whom an authority deems that it applies, so some authorities might apply it only to children who have CSPs. My view, which Margaret Doran shares, is that the provision should apply universally—children’s views must be considered and sought as part of the process.

I am concerned that the placing request legislation does not permit the child’s view to be considered. A child of 14 might regard having a co-ordinated support plan as socially unacceptable in his peer group, whether or not his mother wants him to have one. We now face that balance, which you have raised before, between the rights of parents—which were all that was considered in the past—and the rights of the child. We must unravel that. The child’s view is where the law now rests. As has been said, advocacy on behalf of children and views on that should be actively encouraged.

Dr Jefferies: A serious onus is on local authorities to find out children’s views. That is an emerging skill in Scottish education in personal learning planning and involving children in directing their education.

On contentious matters such as placing requests, a serious concern is that adopting a view that is not the same as that of their parents is difficult for children. It is tough for a young person to say, “My mum wants this, but I don’t want it to happen,” and to be held to account for that. Some young people say privately to a trusted teacher, “It’s really my mum that wants this to happen,” but putting a child in that position in a tribunal or even in a small group is a tough ask. Continued effort is needed on that.

Rather than people who are brought in to take young people’s views, the people who get closest to those views are often those who know the children, such as trusted teachers or assistants in schools. How we commission such people to obtain a child’s view fairly and equitably is the challenge. A child should be allowed to express a view not in a formal setting, but in an informal setting, and that should be translated in a way that can be relayed. We have not cracked that challenge.

Martin Vallely: I agree that the matter is complex, but the bill does not address it—the bill body-swerves it. Does the bill even see that as an issue? The question requires to be examined in depth in its own right. Our view is that the lack of provisions on that is a shortcoming in the 2004 act and the bill. In this age, we cannot turn a blind eye to that.

Bryan Kirkaldy: We know that children are able to express their views when they are in the company of people whom they know and trust—people with whom they are familiar and with whom they are used to being listened to and respected. It is almost always the case that the children’s parents can provide a mouthpiece for them.

For us, the difficult cases arise when the child’s views, or what might be considered as the child’s best interests, are different from the parents’ views. We have to be especially vigilant in such cases, making special arrangements to ensure that those children have access to trusted and familiar adults who will listen to them and help them to rehearse and practise what they will have to say for themselves. I am talking about our staff.

In a formal tribunal-type hearing, it is difficult to imagine a youngster being able to express their views clearly—although sometimes they can, especially if they have been able to practise beforehand. In other cases, they are dependent on adults to be their spokespersons.

Margaret Smith (Edinburgh West) (LD): Good afternoon, gentlemen. Before I ask a question, I would like to pick up on that last point. Within the children’s hearings system, allowance is made for young people to express an opinion, and I have been at hearings at which the young person has taken a very different view from their parents. I agree that the issue is difficult; we should try to turn our attention towards improving the situation.

I have a wide-ranging question for the panel, one that I think will bring our questions to a conclusion. We have heard evidence and received written submissions from a number of organisations, and a number of proposals for amendments to the bill have been put to us. Indeed, you have made some proposals today. We have also heard about areas that have not been considered but which people feel should be considered.

I will try to give you a flavour of some of the proposals: the 2004 act should cover everyone in school education, even if they are over 18; failure to comply with duties on transition should be a
ground for appeal to the tribunal; the tribunal should be able to state when a placing request should start; looked-after children, young carers and children with mental health issues should be assessed on whether they need a CSP; and the word “significant” requires further definition. The latter two points were touched on earlier.

Mr Vallely of City of Edinburgh Council—in a slightly different setting from where we normally meet each other—has said that the council believes that it is premature to consider extensive revisions to the 2004 act. However, much of the evidence that we have heard—formally, informally and anecdotally—suggests that a groundswell of opinion exists that it actually is time to consider revisions to the act.

What do the witnesses think about the proposals that I described? Do you think that it is too soon to revise the act? Those are small questions to finish things off.

**The Convener:** And you get only one stab at them.

**Bryan Kirkaldy:** That was a series of questions. I will attempt to answer some of them.

The cycle of legislative reform in this area is relatively rapid. In recent times, the cycle has been around 20 years, although as we become more alert, with a devolved Government and improved communication, the cycle might go faster. However, given that the current legislation was enacted in 2004 and was implemented in full only two or three years later, it seems relatively early to amend it, particularly given the consequences of root-and-branch amendment.

ADES’s position is that the bill’s proposals are more complex and bureaucratic than they need to be. We are interested in taking a simpler, user-friendly, family-friendly and comprehensive approach to additional support needs in the context of inclusive education. I refer to my earlier suggestions about the evaluative indicators and the valued outcomes for which we would want to be held accountable for all children. That is to do with the life chances that we create for them and the satisfaction that they and their families feel with the provision that we make while they are with us—that applies particularly to this most vulnerable population.

We would be interested in discussing more radical reform of the existing legislation, but it would have to be carefully considered. I strongly advocate simplifying the legislation rather than making it more complex.

**Martin Vallely:** The City of Edinburgh Council’s submission that it is premature to consider a wholesale revision of the 2004 act rests on two factors. One is that the 2004 act was put in place as part of a suite of initiatives to modernise education in Scotland. In particular, it was designed to complement the introduction of the curriculum for excellence, but it was also designed with at least some reference to the getting it right for every child programme.

The changes that we are talking about are fundamental in terms of the culture of our schools and services, and the substance of what school education constitutes. Change in a complex setting like education takes time. It is relatively easy to change laws—although I am sure that that is demanding in its own way—but it is much more difficult to change attitudes, beliefs and behaviours. We see the impact of the 2004 act permeating day-to-day practice in schools, with many children benefiting and practices improving, but it takes time to secure that. It is interesting that, although issues that have been raised in the consultation on the bill may be important in their own right, they are relatively minor and technical in terms of the substance of the 2004 act. There is a danger that we will distract ourselves by dealing with those rather than dealing with the sea change that should be our focus in the circumstances.

The proposal to extend the 2004 act involves all sorts of issues that need to be considered, for example extending to cover over-18s legislation that is focused on children and young people. That involves fundamental issues about human rights that have all sorts of ramifications, which I am sure Cameron Munro can highlight. Such a change should not be done on the run.

I would think that the mental health issues that have been highlighted are already accommodated in the 2004 act. Cameron Munro highlighted earlier the clarity of the definition of “significant”. We have been given guidance by the courts that must be properly interpreted in giving operational guidance to local authorities and information to parents. I am sure that more could be done in that respect.

If an appetite exists for wider change, I suggest that we need to take a wider view. In practice, many disputes that have been referred to the tribunal involve interfaces between health service and social work service responsibilities, and circumstances in which parents find maintaining a child at home extremely difficult so they look for a residential school to resolve the situation. In some circumstances, parents who are anxious to secure a level or type of therapy provision use the 2004 act and the education authority indirectly to secure that end. If an appetite exists to change the legislation more broadly, we should address all agencies and ensure that there is a balanced approach to responsibility and accountability in relation to the future direction of children’s services.
Dr Jefferies: Overturining completely the 2004 act, which has operated for a relatively short time, would be premature, although there is a big caveat: the act focuses everybody’s attention on CSPs, placing requests and disputes, which contradicts its stated intention of taking a broader view of additional support needs so that, rather than focus on children, we focus on who we need to support and on what we need to do as local authorities to improve children’s education. A range of children, not only one group, have special needs or co-ordinated support plan needs. Some elements of the act have undermined the original intention.

We need to keep the 2004 act under close review. I subscribe to the view that the direction of travel should be towards a simpler, clearer and more parent-friendly, teacher-friendly and everybody-friendly system. Disputes will always arise—some parents will feel that their child should have something that the local authority feels is unnecessary—but that should not be built up into something that dominates the system. Achieving a simpler system should be the direction of travel.

Legislation—not on all subjects, but on this one—often works best when it codifies existing good practice rather than leads practice. It often works best when it identifies good practice—the gold standard of operation—and helps everybody to aspire to it. Expecting the 2004 act suddenly to transform support for children with additional support needs was a false hope. It could have consolidated existing systems, but I am not convinced that it did that tremendously successfully. The system at its best should be married better with the legislation. That is not a job for next week or for six months’ time—it is for the longer term.

I hope that the committee will finish its impressive consultation on the bill with the clear understanding that it ain’t all fixed and that legislation on additional support needs must be kept under review. I suspect that members will not find an easy resolution to the placing request issue, for example. Whatever happens will have unintended consequences, which will need to be revisited over time, so a review system should be in place. Argyll and Bute Council has no appetite for restarting everything. We need to keep the 2004 act under close review. We need to understand that it ain’t all fixed and that we should be aware that parents’ focus is on the individual child. Parent X is not concerned that Glasgow City Council is doing a tremendous amount of work on children with autism; their cry is, “What is the council doing for my child?” That is the starting point.

We also need to recognise that, over the years, we have developed separate systems of law for children’s welfare and children’s education, which involve different procedures and practices; indeed, they almost have different moralities. The 2004 act was not about getting it right for every child. I am cautious about our moving towards wholesale change until we are clear about where we are going with the current model, so that we can ensure that we are moving forward together.

Cameron Munro: I like Ted Jefferies’s idea of everybody being friendly and happy. I thought that he was going to pass round the hat after a while—that was the touchy-feely approach at its best. That is the psychologist in him.

We must start by recognising where we are. More than 30 years ago, when I started as a teacher, there was a big sign outside the school that said, “No parents beyond this point.” If you got past that, there was a guard dog, a trip wire and then the janey, who had been on a customer care course. His opening line was, “What do you want?”

If we make education extremely important—which is not a bad thing to do—it is inevitable that we will make parents slightly more anxious and authorities slightly more edgy about being accountable. We should be aware that parents’ focus is on the individual child. Parent X is not concerned that Glasgow City Council is doing a tremendous amount of work on children with autism; their cry is, “What is the council doing for my child?” That is the starting point.

The bill proposes extremely limited amendments. Many of the proposals that Margaret Smith referred to do not touch on the practical issues that are of concern to people. I would be concerned if the Government’s solution were to shift all the issues that have been mentioned into a code of practice. That would be disastrous, as it would clarify nothing and would simply add more confusion. We would end up in a Lewis Carroll scenario, whereby people would argue that the word “significant” meant what they said it meant. Why do we not just change the law and make it clearer?

We should bear in mind the fact that the principle of section 1 of the 2004 act is that children who have additional support needs will get support in order to benefit from school education. However, I am conscious that there is a broader issue. The Parliament legislated for Careers Scotland and the further education colleges to be among the appropriate agencies. There is an issue about transition, which is analogous to the situation of the child who, for want of a better expression, comes out of care into the adult world. There is a danger that they will fall through the gaps. We know that that is where the problem lies. I am not convinced that it is easy to address that by changing the education element of the system. I certainly have no difficulty with the issue of looked-after and accommodated children, which is extremely important. As you would
expect, my view is that matters to do with significant additional support should be legislated for.

We must stick by the tried and tested approach. Five years ago, Glasgow City Council had almost 3,000 children who had a record of needs. They have been migrated into a system in which fewer than 400 children have a co-ordinated support plan. We have managed to do that with the minimum of legal challenge because, as the residential authority, we have built up and put in place a set of procedures for dealing with a complex range of children and difficult parents that places on us responsibility for trying to solve the problem in house. I am concerned that there is a danger that unless we build in safeguards, the apparent no-brainer—as Ted Jefferies put it—of allowing parents to make a placing request to any school in Scotland will not allow us to consider a range of problems that will arise from that.

The Convener: That concludes the committee’s questions. I thank the witnesses very much for their attendance and for their detailed answers. They have made a number of points, on which I am sure the committee will reflect as we conclude our stage 1 consideration of the bill. I suspend the meeting for five minutes to allow the witnesses to leave.

12:24
Meeting suspended.
14 January (1st Meeting, 2009 (Session 3)) – Written Evidence

ADES
Argyll and Bute Council
City of Edinburgh Council
Glasgow City Council
Education (Additional Support for Learning) (Scotland) Bill: Stage 1

10:00

The Convener: Item 2 is the committee’s continued consideration of the Education (Additional Support for Learning) (Scotland) Bill at stage 1. I am pleased to welcome to the meeting Adam Ingram, the Minister for Children and Early Years. He is joined by Government officials Robin McKendrick, head of branch 1 in the support for learning division; Susan Gilroy, policy officer in the support for learning division; and Louisa Walls, who is a principal legal officer.

Minister, I understand that you have a short opening statement.

The Minister for Children and Early Years (Adam Ingram): Yes, indeed—thank you, convener, and good morning, colleagues. I thank committee members for their work over the past few months in considering the bill. Some aspects of the bill and of the evidence that you have taken are technically quite complex, so I appreciate the committee’s careful scrutiny.

The Education (Additional Support for Learning) (Scotland) Act 2004 commenced over three years ago. It has always been the intention to revisit the additional support needs legislation and the code of practice to reflect on what we have learned from our experience of implementing the 2004 act. As the committee has heard from my officials, the bill does not alter the ethos or the fundamental building blocks of the 2004 act, which is aimed at a broad group of children and young people with additional support needs. The bill amends the 2004 act in light of the reports by Her Majesty’s Inspectorate of Education, the Court of Session rulings, the annual reports from the president of the Additional Support Needs Tribunals for Scotland, stakeholders’ views and informed observations in light of practice.

The bill’s proposals will strengthen the rights of children with additional support needs and their parents by providing the parents with the same rights as others to make placing requests to local authorities outwith their area. The bill will give parents and young people access to mediation and dispute resolution from the host authority, following a successful out-of-area placing request. It will also increase parents’ and young people’s rights in respect of access to the tribunals regarding failures by the education authority.

The code of practice will be amended in due course and laid before the Scottish Parliament. The redrafted code will place the 2004 act in the
context of our current policies, such as getting it right for every child, the early years framework and the curriculum for excellence. I am aware that a number of those who have provided evidence to the committee have asked for clarification of the term "significant" in the phrase "significant additional support", which is one of the criteria for a co-ordinated support plan. It is our intention that the redrafted code will develop further and clarify the definition of the term "significant". We are working with stakeholders to develop further guidance on the meaning of that term. The code will also clarify the process of making placing requests.

As members are aware, we held an extensive consultation on the draft bill and I met the Convention of Scottish Local Authorities and various other stakeholders. Most stakeholders were very supportive of the proposed amendments. However, concerns were raised regarding the enforcement of a restricted reporting order or an award of expenses. Because of that concern, the proposed enforcement amendment has now been dropped from the bill.

In addition to the amendments that are contained in the bill, stakeholders suggested a number of amendments, which I have considered carefully. I am in no doubt that the committee will wish to discuss some of those additional amendments with me, and I acknowledge that some of them may help to improve and strengthen the 2004 act. As a result, I share with the committee the three additional amendments that I am minded to explore further. The first is to enable tribunals to specify when a placing request should start.

I am pleased to announce that we intend to develop proposals to take forward representative advocacy support for parents. I want to ensure that parents have access to advocacy at a tribunal. As the committee knows, Independent Special Education Advice (Scotland) and Govan Law Centre are the two main voluntary organisations that support parents at tribunals. I met ISEA and Govan Law Centre in the summer and agreed short-term funding to safeguard and support those advocacy services for parents in 2008-09. As well as training advocacy organisations to build capacity, Govan Law Centre will make recommendations on how best to address the need for representative advocacy at tribunals throughout Scotland in the longer term. Its report on that is due next month.

I hope to be in a position to provide more detailed information on that at stage 2 of the bill. However, as the committee will appreciate, any proposed action will take time to plan and implement. We therefore propose to fund ISEA for a further nine months, from April 2009 to December 2009, to ensure that in the meantime parents have continuing access to advocacy at the tribunals.

I am aware that we need to do more to ensure that parents are aware of their rights under the legislation and I will be considering how we can ensure that we improve the quality of information received by parents.

I am sure that the committee will agree that some aspects of the bill are fairly technical. As a result, I seek your approval to reserve the right to respond to you in writing if required.

The Convener: Thank you for your opening statement, minister. I am sure that members will be more than happy for you to respond in writing. We have struggled with the technicalities of the bill over the past few months, so we understand.

Every committee member will welcome your commitment to pay particular attention to three areas that have been raised with us repeatedly in our evidence taking at stage 1. I am sure that further questions will be asked on those areas today, but we welcome the Government's commitment and willingness to act before stage 2.

The bill's main policy principle is to extend the right to parents of children with additional support needs to make a placing request. Why do you believe that it is important to do that?

Adam Ingram: It is a question of equality, and rights under the law. You will be aware that a Court of Session ruling under Lord Macphail upheld a local authority's appeal against applications from parents with children with additional support needs for out-of-area placing requests. All other parents have that right, and we believe that children with additional support needs should have that right, too.

The Convener: I have considerable sympathy with that view, as do a number of local authorities. However, Cameron Munro, who represented Glasgow City Council at the committee last week, said that he would like the committee at least to consider the fact that there is already provision for a parent to make a request to have their child placed in another school in another authority area."—[Official Report, Education, Lifelong Learning and Culture Committee, 14 January 2009; c 1860.]  

How does the Government respond to that, and why do you think that the legislation that you propose is required?

Adam Ingram: Glasgow City Council and, I think, the City of Edinburgh Council, describe
scenarios in which a parent can make an out-of-area placing request by submitting a request to their home authority to place their child in a school, but that is not really a parental placing request as such. In effect, the parent is asking one authority to enter into arrangements with another authority to place the child in a host authority area. That is quite different from a parental placing request. Even before the 2004 act commenced, parents could approach their home authority to do just that. It seems that Glasgow seeks to reduce parental choice in this regard; on principle, we do not think that that should be upheld.

The Convener: Thank you for that clarification of the Government's views.

Several local authorities and the Association of Directors of Education in Scotland, which was represented at the committee last week, made strong representations that if the bill is enacted—and I think that there is a will for the placing requests procedure to be amended—we should consider an amendment at stage 2 to ensure that similar procedures and safeguards will exist for placing requests that are made by the parents of children with additional support needs as currently apply when a placing request is made to an independent school. Should those same safeguards be in place, or has the Government already considered and discounted them?

Adam Ingram: What safeguards are we talking about?

The Convener: Mr Munro spoke about the process. He said that Glasgow proposed "treating such a request as equivalent to an application to an independent or independently funded school. A parent would make the placing request to their home local authority … The crucial test for the authority would be whether it could make the same or better provision within its own system."—[Official Report, Education, Lifelong Learning and Culture Committee, 14 January 2009; c 1862.]

Adam Ingram: The authorities are reiterating the argument about placing requests being made through home authorities rather than allowing the parent to be independent, to exercise their choice outwith their home authority and to apply to an independent school or a host authority. Again, we are not minded to go down that route.

The Convener: Another aspect of the authorities' argument is that, currently, independent schools cannot be involved in the local authority's decision making and make representations along with the parents when they make their request. They think it right that those same procedures should apply when a parent whose child has additional support needs makes a placing request. Has the Government considered that?

Adam Ingram: I will come back to you on that point, because I have not considered it.

The Convener: That would be helpful, because local authorities were seeking assurances on those issues. It is for the committee to decide whether we agree with them, but it would be interesting to receive more information on that.

10:15

Elizabeth Smith (Mid Scotland and Fife) (Con): Good morning, minister. You said clearly in your opening remarks that there is a fine balance to be struck between getting the legislation right and producing a code of good practice that is not enshrined in the legislation. That is central to a lot of the debate that we are having on the issue, as it raises questions about whether, just by making better legislation, we will be able to deliver better care for those who have additional support needs. That is a major issue to keep at the back of our minds.

A lot of the evidence that we have taken suggests that there is a definition problem. You referred to the fact that the word "significant" is open to question. Has the Government considered the definition of those who have a permanent disability as opposed to one that might result in the need for additional support for only a year or a couple of years? It might be helpful to tighten up the definitions in the bill by defining somebody who has a physical disability that will last for their whole life.

Adam Ingram: You will be aware that there was significant debate on such definitions when the 2004 act was under scrutiny—Ken Macintosh will remember that—especially regarding who would be eligible for a co-ordinated support plan. Those would be children with multiple, complex and enduring needs of the type that you are talking about. The debate at that time centred on whether we were creating a two-tier system. Essentially, we were providing rights to children with additional support needs and their parents, so why should we single out children with enduring, complex and multiple needs? The answer was that the system fails most often in dealing with those children with multiple and enduring needs. That is why we were concerned to ensure that resources could be maintained and targeted on that group of children.

Elizabeth Smith: Those who have provided evidence for us feel quite strongly that, at present, it is too easy for different local authorities to have slightly different interpretations. They suggest that that is partly a problem of definition within the existing legislation. That is an important point.

As the convener said, we have taken evidence from lots of different local authorities that have differing interpretations. The fact that the
definitions are not tight enough perhaps gives them a barrier to hide behind. I accept your point about having different definitions, but there are children who have long-term additional support needs as opposed to those who can get sorted out within a shorter space of time. I wonder whether we should consider including a separate definition of those children in the bill.

Adam Ingram: I think that such matters would be better addressed in the code of practice. In my opening remarks, I mentioned that I am looking carefully at the term “significant”. It is a very difficult issue, although Lord Nimmo Smith, of the inner house of the Court of Session, has given us a working definition that we can start with. As you rightly say, many of the stakeholders are concerned about the definitions of the term “significant” and other terms.

I recently set up a working group on co-ordinated support plans, not least because of the low number of such plans. The group will consider definitions—it will address the definition of “significant”, in particular—taking into consideration all the submissions that have been made on the definitions in the bill. That work will inform the later stages of the bill process and the revision of the support for learning code of practice.

Elizabeth Smith: That is helpful. At a time when there are budget cuts and concerns about the availability of resources, it would be helpful to have some tightening up of the definitions. It has been a thread in much of the evidence that we have taken that there is a definitional problem, and that it is too easy for local authorities to have slightly different interpretations, which does not always best serve the child.

Adam Ingram: I think that the allegation is that the term “significant” has an extremely high threshold for local authorities.

Elizabeth Smith: I am sure.

I turn your attention to the co-ordination between the two authorities that are involved in a placing request. Mr Nisbet of Govan Law Centre said that he was concerned that the reference in section 5 of the bill to a child belonging to a certain authority would pose difficulties if the child’s father was in one authority and their mother was in another. Are you confident that the bill deals with that issue?

Adam Ingram: The bill clarifies the position. In particular, we clarify that the child is the responsibility of one authority at a time. Iain Nisbet was concerned about the existence of a grey area as regards which authority was responsible for, and which authority we were asking to attend to, the needs of a child in a particular situation. We are tidying up the legislation in that regard so that it is clear which authority is responsible for a child in all the relevant circumstances.

Elizabeth Smith: Do you believe that that must be done in the bill, or could it be dealt with in the code of practice?

Adam Ingram: As regards the process, the code of practice will obviously need to be clarified in that respect, but with some of the amendments that we have proposed in the bill, we should be able to clarify that issue.

Elizabeth Smith: I want to take up the convener’s point about independent schools—not independent special schools, but independent mainstream schools, a few of which offer special facilities. That is a consideration. The convener is right to say that it is important to ensure that the parents of any child who requires additional support have not only special schools available to them, but independent schools that are in the mainstream stream, some of which have specialist dyslexic units or whatever. Although local authorities have no responsibility in that area, we want to ensure that that is not lost in new legislation.

Adam Ingram: Such schools would be defined as special schools, just as local authority schools that have bases for children with particular needs are defined as special schools.

Elizabeth Smith: Okay. Thank you.

Ken Macintosh (Eastwood) (Lab): I have a question about costs that picks up on the questions that the convener asked about the principles that underpin out-of-authority placements. The local authorities put up the argument that they are responsible for providing for the needs of all their children, so if parents and children apply to another authority, the decision on costs is taken out of their hands. Do you accept that that is entirely the case? Will you give us your thoughts on the principle of costs following the child and to what extent that happens at the moment?

Adam Ingram: The cost arrangements for interauthority transfers are well understood by the education community and especially by education authorities. The relevant legislation is section 23 of the Education (Scotland) Act 1980. We are talking about the additional costs that arise from additional support needs provision. The host authority can, rightly, send a bill to the home authority for the additional costs, which obviously must be justified. An incentive is built in to the system for home authorities to develop additional support needs provision in their area if they are concerned about the number of children who are going out with the area to receive provision. It is incumbent on home authorities to provide a broad range of provision that satisfies the needs in their own areas. The system therefore reinforces the
need for authorities to make provision in their own area.

Ken Macintosh: To what extent do you think that funding follows the child—particularly a child with additional needs?

Adam Ingram: Do you mean funding for education authorities from the Government?

Ken Macintosh: Yes.

Adam Ingram: My understanding is that the funding follows the child. There might be a year’s delay in transferring funds because they are based on the school census figures, but my understanding is that that system works well.

Ken Macintosh: Do the school census figures provide additional funding when a child is identified as requiring additional support that means additional costs?

Adam Ingram: No—what is transferred is the funding for the particular school place. Any additional costs for additional support needs provision must be paid for by the home authority when the child transfers.

Ken Macintosh: Exactly, but the local authorities argue that they do not have a say in addressing the needs. In other words, a child’s parent can apply to another authority for a range of services when additional needs might not have been diagnosed or recognised at that stage. Local authorities think that the principle of another authority providing a range of services but billing the entire amount to the home authority is problematic when the home authority is responsible for all the other needs.

Adam Ingram: I do not doubt that they think that. All I would say is that the provision for the circumstances that you describe has been settled for some 30 years now, so the system clearly works. I return to my point about the incentives in the system for all authorities to build up provision in their own areas. We hope that that would reduce the demand for out-of-area placing requests, which can be costly.

Ken Macintosh: It is interesting that you suggest that there is an incentive for home authorities to develop their resources. The committee has heard the opposite argument—that the system introduces a perverse incentive to parents to apply to special schools because there is an appeal process for such schools.

I was pleased to hear the measures that you outlined earlier. I was gratified to hear your thinking on a range of issues, including the one about appeals for all special schools being dealt with through the tribunals system. However, some local authorities have said that the danger is that that creates a perverse incentive. Several have suggested that we will see the growth of independent special schools because they will be dealt with in a different way and their funding will be slightly different. The implication is that such schools would be under less control from local authorities. The suggestion was that local authorities with children with severe needs would have an incentive to send the children to other authorities.

10:30

Adam Ingram: We need to remember that checks and balances are built into the system. Obviously, host authorities can refuse placing requests. Schedule 2 to the 2004 act provides a number of criteria that apply in such circumstances, so any spurious or irrational requests should be sifted out of the system at that point.

Incidentally, I welcome your welcome for the extension of the tribunal’s jurisdiction. I point out that I have been consistent on the issue, given that I moved amendments to that effect during the original bill’s passage through Parliament in 2004. However, those amendments were defeated.

Ken Macintosh: I hate to think who might have voted against those amendments.

Adam Ingram: You did.

Ken Macintosh: Hindsight is a wonderful thing.

I have a final question on costs. You have said several times that the current system is well understood and works well, but I am not entirely sure that is the case. For example, as far as I can see, none of the adjudications that have been made by the Executive under section 23 of the 1980 act have actually been observed by the local authorities. Although the majority of authorities do not have an issue with the legislation, none of those for which it has been an issue have made by the Executive under section 23 of the 1980 act have actually been observed by the local authorities. Although the majority of authorities do not have an issue with the legislation, none of those for which it has been an issue have observed the decisions under section 23, which take years to reach in every case. All the decisions have been appealed to the Court of Session, where they might be appealed again. That does not sound like a system that is well understood or working.

Adam Ingram: To be fair, we are talking about a relationship between two authorities. Those are the only decisions that have come to Scottish ministers. The issue is something of a long-running saga, as you well know, given that East Renfrewshire and Glasgow City Council are the two authorities concerned.

An interesting point is that the directions given by Scottish ministers were upheld by Lord Penrose in the outer house of the Court of Session. It is up to the host authority where it goes from here. The host authority came to Scottish
ministers, who made a direction. The authority then went to the outer house of the Court of Session, which upheld that decision. Really, the ball is in the court of the host authority. I do not think that it can be said on that basis that the system is not working. I do not know whether it is appropriate for me to say much more on that.

Ken Macintosh: Although the decisions have all been consistent, they have not all been observed yet. I suggest that the payment and cost issue needs to be resolved. Although only two authorities are involved, I think that other authorities are looking at the principle closely to ensure that they have the relationship right.

Adam Ingram: As I said, the situation that we are describing is anomalous. The fact that local authorities have made very few submissions to ministers under section 23 of the 1980 act—the only submissions have arisen from that specific interauthority relationship—suggests that the system is working and people understand how it operates. The lack of disputes, rather than their incidence, is remarkable.

Ken Macintosh: Possibly. Would you be sympathetic to an amendment that tightened up the legislation on that issue?

Adam Ingram: I would need to see what the amendment said.

Ken Macintosh: You do not think that there is a problem.

Adam Ingram: No, I do not see a problem.

Ken Macintosh: Convener, if I may, I will come back later to my other question, which is on general issues rather than on costs.

The Convener: In that case, we move on to Mr Gibson.

Kenneth Gibson (Cunninghame North) (SNP): Good morning, minister. I welcome the fact that you have welcomed Ken Macintosh’s welcome.

One of the amendments that you mentioned would result in all placing request appeals being heard by tribunals. Would that mean that a co-ordinated support plan would be needed or could an appeal progress without one? Argyll and Bute Council, for example, believes that CSPs do not reflect the complexity of children’s needs.

Adam Ingram: Yes, we are, in respect of out-of-area placing requests to special schools, extending the jurisdiction beyond children with CSPs.

Kenneth Gibson: How are you extending it and what will that mean?

Adam Ingram: A parent who applies to an authority for a place in a special school, but whose application is refused, can go through the dispute resolution process and can eventually appeal to the tribunal.

Kenneth Gibson: Do you believe that that will increase or reduce the number of appeals?

Adam Ingram: It will reduce the complexity of the system, which is an important—

Kenneth Gibson: It will also reduce the confusion that surrounds it.

Adam Ingram: Yes. There is significant demand, but there is also a natural ceiling on demand for places in special schools, so I do not anticipate a large increase, although we have factored in additional costs that will need to be taken into consideration in the financial memorandum to accommodate extra provision in special schools. The placing requests figures for 2006-07 show that 14 special school placing requests were referred to education appeal committees and none was referred to the sheriff. When we transfer cases to the tribunal, the cost is £2,000 per case, so we need to make available an additional sum—the total would come to something like £40,000.

Kenneth Gibson: Parents have expressed to us—in formal and informal meetings—considerable frustration about the time it takes to go through the appeals process and so on. Will the changes that are being made expedite decisions or will there still be the same long drawn-out process that some families have experienced?

Adam Ingram: As I said, clarification on such issues should expedite decisions and speed up things significantly.

Kenneth Gibson: What do you mean when you say that it should speed up the process “significantly”? We have heard that some cases have lasted for up to two years.

Adam Ingram: As Kenneth Gibson knows perfectly well from his constituency cases, there can be a long and weary wait before a conclusion is reached when cases go to a sheriff. Tribunals are much more responsive. Another benefit of referring cases to tribunals is that they will be dealt with by a body of people who have expertise in additional support needs and who understand the issues, so the quality of decision making could, and should, improve.

Kenneth Gibson: Yes. So—we are looking at improved decision making and decisions being made much quicker. I know that every case is different, but is there a time within which you believe cases should be resolved? Should they be resolved within three months or six months, for example? Will there be anything in guidance to
ensure that cases are not dragged out for longer than necessary?

Adam Ingram: A timetable for tribunals is laid down in the regulations. We already have timeous dealing with cases—I have not heard evidence to suggest that there is anything wrong with the process just now. I refer to the education appeal committee route down to the sheriff and so on.

Kenneth Gibson: I know what you mean. You are saying that that is not necessarily where the bottleneck is.

Adam Ingram: Yes.

Kenneth Gibson: Given the changes that are being made, the other bottlenecks will hopefully be cleared, too.

Adam Ingram: Indeed.

Claire Baker (Mid Scotland and Fife) (Lab): I want to return to the adversarial nature of the process. In your opening remarks, you said that you are looking at representative advocacy services for parents, in recognition of the increasingly adversarial nature of the tribunals. That issue was raised by the ASNTS’s president, who gave us figures on the increasing numbers of respondents and appellants who are represented by legal counsel. One suggestion from the tribunal chair was that parents could, at the discretion of the chair, receive legal support on points of law. However, local authorities tend to favour the adversarial, and suggest that the quality of decision making is part of the problem. How might representative advocacy support address some of the issues that have been raised with us?

Adam Ingram: A lot of witnesses suggested that there is an imbalance between local authorities and parents in the power of argument that can be brought to a tribunal with legal representation: local authorities are obviously better able to afford legal representation. How do we level the playing field? I do not want to make the process more adversarial and bring more lawyers into it. I want to neutralise the effect of local authorities employing solicitors. In essence, I want to try to make lawyers redundant—

Margaret Smith (Edinburgh West) (LD): Can we vote on that now, convener?

Adam Ingram: I want to make lawyers redundant in the tribunal situation, which we can do through the rules and procedures of the tribunal. We have three members on the tribunal who could be more interrogative of both sides and could limit the opportunities for legal representatives to advocate their side of the argument. The tribunal members could ask all the questions and we might not allow cross-examination by someone else’s representative. I know that the president of the ASNTS has issued directions to encourage that type of thing in our tribunal conveners. I am planning to get together with the president to see how far we can take that and whether we can address the issue in that way.

10:45

Claire Baker: Why do you think local authorities have moved towards increased legal counsel at tribunals?

Adam Ingram: Their approach is very conservative and defensive. When a local authority and a parent are at odds, the local authority wants to stack the odds in its favour and to ensure that its position is represented as effectively as possible.

Aileen Campbell (South of Scotland) (SNP): It was good to hear, in your opening remarks, that you want to improve the quality of the information that parents receive about their rights regarding mediation and dispute resolution. The evidence that we have taken suggests that there is low awareness of those rights among parents. I would like to pursue the matter a wee bit further.

When Robin McKendrick came to give evidence at the start of last month, he talked about local authorities not providing information about mediation and dispute resolution in the same way. We heard a similar argument from Lorraine Dilworth, who told us what some local authorities do to promote knowledge of parents’ rights. The provision of such information is pretty patchy throughout the country. What does the Government think about the need to ensure that each local authority improves parents’ knowledge of their rights regarding mediation and dispute resolution? How might the Government monitor what local authorities do, or is that not an appropriate way in which to approach the issue?

Adam Ingram: I accept that that is a significant and serious issue. HMIE’s report also flagged up the need to improve the quality and extent of communication with parents and young people, including information about how to resolve disagreements and the like.

I am still astonished at people’s lack of awareness about their rights—despite all the statutory duties that are placed on local authorities and others to inform people of their rights, whether through the Scottish Schools (Parental Involvement) Act 2006 or whatever. We have tried several different ways of marketing—if you like—that area, but we have not cracked it yet. We will look again at the support for learning code of practice and try to address the issue through strengthening the obligation on authorities to provide information.
Let us consider the correspondence that goes backwards and forwards, especially in the dispute resolution process. For example, when the tribunal writes to parents with its decisions—especially if it is upholding the parents’ case—it should point out that, if the local authority does not comply, they have rights under section 70 of the Education (Scotland) Act 1980 to pursue the matter by complaint. I understand that that does not necessarily happen at the moment. We must try to get consistency throughout the country in the methodology for informing parents, especially in the mediation and dispute resolution process. Some local authorities are better than others at providing the information.

**Aileen Campbell:** We have heard that. Lorraine Dilworth noted also that it is not possible to find the name of the director of education on one council’s website. Such basic things need to be addressed.

We have also heard about problems in getting information out to parents in particular groups, such as Gypsy Travellers, armed forces parents and parents who are on low incomes.

We also heard from Cameron Munro about a specific issue with looked-after children in which a council may almost end up mediating with itself. What does the Government plan to do to help those groups of families in Scotland?

**Adam Ingram:** On Traveller children, we have the Scottish Traveller education programme. There are clearly issues with interrupted learning and assessing where Traveller children are in terms of their education when they arrive at a school. There is the same sort of issue with the children of service personnel, so we are pulling together a forum, or seminar, of local authorities to discuss the issues. The Scottish Traveller education programme has come up with a series of recommendations for addressing the issues that relate to Traveller children.

I notice that the president of the Additional Support Needs Tribunals for Scotland suggested that there should be some sort of six-monthly review to determine whether looked-after children ought to have co-ordinated support plans. I do not favour that approach, which would be overly bureaucratic and burdensome, but I am keen that every looked-after child should have a care plan from the outset of their becoming looked after. We are developing policy on that all the time: we have launched “These Are Our Bairns: A guide for community planning partnerships on being a good corporate parent”, and we are developing our regulations on looked-after children, which will come through this summer. We have also designated managers within residential care establishments and education establishments to focus on looked-after children. That is the way to deal with those issues: at the source of the problem, rather than trying to build in some sort of remedial action through the tribunal process, which would be cumbersome and ineffective.

**Alex Neil (Central Scotland) (SNP):** The bill is necessary partly because of rulings that some sheriffs have made, which have not always been in tune with the spirit of the 2004 act. As you know, I have been particularly concerned about the sheriff’s decision in one case in South Lanarkshire. I will not name the case publicly, but the minister is familiar with it. People who come into the system will benefit from the bill when it is enacted, but we also have a duty to people who find themselves in difficult positions as a result of court decisions that do not necessarily follow the spirit of the act. Will those people have the right to go back to the tribunal and have it reconsider their cases and, possibly, make a ruling that runs counter to a decision that a sheriff took some time ago?

**Adam Ingram:** I do not want to go into too much detail about the case that Alex Neil mentioned, but parents in such situations must come back under the aegis of the education authority. Parents have the right to make placing requests annually, so if they are refused one year, they can try again another year.

If a parent—for understandable reasons—unilaterally takes the decision to send their child to a special school and to pay for it themselves, they have let the education authority off the hook, so to speak. In such a situation, the parent would have to review their own position and perhaps change tack.

**Alex Neil:** Under the present legislation, would the parents require a co-ordinated support plan for them to be able to go to the tribunal?

**Adam Ingram:** They will not require one now.

**Alex Neil:** They will not require one once the legislation is passed.

**Adam Ingram:** No.

**Alex Neil:** Will that be in the primary legislation or the code of practice?

**Adam Ingram:** It will be in the primary legislation.

**Alex Neil:** Okay.

I have made this point to the minister before: even if we assume that the bill will be passed, it is clear, as far as I can tell, that in cases in which parents are still dissatisfied, for the few who know about section 70 of the Education (Scotland) Act 1980 and have actually used it, it has proved to be extremely unsatisfactory. Do you have any plans to improve the way in which section 70 applications are handled?
**Adam Ingram:** Yes. We have had very few complaints under section 70.

**Alex Neil:** That is because people do not know about it.

**Adam Ingram:** Exactly—that is one aspect of it. When we get section 70 complaints, we need to pursue them vigorously. We should take them up on behalf of complainants in a way that encourages local authorities to respond. I have had a meeting with officials to that effect. As I pointed out earlier in response to Aileen Campbell’s question on information during disputation, we have to get the message across to parents that that route is available to them.

**Alex Neil:** That brings me to my final point on making parents aware of their rights. As a list member, my constituency covers four local authority areas. Two of those authorities not only do not tell parents their rights, but go out of their way to avoid doing so, as I could prove in relation to a number of cases. Even the authorities that do tell parents their rights do not tell them about things such as section 70. I welcome—and I welcome everybody else’s welcomes—your proposed amendment in that area.

Once a child has been assessed as requiring additional support needs, is there a need for the Scottish Government to go over the head of the local authority to ensure that the parents are given a pack of some kind that explains all their rights, rather than our relying on 32 local authorities to put together their own packs?

**Adam Ingram:** We support with around £400,000 the Enquire organisation and helpline, which produces leaflet packs and the like.

**Alex Neil:** With all due respect, many parents do not know that they can contact Enquire.

**Adam Ingram:** I know—I spoke about that problem earlier. Local authorities are under a statutory duty to inform parents of what is available to them. I recently attended a meeting that was called by East Ayrshire Council, which brought groups of parents together to inform them of their rights under the 1980 act. We need more such activity. The support groups that exist to help parents, such as dyslexia and autism support groups, can spread the message and help inform parents, on top of anything that the Government or local authorities provide. However, we need to get our act together on that front. I am not satisfied that parents are being properly informed.

11:00

**Claire Baker:** The minister partly addressed my point in responding to Aileen Campbell’s question about mediation and dispute resolution. Is there a greater role for an independent element in that process? Could the voluntary sector play a bigger role in supporting parents? Aileen Campbell talked about looked-after children. Such an increased role would be a way in which to resolve the tension that exists when a local authority mediates with itself.

**Adam Ingram:** People have questioned the independence of the dispute resolution process because parents have to apply to the local authority to go through the process. However, I warn against removing from local authorities the duty to respond to the issue, because they are responsible for gathering together all the paperwork. It would be extremely burdensome for a parent to go through that process independently. It is important that local authorities retain the duty to provide support to parents during the independent adjudication process. Of course, the adjudication itself is absolutely independent—it involves people who are appointed by the Scottish ministers to consider individual cases. I do not see a case for tampering with those arrangements and would reject any such amendments.

**Margaret Smith:** We have heard, in formal and informal sessions, a great deal of concern from people about how the existing legislation is working. One of the dilemmas with which I came into the meeting was that, although there is a great deal of support for the bill, it is clear from the evidence that has been presented to us that the bill does not go far enough. We are reviewing the 2004 act, but we might be letting an opportunity slip by. However, at the risk of sounding dull and boring, I say seriously that I, like other members, welcome what you have said this morning, minister—your comments have been heartening. I am talking not only about the three items to which you alluded, to which I will return, but about what you said in your discussion with Alex Neil on the section 70 issues and the need for you to pursue that with vigour. Almost as important as the specific points that you mentioned is the need for all of us to pursue with vigour the issue that the Parliament’s best intentions in the 2004 act have not seen the light of day when it comes to local authorities dealing with individual children and family circumstances. I very much welcome what you have said, minister.

I am sure that you are well aware of the joint submission that we received from a range of organisations, including Scotland’s Commissioner for Children and Young People, the National Autistic Society and the Govan Law Centre. I will mention a couple of points that it raises as potential areas for amendment.

The first proposal relates to the decision by Lord Wheatley that educational support is that which is offered in a teaching environment. Most of us
assume that additional support needs encompass a wider scope than that and that other support can assist children in their education, even though it is not provided in a teaching environment. The organisations outline several such measures, such as a “communication programme drawn up by a speech … therapist” and “an anger management programme”.

The organisations suggest an amendment to make it clear that additional support does not mean just support in a teaching environment. Are you minded to consider that?

The second proposal is that a reference could be made to the tribunal in respect of transition planning. We all know from dealing with constituents that transition points are important for families with children who have special needs. We probably do not hear about the times when transition goes well, although we often hear about transitions that do not go well.

Will you comment on those two suggested amendments to the bill?

Adam Ingram: I thank Margaret Smith for her questions. Lord Wheatley’s decision was first brought to my attention by Iain Nisbet of Govan Law Centre, who made the points that Margaret Smith described in his submission to the committee.

The intention behind the 2004 act was clear. The purpose of additional support is to allow children and young people to benefit from school education. That support should not be limited to support that is offered in a teaching environment; it can involve not only education services, but other agencies, such as health and social work services.

Lord Wheatley’s decision casts doubt on the interpretation of the 2004 act. The Government’s policy officials and solicitors are still considering the implications of his ruling. We intend to make the bill as clear as possible, to meet the policy intention that I described. We think that the issue is for the code of practice, but we will continue to reflect on that and we will tell the committee our further thoughts.

I agree that transitions are critical. However, dispute mechanisms are in place to deal with problems that parents want to address. If the parent of a child with additional support needs feels that transitional arrangements are necessary for their child, but the education authority disagrees, the parent can refer the case to dispute resolution or, if the child has a CSP, to the tribunal, for consideration of the level of provision in the child’s last year at school. Margaret Smith commented in a committee meeting on the complexity of the bill and on the number of layers that exist. Adding yet another layer—a reference to the tribunal—is unnecessary and we should avoid that.

Margaret Smith: I will ask for clarity about a couple of amendments that you said that you will lodge, although I appreciate that we will see more information about them in due course.

You said that you will allow parents to ask for an assessment at any time. I understand that, at the moment, they are able to ask for an assessment only if the child has a CSP. Have I got that correct?

Adam Ingram: Yes.

Margaret Smith: Concerns have been addressed to us about the number of CSPs that are produced. The City of Edinburgh Council, from which we took evidence last week, believes that it has legitimate reasons for not having as many CSPs as people might expect it to have. I am not saying whether or not I agree with that position. Nevertheless, people have raised a concern that the number of CSPs in circulation is not what might be expected. How will giving parents the right to ask for an assessment at any time differ from the current situation?

Adam Ingram: At the moment, when a parent seeks a co-ordinated support plan for their child or asks a local authority to address their child’s additional support needs, they ask for assessments at that time. However, education authorities tend to draw the line at that request—they will respond to that request but they will not respond at other times. We think that parents are in the best position to monitor the progress and needs of their child, and a child’s needs change over time. In order that the parent can be satisfied that they are able to secure the best possible provision for their child’s needs, they must be able to ask for an assessment at any time during the course of the child’s progress through school.

Margaret Smith: That is prior to the production of a CSP.

Adam Ingram: Yes.

Margaret Smith: The parent will be able to do that whether or not the child has a CSP.

Adam Ingram: Yes.

Margaret Smith: As you say, circumstances change; therefore, assessments may or may not have been carried out previously and a CSP may or may not be in place.

Adam Ingram: Correct.

Margaret Smith: And the policy will apply across the board.
Adam Ingram: Yes.

Margaret Smith: Good. I have one final point to raise. You also said that you are minded to lodge an amendment that will allow the tribunal to say when a requested placing should begin. I welcome that. We have heard strongly in evidence that that would be a good move. We questioned the president of the Additional Support Needs Tribunal for Scotland on whether, given that that would involve its having more of a monitoring role than it has had before, it feels that it has the resources to do that. I think that she said that it does feel that it has the resources that it requires. Have you evaluated whether the changes that we are talking about, which you have announced today, will require further resourcing of the current tribunal system?

Adam Ingram: We do not believe so. I do not think that there will be any substantial increase in the burden on tribunals. As you have pointed out, the president of the ASNTS helpfully suggested that she has enough resources to tackle the new requirements.

Margaret Smith: Quite right. I think that that is why we asked the question—to tee it up nicely for you.

Adam Ingram: Thank you.

Christina McKelvie (Central Scotland) (SNP): Good morning, minister. One of the pitfalls of being the person with the last theme on the list is that by the time you get to it everyone else has asked all the questions. I therefore hope that my questions will be brief, as there are just a couple of things that I want to pick up from what you have told us this morning. Also, I join everybody else in welcoming; I do not want to be left out of welcoming the welcome to the welcome.

I want to pick up the issue of looked-after and accommodated children, which was raised at our round-table session with stakeholders. I welcome some of the points that you have made this morning about that. However, in response to Margaret Smith’s questions, you said that parents will be able ask for an assessment when they think that that is appropriate, having monitored the situation. Who will be responsible for requesting assessments for looked-after and accommodated children? In response to an earlier question, you said that the local authority will be responsible for pulling together all the paperwork, as that would be an arduous task for a parent. Who will be responsible for doing that in the case of looked-after and accommodated children? Will the bill allow you to remedy the problems that exist?

Adam Ingram: Yes.

Margaret Smith: Good. I have one final point to raise. You also said that you are minded to lodge an amendment that will allow the tribunal to say when a requested placing should begin. I welcome that. We have heard strongly in evidence that that would be a good move. We questioned the president of the Additional Support Needs Tribunal for Scotland on whether, given that that would involve its having more of a monitoring role than it has had before, it feels that it has the resources to do that. I think that she said that it does feel that it has the resources that it requires. Have you evaluated whether the changes that we are talking about, which you have announced today, will require further resourcing of the current tribunal system?

Adam Ingram: We do not believe so. I do not think that there will be any substantial increase in the burden on tribunals. As you have pointed out, the president of the ASNTS helpfully suggested that she has enough resources to tackle the new requirements.

Margaret Smith: Quite right. I think that that is why we asked the question—to tee it up nicely for you.

Adam Ingram: Thank you.

Christina McKelvie: It was about who will have responsibility for looked-after and accommodated children, but I think that you have answered it. Over the years, I have noticed that different local authorities have different ways of putting together care plans and educational support plans, and that some issues are prioritised over others. In many cases, I have seen quite poor results in identifying a child’s educational support needs, because their social needs or the reasons that they are looked after and accommodated have become the priority. Will the code of conduct include direction on how local authorities should put together care plans to ensure that there is a holistic approach?

Adam Ingram: We are keen to emphasise the links between additional support legislation and the care planning process. We will ensure that the code of practice for the bill spells those out. I hope that that will reassure you.

Christina McKelvie: Scottish vocational qualifications and higher national certificates for care staff address the issue in a positive way. One of the units is about care planning, and the children and young people qualification places a huge emphasis on educational support needs. I saw a huge change in one member of staff who was doing the qualification and who put a care plan together appropriately at the beginning of the process but did so appropriately at the end. The most important point is that that was of real benefit to the child concerned. However, the status of the local authority as the corporate parent could still lead to conflicts of interest when cases come before tribunals. I hope that that can be addressed by the bill and by putting in place more vociferous advocacy for young people from their key workers. There is a real failing in how we support looked-after and accommodated children.

Adam Ingram: That was a worry in relation to the number of co-ordinated support plans. When the HMIE report on improving the education of our looked-after children made the situation plain, I
asked education authorities to review their procedures. On the face of it, looked-after children are likely to be candidates not only for additional support needs provision but for co-ordinated support plans. I have tasked the short-term CSP working group to examine such issues and find out the precise number of co-ordinated support plans and what we need to do to ensure that, if there is a shortfall, it is dealt with. As I said, looked-after children will be a focus with regard to that provision.

Christina McKelvie: Some submissions, particularly the joint submission led by the Govan Law Centre, have suggested that the bill be amended to give children the right to express their views during the process. As something of a champion of children’s rights, I would welcome such an approach. How would the bill allow children to give their views?

Adam Ingram: Such a provision is built into the 2004 act, which gives children over the age of 12—young people, if you like—the right to be independently consulted on co-ordinated support plans, additional support needs and the provision that has been put in place for them. As I said, we do not need to reinvent the original legislation, but to ensure that it is properly implemented.

Christina McKelvie: I agree that giving children the opportunity to express their views and rights is, like the issues that Aileen Campbell raised with regard to parents, more to do with awareness.

The Convener: Although I understand the Government’s commitment to the historic concordat, I would have thought that Mr Neil’s point about forcing local authorities on certain matters might have sat at odds with the historic concordat’s ethos. Does the Government have a view on the provision of independent advocacy services, particularly for looked-after and accommodated children? Are you confident that certain local authorities are not trying to reduce that provision in order to make savings in their budgets without being noticed?

Adam Ingram: I am committed to the agenda of improving the situation for looked-after children. I am certainly aware of the issue that you raise; indeed, I have asked officials to map current advocacy support with a view to reviewing our policy. That said, I have no proposals to discuss with the committee. As I indicated, we will address the issue of advocacy provision by additional support needs tribunals. Perhaps I can come back to the committee on how we will take forward advocacy for looked-after children.

The Convener: I appreciate your personal commitment to the issue of looked-after and accommodated children. We need to pay particular attention to getting things right in this area and I believe that all parties are willing to work together on taking forward that agenda. I am sure that the committee will welcome your response to these questions.

Do you have another question, Mr Macintosh?

Ken Macintosh: Yes. Is that all right?

The Convener: Yes, if you are brief. The minister has been giving evidence for an hour and a half now.

Ken Macintosh: I will be brief as possible. I very much welcome the fact that, as usual, the minister has taken a particularly constructive approach to the committee’s questioning.

I hesitate to ask this question, as I might have missed something earlier in the session. A number of people who have submitted evidence have suggested that, as Lord Wheatley’s judgment specifically limited additional support to educational support provided in the classroom, the word “educational” be removed from the 2004 act. Are you sympathetic to such views? Is that an issue?

Adam Ingram: The Wheatley judgment is definitely an issue. However, as the focus of the original legislation was additional support for education, removing references to education does all kinds of things to the potential scope of the bill, so I am not in favour of such a move.

That said, we need to address the Govan Law Centre’s particular question whether additional support applies only to the teaching environment. That is not the case; as the original legislation intended, such support goes much wider than that. We need to restore that intention if it has, indeed, been brought into doubt.

Ken Macintosh: It might make a difference in speech and language therapy, which is often provided by health authorities rather than by education authorities. Perhaps the minister might think about the issue and get back to the committee before stage 2.

I believe that Margaret Smith wants to ask about the same point.

Margaret Smith: I am starting to wonder whether you have been in the same room, Ken.

Now that I have the paperwork in front of me, I point out for clarification that the suggestion by Govan Law Centre and the other organisations involved in the joint submission was to “delete the word ‘educational’ … and/or insert the words ‘(whether relating to education or not)’.

They are seeking not to take education out of the picture but to ensure that the legislation contains the broadest possible definition of “education” and
support thereof. I do not think that that suggestion is incompatible with the 2004 act.

Ken Macintosh: I appreciate that Margaret Smith raised the question earlier. I was raising the issue again simply because I was not quite sure whether I had heard the answer correctly.

Adam Ingram: We are not quite sure of the answer, either, Ken.

Ken Macintosh: I have two other questions, the first of which, about assessment, has also been raised by Margaret Smith. I am not sure that I understood the minister’s response. Am I right in thinking that you were suggesting that we do not need to change the law because parents have the right to on-going assessment pretty much at any stage?

Adam Ingram: I am suggesting that we need to ensure that those provisions are actually implemented. The practice in many local authorities is to offer and provide assessment only at the outset, either when additional support needs are identified or when a co-ordinated support plan is requested. We need to make it clear that assessment is available all through the child’s journey through school.

Ken Macintosh: The witnesses have suggested that that might need legal clarification, which might require the bill to be amended.

Adam Ingram: That is why we will address the matter in the primary legislation.

Ken Macintosh: I welcome the minister’s comment about getting rid of lawyers. However, I find it interesting how we can all change our positions. For example, I am not entirely sure that the minister held the same view when, during the passage of the 2004 act, he moved amendments on legal aid. I suppose that we have all moved with time, and I welcome the change.

The minister has said that there are already a number of duties on local authorities, but a number of witnesses are seeking a new duty on authorities to provide support and advocacy, outwith the tribunal system, to all those who require additional support needs. Is the minister sympathetic to that suggestion?

11:30

Adam Ingram: I might be sympathetic to the suggestion but, given that we are talking about 12,000 people, it would be extremely burdensome and costly. As Ken Macintosh will well remember, we had this debate during the passage of the 2004 act and came to the view that we simply could not afford such a right.

Ken Macintosh: Will the short-term CSP working group complete its work before the bill completes its passage through Parliament?

Adam Ingram: That is the intention. We want to feed in any outputs, outcomes and recommendations into the further stages of the bill’s passage or into the revision of the code of practice.

The Convener: That concludes our questions to the minister. I thank him for his attendance. The committee looks forward to receiving the further written information that he has indicated he will supply to us and, indeed, looks forward to seeing him at stage 2—if, of course, the Parliament agrees the bill at stage 1. I do not want to pre-empt anything.

I suspend the meeting for five minutes for a short comfort break.

11:31

Meeting suspended.
ANNEXE E: LIST OF OTHER WRITTEN EVIDENCE

Copies of all other written and supplementary evidence received by the Committee can be found on the Scottish Parliament website (www.scottish.parliament.uk) or can be provided, on request, by the Clerk to the Committee.

The following written evidence has been received by the Education, Lifelong Learning and Culture Committee:

Aberdeenshire Council
Additional Support Needs Tribunals for Scotland
ADES/ADSW
Afasic Scotland
Angus Council
Argyll and Bute Council
Association of Scotland's Colleges
Autism Rights
Barnardo's Scotland
Care Co-ordination Network UK Scotland
Children in Scotland
Clackmannanshire Council
Consumer Focus Scotland
East Ayrshire Council
East Dunbartonshire Council
East Lothian Council
East Renfrewshire Council
City of Edinburgh Council
The Educational Institute of Scotland
Fife Council
Glasgow City Council
Govan Law Centre's Education Law Unit
Joint submission led by the Govan Law Centre
HM Inspectorate of Education
Inverclyde Council
ISEA Scotland
Jardine, Colin
Learning and Teaching Scotland
Midlothian Council
The Moray Council
National Autistic Society
National Deaf Children's Society
Perth and Kinross Council
Quarriers
Renfrewshire Council
RNIB Scotland
SCAJTC (Scottish Committee of the Administrative Justice and Tribunals Council)
School Leaders Scotland
Scottish Borders Council
Sense Scotland
Shelter Scotland
Scottish Traveller Education Programme
Stirling Council Children's Services
West Dunbartonshire Council
West Lothian Council
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, not withstanding 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 ADDITIONAL SUPPORT NEEDS TRIBUNALS FOR SCOTLAND

Education (Additional Support for Learning) (Scotland) Bill

Summary

1. Scotland’s children would benefit from the following amendments to the Bill:

   1. Provide for all appeals in respect of placing requests for special schools, independent or otherwise to be heard by the ASNTS;
   2. Provide for the Tribunal to direct, where a placing request appeal is allowed, the commencement date of that placement;
   3. Provide for a mechanism whereby a parent may refer back to the Tribunal where any decision of the Tribunal has not been implemented for the purposes of ensuring implementation and reporting;
   4. Provide for a statutory review to determine if there should be an assessment for any child who is accommodated or looked after for any period in excess of six months within the following three month period to identify whether or not the criteria for a co-ordinated support plan are satisfied;
   5. Provide for the jurisdiction of the Tribunal to be extended to cover all persons undergoing school education (including where this is provided within a FE college under school-college partnership arrangements) whether or not they have attained 18 years in view of the duties under the Act in respect of school leavers and transitions;
   6. Provide for any exclusions, where the parent or young person claims that the behaviour leading to the exclusion is in consequence of additional support needs, to have that matter considered by the Tribunal.

Introduction

2. This legislative review, three years after the legislation came into force, is welcomed, but it is limited in scope. We now have an opportunity to ensure that the legislation is made fit for purpose so that children and young people with additional support needs may have access to appropriate assessment, support and remedies. This response draws on our experience of 147 references, 55 of which have been decided at hearing, and it addresses only those matters where the Tribunal may assist in strengthening the ethos of the legislation.

3. It is noted that the Scottish Government’s Disability Equality Scheme (2008-2011) commits to “a full legislative review of the Education (Additional
Support for Learning) (Scotland) Act 2004” by 2008/2009 in order to improve “education and support for children with additional support needs (ASN) and disabilities”. It is submitted that a broader review is appropriate and these proposals try to achieve this end.

4. The progress and development of the Tribunal can be followed in the President’s three Annual Reports delivered to Scottish Ministers for the years 2005 to 2008 and these can be accessed at www.asntscotland.gov.uk. We particularly welcome the fact that some of the legislative proposals implement issues highlighted in past reports as requiring amendment whilst others may be addressed through secondary legislation.

1. Placing request references

5. It is noted that the proposals include provision to permit the Tribunal to consider any placing request appeal where a CSP has been prepared, or is being considered, at any time before final determination by an education appeal committee or a sheriff. The intention to avoid the anomaly of a parent having to face two separate hearings is being addressed, but in the light of criticisms of the legislation as being too complex, particularly in respect of routes of redress, the proposed changes only serve to further complicate what should be a clear and consistent appeal pathway. In view of the very wide variation in the incidence of CSPs across education authorities and the fact that the references on placing requests dealt with by the Tribunal have all related to special schools then the proposal to reserve to the Tribunal all placing request appeals relating to special schools would greatly simplify, and bring consistency to decision-making in respect of placing requests.

6. It would also enable parties to benefit from a specialist decision-making body with expertise in additional support needs rather than such appeals being heard by the Education Appeal Committees. This amendment would remove the uncertainty in the Bill where the Tribunal may, or may not, decide to retain jurisdiction in some circumstances and prevent a situation where a parent may find themselves having to appear to give evidence on the issue of the placing request before two separate bodies.

7. The potential increase in the number of appeals to the Tribunal would be modest and could be accommodated within the existing Tribunal resources. The weight of the responses to the consultation on the amendments to the legislation support this change and the stated concern of “frivolous” references on CSPs to secure the jurisdiction of the Tribunal would be entirely resolved.

2. Commencement date of placement

8. The legislation should make explicit the power of the Tribunal to state, in appropriate cases, the commencement date where the placing request is allowed in order to deliver the certainty which the parent seeks once such a decision is made. There have been a number of instances where a decision of the Tribunal has not been implemented timeously and where the expectation
of the parent has not been met. Any decision stating the commencement date would, as in any Tribunal decision, be subject to parties being heard on this issue at hearing.

3. Power or referral for implementation

9. As indicated above, there have been a number of instances where the Tribunal has been asked by parents who have had a successful appeal outcome to ensure that the decision is correctly and expeditiously implemented by the authority. There is currently no power for the Tribunal to address this.

10. There are several possible routes for trying to ensure implementation but none of these revert to the Tribunal and there is no way of tracking when decisions made are not implemented, or not correctly or timeously implemented. A provision to grant parties liberty to apply directly to the Tribunal for power of referral to Scottish Ministers in the event of failure to implement would greatly enhance the force of Tribunal decisions and assure the effectiveness of decision issued.

4. Assessment for accommodated or looked after children

11. The apparent failure of the legislation to adequately encompass the needs of accommodated or looked after children is evidenced by the absence of any references to the Tribunal relating to such children and is also raised by HMiE in their 2007 Report. It is clear that specific provisions are required to demonstrate and deliver an effective service for some of the most vulnerable children.

12. *These Are Our Bairns*, the guide to community partnerships on being a good corporate parent published in September 2008, whilst recognising that many, if not most, children in this situation will have social, emotional or behavioural problems, barely mentions the Education (Additional Support for Learning) (Scotland) Act 2004 or the potential applicability of a co-ordinated support plan in meeting the needs of such children. Their generally poor educational attainment is well documented.

13. The needs of these children should be approached in a holistic manner through the change programme envisaged in Getting It Right For Every Child but those children with the most severe or complex needs should also be assessed for a CSP. There is no evidence that this is currently happening throughout all the authorities. These children all have needs which already involve agencies other than education but there may be an absence of a person to advocate on behalf of the child to ensure that the support in relation to the child’s educational development is appropriate or sufficient. Accordingly it is suggested that an amendment to provide that where a child is accommodated or looked after for a period in excess of six months, there should be a review to determine if an assessment should be carried out in the three month period thereafter to determine whether the child meets the criteria for a CSP. In the absence of such a provision it is likely that children or young
people who are accommodated or looked after will not be enabled to benefit from this legislation despite the policy intention that they be specifically included.

5. Extension of jurisdiction for all young persons undergoing school education

14. Under the present legislation the Tribunal has no jurisdiction when a young person reaches the age of 18 even if they are still attending school. A number of cases have addressed the needs of children who are aged almost 18 and the Tribunal cannot proceed to address the issues once the young person reaches that age despite the fact that the school provision may have an impact on the priority received by the young person in accessing transitional post-school provision. The amendment should simply change the definition of young person to define it by reference to a person undergoing school, or equivalent, education. Although this may be seen as a minor issue, it is submitted that such an amendment would be consistent with the intention to make accessible the appropriate provisions for school leavers with complex additional support needs and would result in little additional financial cost.

15. Such an amendment would also facilitate transitional arrangements for those learners who have had a significant element of their school education provided in a further education college from as early as S3. Many have additional support needs and may have a co-ordinated support plan. In some cases the young person may remain on the school roll until aged 18 and then transfer to the college as a student, at which point the authority is no longer responsible for the young person’s education. This amendment would undoubtedly ease the transition process.

6. Jurisdiction to cover exclusion appeals where the child had additional support needs

16. The broadly equivalent jurisdictions in Wales and England are currently considering proposals to bring within their ambit appeals relating to exclusions where the child has additional support needs (special educational needs) in view of the accepted close correlation between exclusions and additional need factors.

17. Any submission based on recent statistical evidence is not possible in view of the absence of figures relating to exclusion appeals in Scotland since the implementation of the 2004 Act. The most recent figures available dating from 2004/2005 confirm the relationship between additional support needs giving rise, in some cases, to school exclusion but the absence of more recent data alone raises concerns about the way in which such appeals are currently heard. In response to a request for current information, the Statistician at the Pupil and School Statistics Department of the Scottish Government stated “The information we receive from Local Authorities is deemed highly unreliable, with appeals (especially successful appeals) likely underreported. This would give an incomplete and possibly skewed picture if a large proportion of successful appeals were by pupils with ASN”.
18. The possibility of children with additional support needs, which are not currently sufficiently well addressed, being excluded from school, is a real one. By placing this type of appeal within the jurisdiction of the Tribunal these issues could benefit from adjudication by a panel comprising of two members with relevant expertise.

Jessica M Burns
President

Lesley Maguire
Secretary

19 November 2008
1. Further to the question raised by your colleague Ken Macintosh MSP at the meeting of the Education, Lifelong learning and Culture Committee on Wednesday 10 December 2008, please find in the Annexe a table for appellants (parents) and one for respondents (Education Authorities) comparing the type of representation obtained with the outcome of the appeal.

2. Broadly speaking, fielding a legally-qualified representative does not place parties at an advantage in terms of obtaining the desired outcome. On the four occasions where the authority was represented by Counsel at hearings, the Tribunal confirmed the authorities’ decisions on three occasions and upheld the parents’ appeal on one occasion. That said, it is arguable whether any inference can be drawn from such a small sample.

3. I trust the attached data is clear but please do not hesitate to contact me if the Committee has any further questions.

Lesley Maguire
Secretary
### Table 1 - representation of appellants

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### Table 2 - representation of respondents

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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
Senior Manager
Fife Council
(ADES)

Michelle Miller
Chief Social Work Officer
City of Edinburgh Council
(ADSW)
SUBMISSION FROM AFASIC SCOTLAND

Education (Additional Support for Learning) (Scotland) Bill

1. Afasic Scotland welcomes the opportunity to submit evidence to support amendments to the current legislation designed to ensure that children and young people who need additional support to enable them to benefit from the education to which they are entitled, receive that support.

2. Afasic Scotland is party to the joint submission led by the Govan Law Centre but is also submitting this separate submission which goes beyond the consultation framework circulated and reflects consultation with our membership and experience.

3. Afasic Scotland is a parent-led organisation and part of Afasic (UK), established in 1968 to work on behalf of children and young people with speech and language difficulties and support their parents and carers. As part of our core work, we provide training for teachers and others working with children and young people with speech and language impairments. Our training events are marked by a commitment to collaborative practice and all professional events are attended by a mixture of teachers, speech and language therapists and others who work to support learning. The events are always open to and attended by parents as we believe that professionals and parents should work together in the interests of the child/young person. We also provide information and training for parents to help them understand the network of services which their child may be involved with, their child’s educational entitlement and the rights and responsibilities of all parties and support parents to secure the service provision needed for their child. In working with and for parents, Afasic advocates collaboration, co-operation and conciliation as the best approach to securing a positive relationship with service providers and the best and most informed structure of additional support to the child or young person.

4. In the main, our members welcomed the development of the concept of additional support needs and what was believed to be a genuine attempt to establish a legislative framework which would encourage new and improved practice in meeting the needs of children. The opportunity which the Scottish Government has created to consider the effectiveness of the current legislation and bring forward amendments in light of experience in implementing the ASL Act and developing practice is also welcomed.

5. That said, the experience of members of Afasic and their children, and the feedback we receive, suggests that the amendments proposed, while welcome in themselves, will not address some remaining weaknesses in the legislation. Our experience reflects a significant variation in practice across Scotland.

6. It is a given, that membership of an organisation such as ours is driven by parental worries about their child, a need for more information and support and a fear for their child’s future in school and beyond. Many of our members
go on to report good relationships with service providers and increasing confidence in the services provided, but for a significant number the experience is less positive and we are aware of much variation in practice across Scotland, of differences in interpretation of the ASL Act and of understanding of and commitment to the spirit of the Act.

Equality before the law remains an issue.

i) Currently neither parents nor children have rights to assistance to secure legal representation to help them take forward their case. It is understood that in drafting the original legislation and building in mechanisms for mediation and rights to support/advocacy, the intention was not to over-legalise the structure and to seek to resolve issues within a more supportive environment. It is accepted that this position is well-intentioned. However, it leaves parents and children in an unequal position, arguing what may well be a justifiable cause against professional educational officers of the education authority who may be advised and represented by legal professionals from that authority, at public expense. There is already evidence that the mediation structure is achieving some measure of success. In those cases which go to a hearing, parents and children should be entitled to parity before the law in seeking what they believe to be a legal entitlement. Some parents can afford to secure legal representation – which can be costly – many cannot. These parents may also be the ones least able to take forward their own case and to fulfil their own duty to their child.

ii) The recent development to fund advocacy services within the ASL Tribunal system is welcomed but additional support to secure settlement outwith the tribunal would be welcomed. While Section 11A of the ASL Act gives both parents and children the right to support/advocacy there is no duty on anyone to provide or fund such a service. A number of short-term initiatives to fund advocacy projects and services point to the need for such a service but without funding, these independent advocacy services cannot be sustained. A right which carries no matching responsibility is meaningless. Children and young people affected by speech and language impairments are amongst those least able to advocate on their own behalf, they do not necessarily have parents or carers who can do so either.

Health agencies

7. Speech and Language Therapy services play a key role in supporting children and young people with speech and language impairments both directly and indirectly. Afasic Scotland has always expressed concern that a service which may be critical to supporting a learning need is not party to the Act. The recent obiter from Lord Wheatley (CSOH) 2008 serves to emphasise that the good intentions behind the Act may not necessarily be interpreted or implemented. Afasic is concerned that since the ASL Act, the right to
provision of Speech and Language Therapy, which may be essential to meet a child or young person’s learning, has not been recognised. Previously, by extension, if a speech and language difficulty was identified as constituting a special educational need, the responsibility lay with the education authority to provide such therapy and funding was provided to education authorities for that purpose. Contracts with the health trust were the preferred option for providing this service and Afasic is aware of many areas where the relationship works well and new approaches have been successfully developed. However, we also have experience of areas where the relationship between the education authority and the health board is less good, of threats of breach of contract, of requests to us for private therapy service providers, and practice which may look collaborative on paper, but in practice fails to reach the children. Compacts and concordats do not secure children’s rights.

8. The ASL Act Section 23 names “health boards” as an appropriate agency under the Act and empowers Scottish Ministers to ensure compliance by regulation. Afasic asks that health boards who are party to the provision of additional support to meet an identified need, should be a direct party to the Act and that compliance within a CSP should be subject to the ASL Tribunal and the courts.

Transition

i) Anecdotal evidence from parents suggests that insufficient recognition is being given to the planning which is central to meeting additional support needs. The purpose of early identification of needs must be to ensure that an authority can plan and make provision for meeting those needs. Members continue to report transition from pre-school to primary where concerns about support remain.

ii) Transition from school to college also remains problematic, particularly where there are Additional Support Needs but no CSP. While colleges have a duty to provide for students with additional support needs and a further duty under the Disability Discrimination Act, significant forward planning is required if students are to be properly supported to access mainstream vocational education.

The right to be heard

9. Afasic Scotland supports the right of children and young people to be heard, and has carried out research to explore the participation of young people with speech and language impairments in the decision making process around their learning. We are aware of significant moves towards consulting young people but are concerned that young people with communication difficulties need significant support if this is to be meaningful. Recent experience also raises concerns that as young people are being “involved” meaningfully or otherwise, parents are being excluded. Children and young people with additional support needs have views and they have a right to
have these views heard. However, parents also have a duty to their children and may often (although not always) be best placed to help their child articulate their views. In recent cases involving transition from school to college we have become concerned, not just at the exclusion of parents, but at the failure to notify parents that transition planning meetings might be taking place and that the young person would need to be prepared for the meeting. The system is not yet characterised by the openness and transparency which should be the hallmark of services which are committed to doing the best for the child or young person.

Monitoring

10. Parents frequently asks us if no one questions how the authority implements the ASL Act or if it’s all down to them, citing as a past example (2000), how £6m of government funding to improve speech and language therapy was diverted by most authorities for other unrelated purposes. Although this action is now historic it serves alongside experience to lead parents to question how authorities are encouraged to fulfil their obligations and monitored to ensure compliance.

11. Afasic Scotland asks the Scottish Government to consider how best the authority could be monitored and to take action to include the implementation of the ASL Act in monitoring or inspection processes.

Ann Auchterlonie
Director
24 November 2008
1. I refer to the call for evidence on the above Bill on behalf of the Scottish Parliament's Education, Lifelong Learning and Culture Committee, and in particular the letter dated 15 October 2008 from Mr Eugene Windsor to Mr David Sawers the Chief Executive of Angus Council. Mr Sawers has asked me to reply on his behalf.

2. Senior officers of Angus Council are generally supportive of the main thrusts of this Bill. Given the level of detail in the Bill, the policy memorandum was indeed helpful in coming to a better understanding of the Bill's foci and intentions.

3. The financial memorandum was also of interest, although clearly the financial impact of the Bill will not necessarily fall proportionately on each and every council in each and every financial year. National financial projections, whilst obviously of some considerable interest, are not necessarily an accurate guide to the implications for an individual council.

4. Officers of Angus Council have no comments to offer on the consultation which the Scottish Government carried out prior to the introduction of the Bill.

5. I have no further detailed comments to offer on the contents of the Bill itself.

6. I hope this very brief response is of some assistance.

Jim Anderson
Director of Education
19 November 2008
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 ASSOCIATION OF SCOTLAND’S COLLEGES

Education (Additional Support for Learning) (Scotland) Bill

1. Thank you very much for your request for written evidence regarding the above Bill.

2. Following legal advice, The Association of Scotland’s Colleges believes the measures proposed in this Bill will have a minimal impact on the operation of Scotland’s colleges.

3. We therefore have no additional comments to make to the Education, Lifelong Learning and Culture Committee on the progress of this Bill.

Howard McKenzie
Acting Chief Executive
20 November 2008
SUBMISSION FROM AUTISM RIGHTS

Education (Additional Support for Learning) (Scotland) Bill

1. Essentially, parental feedback to Autism Rights is that this Amendment Bill is tinkering at the edges of the Additional Support for Learning (ASL) Bill, and is not the full review that was promised. This was contained in our original submission on the Bill and it would seem that this is being ignored.

2. We are supportive of the submissions made by both Govan Law Centre and Independent Special Education Advice (ISEA), who have provided a very consistent and professional analysis of the original ASL Bill and of this Bill.

3. We request that the committee look again at our grave concerns about the implications of the ASL Bill for the development of our children and their future lives. This cannot be done in isolation – the committee must acknowledge the overall failings within the education system as regards children with disabilities and, in particular, the continuing crisis in the schooling of children with Autistic Spectrum Disorders (ASD).

4. By refusing to acknowledge this crisis, and the managerial culture that promotes it, politicians are effectively condoning corrupt, cruel and hugely wasteful practices within the education system and must take responsibility for the consequences of that behaviour, as they must for their failure to provide any appropriate framework of standards for children with ASD within the education system.

5. Whilst it is extremely difficult to provide documentary evidence of this managerial culture within the education system, because of the amount of intimidation meted out to parents, there is still some that we can provide, and which should not be dismissed as isolated or unrepresentative cases. The fact that these behaviours are employed with no fear of sanctions is ample evidence that they are far more widespread than is generally recognised, as is the feedback that Autism Rights has received from our education questionnaire and with ongoing contact with parents. It should also be noted that parents who do manage to obtain a placement for their child at a specialist school are forced by local authorities to agree not to speak to the media about their struggle.¹

1 Some examples of these behaviours:

http://www.guardian.co.uk/commentisfree/2008/oct/05/socialcare.longtermcare
A Kafkaesque ordeal too many suffer
Local authorities’ disgraceful habit of avoiding paying for appropriate care is beyond satire
The Observer, Sunday October 5 2008
This article covers the recent Sheriff Court case brought by the McCulloch family in Helensburgh for a specialist placement for their daughter who is blind. The family were subjected to a campaign of intimidation, which included accusing the parents of ‘emotional abuse‘ and of exaggerating the nature of their child's disability.

http://icayrshire.icnetwork.co.uk/ayrshirepost/news/tm_headline=just-let-my-lewis-be-like-other-kids%26method=full%26objectid=19856340%26siteid=73592-name_page.html [link is no longer active]
Just let my Lewis be like other kids  
Ayrshire Post, 27 September 2007  
An example of the way that my own local authority, South Ayrshire, treats children with disabilities.

http://www.ipsea.org.uk/sundaytimes.htm  
A groundbreaking article from the Sunday Times Magazine about how local authorities avoid making provision for children with SEN in general.

http://timesonline.typepad.com/india_knight/2006/10/sen_and_state.htm  
Link to letter from special school headteacher (dyslexia) about the intimidating way that local authorities treat the parents of children with SEN.

http://www.theherald.co.uk/politics/news/display.var.1157811.0.0.php  
Council ordered to apologise to disabled teenagers  
31 January 2007  
A council has been ordered to pay compensation and apologise for the "bureaucratic and unsympathetic" way it treated two severely disabled teenagers and their families.

Sheriff criticises choking death school  
22 October 2003  
This is about the inquiry into the death of what was probably an undiagnosed autistic child at a `special` school in North Lanarkshire - the staff refused to accept parental advice about their son's inability to chew his food.

http://news.scotsman.com/topics.cfm?tid=702&id=149992007  
Punished, betrayed, sidelined - our 'lost generation' of autistic children  
29 January 2007. Autism Rights comment - post no.21

http://education.guardian.co.uk/print/0,3858,5353177-110908,00.html  
Scandal of secret school exclusions  
Confidential letter reveals that local education authorities are deliberately breaking the law to avoid paying for special needs children. We know that, if anything, this is an even bigger problem in Scotland.

http://news.bbc.co.uk/1/hi/england/beds/bucks/herts/4220964.stm  
The BBC carried this story about a mother who revealed that her social work department had suggested that putting her child into care was the `best` solution - this being much cheaper than a specialist placement

http://news.bbc.co.uk/1/hi/education/4341645.stm  
Research by Brunel University reveals high levels of stress to parents of autistic children caused by local education authorities.

http://observer.guardian.co.uk/uk_news/story/0,1833449,00.html  
US child expert quits Britain over 'hidden crisis' in special needs

http://news.bbc.co.uk/1/hi/health/1258532.stm  
This revealed that a growing number of potentially autistic children have been placed on the Child Protection Register

http://icnewcastle.icnetwork.co.uk/sundaysun/news/page.cfm?objectid=13746545&method=full&siteid=50081 [link is no longer active]  
An article about how parents of children with autism have been accused of MSBP, and an unknown number have had their children taken away from them

Footnote 2: Anti-social services – copied from the `Private Eye`  
Issue No: 1131. 29 April - 12 May 2005
6. In addition to this, documentary evidence is available for all of the following, which apply to a single child's education. Committee members should ask themselves whether this behaviour is representative of a local authority acting in the best interests of a child with ASD and why educational officials would:

1) Claim that a child's Record of Needs was 'sent out in error', even though it was also sent out to the headteacher of the relevant school?
2) Take a further 5 months to permit the parents to appeal the Record of Needs?
3) Falsely claim that the parents did not have the right to make a placing request?
4) Define a child's SEN as 'communication difficulties' on the grounds that autism is 'a term used by our colleagues in health'?
5) Send out a Record of Needs with pages missing?
6) Fail to issue a Record of Needs revised by the Scottish Ministers on appeal until 3 reminders had been sent by the parents and 6 months had passed, and even then fail to include the parental submission (Part VII) with the Record of Needs and fail to make a single change to the part (Part V) specifying educational provision?
7) Refuse to say whether or not they have any plans to set up a base for children with ASD in any of their secondary schools, when their own education committee acknowledged the necessity of setting up such a base some 7 years ago?
8) Agree with members of a school board that 'their' school should NOT be a 'centre of excellence' for the education of children with ASD – even though the local authority planned to set up their only base for children with ASD within this school?
9) Fail to take any action against the same school board when they embargo the minutes of their meetings discussing the setting up of this base until the end of the year?
10) Refuse to provide guidelines for a home school diary and instead withdraw it for 3 months, so that there is no contact between home and school apart from letters to the headteacher?

7. Other examples of such behaviour on the part of local authorities include:

1) Taking 3 years to put together a Record of Needs.
2) Failing to meet their legal obligation to provide a full-time education for many children with autism.

'It is hard to envisage more ignorant or unsympathetic treatment by the "caring professions" than that meted out to the Storey family of Rayleigh, Essex.' I was on an email list with Debbie, and I know something of the background to this case, where she was accused of having MSBP and her two sons (who have Asperger's Syndrome) were placed on the children at risk register, because she and her husband were not willing to let their boys suffer dreadful bullying at school. The Daily Mail also covered this story on 3rd June 2005 ('Fatal Devotion'), after Debbie's death from renal cancer, which had not been diagnosed in time, because of lingering accusations about MSBP.
3) Refusing to fulfil their obligations as laid out in law and regulation to involve parents in the education of their child – notably, failing to involve parents in the drawing up of their child's IEP.

4) Refusing to answer reasonable questions on the educational provision for children with autism.

5) Refusing to permit reasonable contact between parents and their child's teacher, even to the extent of giving less access than for non-SEN children within the same school.

6) Refusing to allow other professionals qualified in autism therapies to access a child's school.

7) Failing to meet the needs of children with SEN by forcing parents to pay for or otherwise provide part of their child's education.

8. Absolutely no account is taken of this institutionalised antipathy towards children with ASD and other children with disabilities amongst local authority education officials – in general, but most particularly within the Additional Support for Learning Act, even as it is proposed to amend it. This antipathy is real but, due to intimidation, the absence of alternative educational provision, the paucity of time and financial resources available to parents and gagging clauses for those parents who win placements for their children in the Sheriff Court or Tribunal, the reality of the abuses of power taking place on a daily basis is never acknowledged. One might also surmise that the employment of these 'hard men' and women is a useful way to prevent expenditure on an area of education which is undoubtedly perceived by many of those holding political office as a bottomless pit, rather than an investment in the future.

9. Of course, in consistently failing to do anything to deal with this managerial ‘culture’ or to institute educational standards for children with disabilities, the parliament and government are wasting huge amounts of taxpayers’ money on educational provision for children with ASD that is designed to fail.

10. Here is the current situation in Scotland as regards standards in special educational needs, with particular reference to educational provision for children with ASD:-

1) There is no mandatory qualification for those who teach children with Special Educational Needs (SEN), whether in special school or other settings.

2) The optional qualification for SEN - which is only usually taken by teachers in special schools - is a 2 year part-time course, taken once the teacher is in post. This means that all teachers are starting teaching children with SEN with no skills and no training in their chosen subject specialism - a situation that is unique in Scottish education. They are learning from scratch on the job how to teach children with special educational needs.

3) The optional qualification for SEN is generic - none of the courses in Scotland give instruction on how to teach children with ASD.

4) There are no Initial Teacher Education (ITE) courses in special education in Scotland.
5) Professional courses in ASD are run by the universities of Strathclyde and Birmingham, among others. These are theoretical courses on autism which do not provide any training on how to teach children with ASD. These part-time courses are post-qualifying courses which are distance learning (Birmingham) or involve attendance at evening tutorials in Glasgow (Strathclyde).

6) In the 21st century, we should not still be in the position where it is usual for a few unassessed day release courses to be the sum total of training deemed acceptable for teaching professionals, as is currently the case with teachers of children with ASD.

7) Inspection regimes are incompetent, because the inspectors themselves know little or nothing about ASD or how children with ASD should be educated, and they have no Quality Indicators specific to ASD to offer even some guidance.

8) There are no adaptations to curricula to reflect the specific needs of children with ASD.

9) Learning Teaching Scotland (LTS), which is the agency responsible for providing advice and materials to support the curriculum and which has an annual budget of £20 million, has, to date, produced just one teaching package for the education of children with ASD - on sex education.

11. Although most of the press coverage supplied as references are from south of the border, the committee should acknowledge that it is simply not credible that attitudes or provision in Scotland are any better, given that it has the lowest per capita spending on special education of the nations of the UK and even less provision for children with ASD, and compare this to the fact that the English Children's Commissioner described educational provision for children with ASD as ‘shocking and appalling’ and that the House of Commons Select Committee on Education described Special Education as ‘not fit for purpose’.

12. Comparative per capita spending between Scotland and the other nations of the UK:

- Expenditure per pupil with special educational needs in England in 2005/6 - £17,896
- Expenditure per pupil with special educational needs in Wales in 2005/6 - £17,931
- Expenditure per pupil with additional support needs in Scotland in 2005/6 - £12,587

Sources of figures: the DCFS, the Welsh Assembly government and the Scottish Executive.

13. Spending on Special Educational Needs has always been lowest in Scotland, out of the 4 nations or part nations of the UK.

14. These figures are taken from the 3rd August edition of the Times Educational Supplement magazine. Compare them with the overall spend on
education in Scotland, which is significantly higher, and it would seem to show a raised level of bigotry amongst ‘decision makers’ in Scottish society. ²

15. Even specialist schools are not monitored effectively, which is another reason why we need standards that are set by government. ³

16. We consider that the HMIe report on educational provision for children with autism was a whitewash, even though it did offer some criticism of current provision. Our criticisms of this report were comprehensively covered in an article written for the Sunday Herald and in our comments appended to the online version of the article. ⁴

17. It is not inevitable that we should have a system of education for children with ASD and other disabilities that is incompetent. There are international standards that we can use, together with own current resources, as a template for standards in Scotland. ⁵

18. Given the information we have obtained from our members of the current treatment of their adult sons and daughters, particularly within the mental health system, we are deeply concerned at the damage being done to the mental health of autistic children through inappropriate healthcare and educational provision. The Public Health Institute for Scotland's (PHIS) National Needs Assessment on Child and Adolescent Mental Health reported a substantial rise in the number of children being referred to CAMHS who have an Autistic Spectrum Disorder. ⁶ All the evidence that we have collated, including responses to the Autism Rights questionnaire on school education, points to inappropriate educational and healthcare provision as the prime causes of these problems.

² http://news.scotsman.com/education.cfm?id=1344422007
Scots education outspends England
The Scotsman, 24 August 2007

³ http://news.bbc.co.uk/1/hi/education/6334805.stm
Special needs ‘costs spiralling’ Pupils with special needs require more support in class: Many of England's most vulnerable children may not be receiving suitable or cost-effective education, says the government's spending watchdog. Children with special educational needs are often put in private placements using an "out of sight, out of mind" approach, the Audit Commission said. Despite costs rising by a third since 2003, there is no proper monitoring of quality and suitability, it added.

⁴ http://sundayheraldsalon.com/salon/2006/11/pupils_with_autism_need_suppor.html#more
4November 2006: Pupils with autism need support that suits them – Guest Vocals

⁵ http://www.vesid.nysed.gov/specialed/autism/apqi.htm
New York Quality Indicators for ASD. These cover Quality Indicators and adaptations to the curriculum for children with ASD. The New York QI's have subsequently been adapted by New Jersey, and by several other states in the US, where there are now also teaching qualifications available in the education of children with ASD.

This is a link to the PHIS report, which failed to investigate the causes of the rise in the number of children being referred to CAMHS who have an Autistic Spectrum Disorder
19. The government is in denial about the damage that is being done by an educational system that is wholly incompetent to teach children with ASD.

20. If there is not a rapid and radical political re-assessment of current educational provision for children with ASD, then there is going to be far greater expenditure required in the future - on social care, healthcare and the justice system.

21. Prevailing attitudes endorse the current expectation that parents will be the sole provider of education and care for their autistic sons and daughters until they drop. There will always be some of us who will do this - but others will not.

22. I know of 2 families who are using their local police to provide ‘respite’ when the behaviour of their son becomes too violent to deal with. I also know that the mess that the local authority’s education department has made of the schooling of one of these boys has undoubtedly led to this situation.

23. The health of those of us who do take everything upon ourselves will not hold out as long as it might, if we had appropriate provision for our sons and daughters, many of whom can make valuable contributions towards society if given appropriate support.

24. We think that ‘decision makers’ ought to stop making the assumption that educational provision for children with disabilities is of a good standard, when there are no standards by which to judge this.

25. The assumption that local authorities act in the best interests of the child is enshrined within the ASL Act and this amendment bill – we have demonstrated that this is manifestly not the case, and that this amendment bill is ‘not fit for purpose’, unless that purpose is to maintain a system which, for children with ASD, is ‘designed to fail’.

22 November 2008
Introduction

1. Barnardo’s is a national voluntary organisation proving 60 services throughout Scotland, working in partnership with almost all Scottish local authorities. We provide a wide range of services to 13,000 children/young people and families. We currently have 10 education related services including pre-school, primary, secondary and post 16. Additionally, the majority of our other services deal with children and young people (C/YP) who, for a variety of complex reasons, have or may have, additional support needs (ASN). These include C/YP with complex disabilities, C/YP who are/at risk of exclusion, C/YP who are/at risk of offending, and Looked After and Accommodated Children (LAAC).

2. Barnardo’s Scotland welcomes the Scottish Government’s review of the Education (Additional Support for Learning) (Scotland) Act 2004 (“the Act”) and the consequent Bill; and welcomes the Education and Lifelong Learning and Culture Committee’s scrutiny of the said Bill. Comments below are primarily in relation to the specific proposed legislative changes contained in the Bill [in light of the Court of Session rulings] and the specific questions asked in the Scottish Government’s consultation on the Bill.

3. However, we would wish to draw the Committee’s attention to additional comments throughout the paper and the list of ‘action required’ at the end of this paper. In relation to the Act’s delivery of its original policy intention - to provide for any need that requires additional support for the child or young person to learn - Barnardo’s Scotland believes that a more general ‘root and branch’ review of the practical function and implementation of the Act is required. We believe that in practice the Act is not as clearly understood or utilised as it should be amongst professionals and parents alike and consequently C/YP with ASN may be being routinely failed across Scotland.

Specific comments

Additional Support Needs Tribunal for Scotland’s (ASNTS’s) jurisdiction regarding placing requests be amended to allow ASNTS to consider any placing request appeal where a co-ordinated support plan (CSP) is involved or is being considered, at any time before the final determination by the appeal committee or sheriff?

4. Yes - in the experience of Barnardo’s Scotland the progress of and completion of the CSP process can be a major problem for C/YP and families. Our services report frustration over delays in consideration of the need for CSP,
the preparation and finalisation of such and even gaining access to meaningful discussion around the CSP and the specific needs of the C/YP. Where a placing request is at stake, especially out of authority, the right to appeal should be made as open/transparent as possible for parents/carers. Allowing an appeal at the earliest opportunity will be beneficial to all parties and hopefully help focus attention onto the key issue at stake- the rights/needs of the C/YP.

Can you foresee any problems with amending the legislation as suggested in Q1 above? If so, what are they?

5. None.

Parents of children with additional support needs (ASN), with or without CSPs, should have the same rights in respect of making out of area placing requests as parents of children without ASN?

6. Yes. C/YP and their parents/carers have the right to have their voice heard and to make a meaningful contribution to the future education of the C/YP concerned. Our services report that many LAs have dismissed ‘out of area’ placing requests ‘as a matter of course’ and many argue that this was done often with no discussion and little consideration of what might be ‘in the best interests of the C/YP’. For example one service said:

“The conflict arises when the wishes of the parent / carer to place (or request) a school provision out with the local authority area is not supported by the local authority. For example a child with special needs parents wanted her to go to specialist provision in the west of Scotland and xxxx refused this as they felt that they provided the same service here. The child’s view was lost as no one actually asked the child where she wanted to go rather the process was driven by adult priorities and LA perception of best interest”.

Are you content that in instances where a CSP is involved or is being considered, a decision to refuse an out of area placing request should be referred to an ASNTS?

7. Yes – this will maximise accountability and maximise parental/carer / C/YP rights and central involvement in the ASN and due process.

Do you agree that in instances where a child or young person is attending a school out with his/her home authority area, as a result of a placing request, responsibility for providing mediation and dispute resolution should rest with the host authority?

8. Yes - Barnardo’s services report many problems in this area; predominantly that there is confusion over who is responsible for what and this usually results in
a poor or absent or inadequate service for the CYP. One service who deals with LAAC – where being educated ‘out of authority’ is for obvious reasons common place, reports significant problems with LA jurisdiction and responsibility:

“xxxx project is working with children who are accommodated within the Looked After Children system and often the children are educated by an authority that is not their “home authority.” This has caused confusion as to responsibility for starting the CSP process and who is responsible for reviewing etc…. We have a case where there is no Educational Psychology/Department input from the home authority at all. The Host authority has opened a CSP and our carers have concerns with both the school and the CSP itself, but they cannot go to the tribunal (as they would for a home authority placement.) The host authority has advised carers to go through the host authorities complaints procedures. … We would agree the host authority as the authority providing the education itself should be responsible for dispute and mediation.

Do you agree that a contribution in respect of a host authority’s provision to parents or young people of mediation or dispute resolution services should not be recoverable from the home authority under section 23(2) of the Education Scotland Act 1980?

9. Yes - for simple practical reasons and to stop the system being clogged up with what could be potentially be a ‘claim and counter claim’ administrative nightmare. But – in the context of the new funding arrangements and concordat, some LAs are likely to be potentially worse off than others, especially where they have disproportionate numbers, for one reason or another, of ‘out of authority’ LAAC in their locality (perhaps because of specialised provision).

CSP process would be streamlined by amending the legislation to provide that, following the acceptance of an out of area placing request for a child/young person who has a CSP, the host authority assumes responsibility for reviewing the CSP, and that such a review should be conducted immediately?

10. Yes. We are aware from our services that considerable confusion exists amongst LA educational professionals on the ASN Act and CSP responsibility etc. Clarification, such as that proposed, will be welcomed and requires to be clearly and simply spelt out in guidance for the avoidance of any doubt! The following worrying example from a Barnardo’s service summarises the problem well:

“We have experienced poor understanding of the ASL act and CSPs by educational professionals, and perhaps more concerning by Educational Psychologists. This issue clearly exacerbates the problems experienced with children placed out of their home authority. This has led to one child’s school, who we strongly feel is eligible for a CSP, not starting the process
initially due to this role confusion. The school sought advice from both home and host authority Educational Psychologists but received no clear guidance. This has become more concerning recently as more pressing issues – imminent exclusion – have “overtaken” the CSP. We are concerned that not having a CSP will detrimentally affect this child’s education.

Do you agree that the best time for the transfer of education authority responsibility to take place is at the time the child starts at the new school?

11. Yes.

Should the ASL Act legislation be amended to allow references to an ASNTS regarding the following education authority failures?

- Under section 6(2)(b) of the ASL Act, a parent or young person requests the education authority to establish whether a CSP is required and the education authority simply fails to acknowledge his/her request.
- Under section 11(2)(a) of the ASL Act, the education authority has issued its proposal to establish whether a child or young person requires, or would require, a CSP but fails to decide either way.

12. Definitely. We have information from a number of services that indicate that for many families this is a common complaint/experience. We work with some of Scotland’s most vulnerable families – who are more likely to be intimidated by ‘the system’ and less likely than middle class parents to demand their ‘rights’ and lobby LAs via politicians etc. The result is often, differential treatment by default. A change of this nature would allow for redress for parents in a more accessible way and organisations like Barnardo’s can be clearer about ‘signposting’ families seeking redress.

Are you content for an ASNTS to be given the power to review its decisions?

13. Definitely - we believe this will make the whole ‘arbitration’ process speedier and more conducive to parental and C/YP involvement.

Views and suggestions relating to any aspect of the Education (Additional Support for Learning) (Scotland) Act 2004 and the Education (Additional Support for Learning) (Scotland) Bill 2008:

14. Barnardo’s Scotland recommends the following action around the Act more generally:

- Increase awareness levels and actual understanding of the ASN Act amongst parents/carers
- Increase access to affordable quality advice and advocacy services for C/YP and families
- Improve understanding of the working implications of the ASN Act amongst educational professionals – both practioners and managers
- Review the operational status quo for LAAC particularly
- Improve guidance to LAs (allowing for the concordat) that ensures the above and ensures that the needs of C/YP are paramount in the ASN process.

Maureen Fraser
Parliamentary Adviser
20 November 2008
1. CCNUK Scotland would again like to highlight the following in relation to the Bill – the need to:

- clearly define ‘significant adverse effect’ in relation to additional support needs
- ensure the same criteria apply across local authority areas in terms of assessment/access to CSPs
- emphasise the need for a multi agency approach to a child/young person’s additional support need and understanding that many factors outwith school can impact on a child/young person’s ability to learn
- ensure that local authorities not only have a duty to identify a child/young person’s needs, but also a duty to meet these needs
- make CSP and other meetings as accessible as possible to parents and children/young people

Catriona MacGregor
Scotland Development Worker
19 November 2008
SUBMISSION FROM CHILDREN IN SCOTLAND

Education (Additional Support for Learning) (Scotland) Bill

1. Children in Scotland welcomes this opportunity to submit Stage 1 written evidence about the Scottish Government’s proposed amendments to the landmark Education (Additional Support for Learning) (Scotland) Act 2004.

2. We advocated for the original legislation and remain convinced that – when fully and properly implemented – the ASL Act continues to be a powerful vehicle for advancing the well-being and life chances of tens of thousands of children and young people across Scotland. We particularly applaud its: universal approach; broad definition of eligibility; applicability to children from their earliest years until adulthood; and, emphasis on the rights of children and their parents combined with the duties of education authorities and other relevant public bodies.

3. In the years since the ASL Act came into effect, Children in Scotland has played a variety of roles to promote awareness/understanding, enhance implementation and share good practice. Our work includes managing the Scottish Government-funded national advisory service and national helpline for mothers/fathers/carers, children and young people, as well as professionals on additional support for learning (Enquire). We also operate the nation’s largest independent education mediation service (Resolve: ASL) funded through service level agreements with local authorities. Enquire and Resolve have had contact with thousands of ASL service users and providers.

4. Beyond these on-going national services, we have engaged in a variety of other ASL-focussed activities. For 18 months, we operated a successful pilot project providing advice and support to parents and pupils with ASL concerns in Grampian and Forth Valley. For the past several years, we have run the Access All Areas project (in partnership with the Scottish Borders Council) in which a broad cross-section of primary and secondary school students are engaged in making their schools more inclusive and welcoming to their peers having ASL needs.

5. We also have convened a large number of independent training events, seminars and conferences to practitioners around key ASL issues, as well as assisting the Scottish Government in its consultation processes around the ASL Act. We have published an ASL newsletter for the Scottish Government – in addition to the many ASL-relevant articles in our monthly magazine. Children in Scotland recently completed and distributed a large (1,200 plus respondent) consultation/research report commissioned by North Ayrshire Educational Services: What North Ayrshire’s pupils and parents told us about ASL services.

6. Last, but far from least, Children in Scotland’s members include most of the voluntary, statutory and private sector groups/individuals with a major stake in the ASL Act. We have been in regular two-way communication with
them over the past several years about what is happening, what is (and is not) working well and what is needed next.

7. These activities and relationships shaped the comments and suggestions that follow about the Education (Additional Support for Learning) (Scotland) Bill. Children in Scotland supports the amendments to the current ASL Act proposed and explained by the Scottish Government in this Bill and in its accompanying background documents.

8. We believe that the Scottish Government has offered well thought out, significant and helpful amendments that will improve the ways in which these specific aspects of the ASL Act will be defined, addressed and implemented. We also appreciate that the Scottish Government and education authorities have made a major (and often successful) effort to enhance the provision of additional support for learning and to improve the learning experiences of children and young people needing extra help.

9. While we support these amendments, Children in Scotland regards the Bill as ‘necessary, but not sufficient’ to create the legal foundation upon which to build a nationwide system of additional support for learning that lives up to the laudable aspirations of the Scottish Government, the Scottish Parliament and all the other public bodies involved in implementing the ASL Act. As noted in our consultation response earlier this year, we believe that there are several other important ways in which the ASL Act should be amended at this time.

10. The original legislation was enacted approximately five years ago and it is now the fourth year in which implementation of the ASL Act is taking place. This is the first time that a new bill has been introduced to amend the basic legislation. It is an unprecedented and very welcome opportunity to determine how to make a fine law even better.

11. A great deal has been learned over these five years about gaps in ASL awareness and understanding, gaps in preparation and ability to meet the duties of the ASL Act and gaps in the actual progress being made by children and young people having a wide range of needs for additional support for learning. Given the many demands upon MSPs attention, time and energy, it is unlikely that further amendments will be considered again for several years.

12. Therefore, this chance to get it right should not be limited to a few significant, but relatively narrow, elements of this legislation affecting tens of thousands of Scotland’s children. Of course, many needed improvements are matters of implementation best addressed not by legislation, but rather by better guidelines/policies, more resources, more extensive training/CPD for practitioners (within and beyond schools) and better communications/relationships between ASL service providers and ASL service users.

13. Some improvements, however, are best advanced through amended legislation. Based upon what we have learned since 2004 from parents,
pupils, partners, policymakers and practitioners, Children in Scotland recommends the following six additional changes to the Education (Additional Support for Learning) (Scotland) Bill:

1. Strengthen the duty to provide information about the ASL Act by requiring governmental agencies to actively promote easily understood (Plain English), age appropriate, genuinely accessible information to all eligible pupils and their mothers/fathers/carers. The ASL Act still is far from a household name across our nation.

14. The key concepts, eligibility criteria, duties, rights and processes that make the ASL Act such a valuable (and distinctively Scottish) law still are not widely known or clearly understood – even by the very children, young people and parents who are its intended beneficiaries.

15. Enquire’s national helpline, publications and website are of great value to, and greatly appreciated by, the people it reaches, but why would people who do not see themselves as being in the ASL picture contact Enquire in the first place? Similarly, the legal right to the mediation services provided by Resolve: ASL loses much of its practical meaning if parents remain unaware of this right or don’t understand that mediation can be a much quicker and easier way of solving problems with schools than the more publicised ASL Tribunal system.

16. One of the ASL Act’s foremost strengths can be found in its potential benefits for children and young people who would not have ‘fit’ under the old special educational needs definitions and eligibility criteria. Unfortunately, these benefits cannot be reaped by parents and children who have no idea — for whatever reason — that this source of assistance is available to them.

17. The ASL Act still is not as well understood among teachers and other relevant practitioners as one would have hoped after several years. We think that one key to changing this situation is to better inform the pupils and parents eligible to benefit directly. Increased demand from users will trigger increased awareness and motivate more ASL knowledge among providers.

2. Couple the existing right to ‘advocacy’ and ‘support’ in the ASL Act with a new duty on government to support independent support/advocacy.

18. Parents and pupils have a right to support/advocacy, as well as to mediation, under Section 11A of the current ASL Act. However, unlike the case of mediation, there is no duty upon any governmental agency to provide advocacy services to mothers/fathers/carers or to children and young people (including those officially ‘looked after’). This makes ‘advocacy’ a fairly hollow right for parents and pupils who cannot afford to pay for such services themselves. It also deepens existing inequalities and results in a postcode lottery. This, in turn, makes it more likely that the children and parents most in need of advocacy/support services become the ones least likely to receive them.
19. Children in Scotland remains disappointed that its successful pilot projects in Grampian and Forth Valley – in which ‘advocacy’ and ‘support’ meant providing independent, bespoke information and empowering advice to help parents and pupils better represent their own interests – were not continued by the Scottish Executive. Our version of ‘advocacy’ often led to people sorting out their problems with ASL provision in a low-key, simple, local manner (rather than through the legal system). This worked well with mothers/fathers/carers and also could be of great help to children and young people who are not going to have parents as their advocates (e.g., young carers or looked after young people).

20. The recent decision of the Scottish Government to fund ‘advocacy’ services that essentially focus on representing people while they negotiate the complexities of the ASL Tribunal system is a very different model. Children in Scotland believes that there is room for both models and that the Government should financially support both versions of ‘advocacy’. Until financing independent advocacy/support becomes a duty (as well as a right) within the ASL Act, it will remain too ad hoc and unreliable to benefit most parents and pupils.

3. Enhance the clarity of, and require greater support for, the existing duty to consult with children and young people (and their parents)

21. The current ASL Act correctly recognises the right of children and young people – under Article 12 of the UN Convention on the Rights of the Child – to be involved in age appropriate ways in making key decisions that affect their lives and well-being. Major decisions about the nature and delivery of their education are a prime example of when consultation and participation are most vital.

22. Consultation with, and involvement of, the intended beneficiaries of the ASL Act continue to be honoured more in rhetoric than in reality. Counterfeit consultations are worse than no consultations, as superficial ‘tick box’ exercises serve primarily to breed cynicism among all parties concerned. The ASL Act is not now – but could become – a key driver for meaningful consultation and participation processes across our nation.

23. Children in Scotland has developed three models of how to make such consultation and participation real through its long-standing project with the Scottish Borders Council (Access All Areas), the participation activities of Enquire and the recent ASL research project in North Ayrshire. There are other examples of good practice. What continues to be missing are national ‘carrots and sticks’ – i.e., incentives (or rewards) for first-rate consultations and participation efforts and disincentives (or penalties) for failing to meaningfully involve pupils and parents. An amendment to the ASL Act could help – for example, by indicating that HMIE inspection criteria of ASL services will reflect and ‘count’ this legal duty from the ASL Act.
4. Require joined-up training, planning and service delivery for children needing additional support for learning, especially in the early years (from birth to school enrolment).

24. Two praiseworthy elements of the original ASL Act are that it covers all children of all ages – and that it anticipates the need for education authorities to work closely with other agencies, professions and services.

25. Two challenges also remain after the first few years of implementation. One is the patchiness and thinness of ASL provision for young children before they become directly involved with education authorities. The other is the extent to which ASL implementation is perceived and treated as an education system policy/priority – not a more universal one – by prospective partners from other agencies and professions.

26. Enquire and Children in Scotland have heard recurring concerns (and dismay) expressed by the mothers/fathers/carers of young children who have found education authorities unprepared to properly meet their child’s ASL needs upon entry to a pre-school or primary school. They had assumed communication and coordination between early years service providers and schools that did not, in fact, exist. This makes the transition into, and the initial experiences with, formal schooling more difficult and less positive for everyone than should be the case.

27. Part of the solution can be obtained through revisions to existing codes of practice and other non-legislative means. However, we also recommend an amendment to the ASL Act that makes explicit the duties placed upon education authorities to become familiar with children in the birth-to-school-entry years within their local authority area who have ASL needs. Alternatively (or in addition to the education authority’s duty), there could be an amendment creating a duty on service providers engaged with young children in such areas as health, social work, early years services and children’s services to inform the relevant education authority about the ASL needs and history of children well before they reach school age.

28. Joined-up initial education and continuing professional development for people providing early years services is an effective way to promote good communications, integrated services and smooth transitions into school for young children having additional support needs. Children in Scotland activities and publications on the children’s sector workforce – including the Scottish Pedagogue model – may be helpful (see our recent publication, Working it out). Again, however, the ASL Act currently offers neither ‘carrots’ nor ‘sticks’ to help ensure that good practice across the relevant fields/agencies/professions actually will occur.

29. We would hope that the forthcoming Early Years Framework from the Scottish Government and COSLA – and the continuing governmental efforts around Getting it right for every child – would dovetail nicely with these suggested changes to the ASL Act.
30. However, the Act itself should be more explicit about who has the responsibility for identifying, meeting and/or coordinating multi-agency ASL services for very young children. It is not good enough to create an entitlement to early years ASL assistance without being explicit about how (and by whom) that entitlement will be given meaning and substance in practice.

5. **Strengthen the right to, and the duty to provide, ASL mediation services.**

31. Mediation has been used successfully in many situations since the introduction of the ASL Act and is becoming embedded into good practice in resolving disagreements in some local authorities.

32. The benefits of using mediation for all the parties involved include: speedier resolution; lower costs to parties (financially and emotionally); better access for the child to be involved; the opportunity to repair parent-school relationships; enhanced communication and the development of practical robust solutions in the child’s best interest.

33. There are, however, a few local authorities that have not engaged with appropriate, independent mediation providers. This leaves parents and pupils in these areas unable to access their legal rights within the Act. These authorities may provide generalist advice and conciliation services, use spot purchasing and/or mediation services from other sectors. These provisions are, and should be treated as, inadequate substitutes for an independent ASL specific mediation service. Mediation must be clearly independent for parents/carers/young people to be able to exercise their ASL rights and to trust the process.

34. While the Act introduced the duty to provide mediation, there is no system to inspect, approve or monitor ASL mediation services. A commitment to first-rate ASL mediation through a quality standard would improve service provision and ensure that local authorities do not use inappropriate and under-qualified mediation services. Appropriate standards recently have been produced by the national ASN Mediation Service Providers Group. These national standards could and should be used as a benchmark by national and local government.

35. Amending the current ASL Act by adding a duty to offer mediation before engaging with the ASL Tribunal system could act as further encouragement to resolve disagreements at an earlier stage and in a quicker, less difficult manner.

6. **Create a duty upon education authorities to plan adequately for the transitions of young school leavers having ASL needs.**

36. The original ASL Act intended to cover all young people until they successfully complete their education or reached adulthood. And yet, young people below the age of 18 are not always covered in practice.
37. For many young people, who have mild ASL needs and who have been relatively successful in school, there is a fairly clear path from school into employment or into further/higher education. Similarly, many young people, who are in special schools or covered by disability legislation, have a reasonable idea about their prospects after the end of schooling.

38. Nonetheless, there also is a significant group of young people with moderate ASL needs who do not fit into either of the aforementioned populations. Some are looked after children who are ‘aging out’ of that system, or runaways, or young people with substance misuse problems, or young carers or others for whom the education authority has no real plans or options to offer after S4. They may still have a need and appetite for more learning and skill development, but they no longer fit comfortably within their school community.

39. Consequently, some students in mainstream secondary schools who are not studying for their Highers after S4 have been ‘encouraged’ to consider that their time in school is over – and thus, their de facto eligibility under the ASL Act has ended. This is happening at the age of 15 or 16, not at the age of 18 (as the ASL Act intended). These are young people who still have ASL needs, but who are facing dismal choices and few chances.

40. Some schools have crafted creative and sensible solutions for such students. For instance, a secondary school may keep some of these 15 to 17 year-old ASL students on their roll (and thus, continue their ASL Act rights and protection), but make arrangements allowing them to spend much of their time at further education colleges or in community-based training programmes. However, appropriate ASL assistance should not be a postcode lottery.

41. The suggestion here is not to burden education authorities with duties to young people beyond the age of 18 or to ask them to guarantee successful lives for students once their schooling has been completed. Rather, our recommendation is much more modest. We think that the ASL Act should be amended to make it clear that: 1) the duty of education authorities toward young people having ASL needs cannot be terminated unilaterally before these young people each the age of 18; and, 2) education authorities have an affirmative obligation to develop a transition plan with, and for, 16/17 year-old students having ASL needs who are not already successfully pursuing a recognised positive pathway to post-school life. The Act should give such young people a reasonable chance of moving toward a positive future as adults.

42. All six of Children in Scotland’s proposed additional amendments to the Education (Additional Support for Learning) (Scotland) Bill share the fundamental goal of making a landmark piece of Scottish legislation even stronger and more likely to live up to its original intent and aspirations. All six suggested improvements are based upon the lessons learned from the initial years of development and implementation. Given that ASL legislation is
unlikely to have the benefit of the Scottish Parliament’s close attention and careful amendments for several more years, it makes sense to take full advantage of this rare opportunity.

Dr Jonathan Sher
Director of Research, Policy and Practice Development
20 November 2008
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
1. Thank you for your letter of 15 October inviting Consumer Focus Scotland to submit evidence to the Committee on the general principles of the Education (Additional Support for Learning) (Scotland) Bill.

2. Consumer Focus Scotland started work in October 2008. We were formed through the merger of three organisations – the Scottish Consumer Council, energywatch Scotland and Postwatch Scotland. One of our predecessor organisations (the SCC) had been actively involved in the policy development and implementation of the Additional Support for Learning Act 2004. Consumer Focus Scotland is represented on the Additional Support for Learning Advisory Group convened by the Scottish Government.

Comments on general principles of the Bill

3. During the Scottish Government consultation we raised concerns that the consultation, while resolving specific technical issues, does not consider the more complex and important issues raised by the HMIE implementation report and Court of Session rulings. The proposed bill is an important opportunity, not just to close loopholes in the Act, but also to revisit elements which have been problematic during implementation. These concerns were also raised by other stakeholders.

4. Consumer Focus Scotland is therefore disappointed that the Bill as introduced does not address these wider issues and indeed that the formal analysis of consultation responses takes no account of these issues. The policy memorandum accompanying the Bill notes these additional concerns but does not explain why these issues are not being considered further.

5. Consumer Focus Scotland would like to take this opportunity to reiterate our concern about the narrow nature of the Bill and highlight the areas of concern that we believe should be addressed:

- **The definition of ‘significant’**
  Throughout the passing of the Education (Additional Support for Learning) Act 2004 and its implementation, stakeholders (both education providers and parent representatives) have called attention to the difficulty posed by the lack of a standard definition of the word ‘significant’. The question of whether or not a child’s needs require ‘significant’ support affects their rights to a Coordinated Support Plan and subsequently their right to have appeals heard by the Tribunal and therefore the continued confusion over this definition is potentially detrimental to children and young people rights. We recommend that the Bill clarifies the definition of ‘significant’ support.
• **Legal aid for Additional Support Needs Tribunal (ASNT) attendance**
  We recognise and support the initial intention of the ASNT to be less formal and more family-friendly than court proceedings. However, we are aware that in the majority of cases local authorities are represented at ASNT through lawyers. We are concerned about the lack of ‘equality of arms’ in the current situation. While we welcome the fact that Legal Aid is available for parents or young people in the preparation of their case, they have to pay for a solicitor if they wish one to be present at the case itself. We recommend that the Bill includes provision for Legal Aid to be available for parents who wish to access legal representation at Additional Support Needs Tribunals.

• **The complexity of appeal routes**
  We have argued consistently that the landscape of education complaints and appeals is complex and confusing. This is particularly true when it comes to complaints and appeals regarding additional support for learning where, depending on the issue raised and the support required by the child, there are three potential routes: the education appeal committee; independent adjudication and; the Additional Support Needs Tribunals. Indeed some of the problems addressed within the Bill have only occurred due to the number of bodies potentially dealing with appeals. We have called on the Scottish Government to simplify the landscape by removing the education appeal committees and independent adjudication mechanisms and transferring their functions to the Scottish Public Services Ombudsman or the Additional Support Needs Tribunals, as appropriate.

• **Strengthening the provision of information to parents and children**
  We noted with interest the findings from HMIE which stated that ‘most authorities had not made parents sufficiently aware of advocacy and of their rights within the new legislation’. This is despite the Act placing specific duties on local authorities to provide information on additional support for learning. While we welcome the recent pilot of a communication strategy in Dundee City Council, we would like to take this opportunity to express concern that it has taken until 2008 to begin to develop a communication strategy aimed at increasing awareness of the Act. We recommend that a national communication strategy is developed and implemented to ensure that parents and children are sufficiently informed of their rights under the legislation.

Jennifer Wallace
Senior Policy Advocate
12 November 2008
The following observations are made on behalf of East Ayrshire Council:

1. The shift to making the host authority responsible for all aspects of a placement appears to be a sensible and helpful development.

2. The amendments do clarify the responsibilities between the home and the host authority in a more helpful manner than at present.

3. While recognising the potential cost savings that may arise of appeals regarding placing requests going to the Tribunal rather than to a Sheriff Court, it remains the view that the Tribunal should only consider cases where CSPs are involved and that existing mechanisms are generally working and appropriate.

4. We would have anxieties that there is perhaps a conflict of interest in a mechanism that allows Tribunals to review their own decisions.

5. It is unclear where financial responsibility lies when a placing request is made to a provision outwith local authority control (e.g.: specialist residential school).

6. We feel that the existing dispute resolution and mediation processes can be appropriate and work well and have an anxiety that these will be bypassed in favour of immediate appeals to the Tribunal.

Tom Williams
Acting Head of Service: Community Support
12 November 2008
SUBMISSION FROM EAST DUNBARTONSHIRE COUNCIL

Education (Additional Support for Learning) (Scotland) Bill

1. The following situation has not been clarified by the Bill:

2. A child attends a school in an authority in which he/she is not resident as the result of a placing request. ASNhs are later identified and the placement is no longer appropriate. The parent wishes to consider accessing provision in the home authority. Are the home authority required to comply with a request from either the parent or the last authority to participate in planning?

3. What procedures will be in place to allow parents to access specialist provision in their home area? Would they be required to make a placing request to their home authority?

Irene MClure
Inclusion Officer
20 November 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 EAST RENFREWSHIRE COUNCIL

Education (Additional Support for Learning) (Scotland) Bill

1. I refer to your letter of 15 October, addressed to Lorraine McMillan, which has been passed to me for reply.

2. Further consideration has been given to the response made by East Renfrewshire Council during the Scottish Government consultation on the Education (Additional) Support for Learning) (Scotland) Act 2004 – Amendment Bill 2008 and to the published responses and analyses. The ultimate proposals have been compared against the original submission. In the main, our responses correlate directly to the majority of other authorities. However, we continue to believe the evidence to support our response of “No” to Question 1:

“No, not as the proposal currently stands.

The worth of such amendment may depend on whether the jurisdiction of the ASNT is considered exclusive or an additional option for parents/young persons etc to avail themselves of. If, as appears to be suggested currently, a reference to the ASNT can be made at any time prior to determination of an appeal by the Appeal Committee and/or sheriff then this proposal would appear to add a further layer of procedure and may undermine the worth of the Appeal Committee as a vehicle for resolving the request.”

3. Further, we should like to reiterate our view in response to Question 9:

“The extent of “responsibility” needs to be defined or clarified. Is it responsibility to provide the necessary services in terms of the CSP or does it entail a wider responsibility to not only provide such services but also to ultimately bear the cost of the same? The question as it stands is ambiguous.

Assuming the question relates to practical responsibility for support provision then commencement at school appears the appropriate stage for transfer. Generally, this is already what happens. Costs remain with the home authority.”

4. In principle, it is important to review the Act which has been implemented now for two years. However, the proposed Bill includes extending opportunities for parents and young people to make out of area placing requests and facilitating their access to mediation; dispute resolution services, and rights to appeal. This will inevitably result in increased costs to local authorities.

Susan Gow
Head of Education Services (Children and Young People)
20 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\(^1\). 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

\(^1\)As 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 need. 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 for placing requests for children and young people with additional support needs. 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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1 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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2 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 THE EIS

Education (Additional Support for Learning) (Scotland) Bill

1. The EIS welcomes the opportunity to respond to this call for evidence on the Education (Additional Support for Learning) (Scotland) Bill.

2. The EIS welcomed, in principle, the Education (Additional Support for Learning Act) (Scotland) 2004. In its advice to members published following the ASL Act, the EIS stated:-

- The EIS is concerned that schools and teachers should not accept additional burdens because sufficient resources are not provided.
- Members should expect information about the Additional Support for Learning Act from their Local Authority.
- The EIS has stated consistently in its responses to the various consultation exercises that the success of this legislation is dependent on the provision of adequate resources to meet the needs of each individual learner.
- This includes the provision of sufficient staff, both teachers and support staff, who have appropriate expertise e.g. speech and language therapy and occupational therapy.
- The EIS has also expressed concerns about access to continuing professional development.
- The EIS has recognised the need to develop joint training for teachers and other professionals involved in supporting young people. It welcomes, therefore, the development of a training programme.

3. In its response to the consultation by the Scottish Executive on the accompanying Code of Practice the EIS stated:

“The EIS believes that the success of inclusion is dependent on proper levels of funding, staffing and resources. The EIS reaffirms its belief that a reduction in class sizes is essential to the requirement to ensure the right of access to education for all children.”

4. The EIS is concerned that this Code should not be used to place undue pressure on schools or local authorities to cover up inadequacies of funding or policy.”

5. The EIS noted the concerns contained in the HMIE report of November 2007 on the implementation of the 2004 Act. The EIS has supported the Act in principle and shares the concerns regarding implementation. It is further concerned that there are pressures on schools and colleges in terms of financing and staffing. The EIS has been advised by its members that there requires to be more training of staff in respect of the Act and also greater knowledge of the provisions of the Act.
6. The attached draft paper provides additional information on EIS concerns about the implementation of the Act. It makes specific reference to the provision of EAL which falls within the additional support for learning framework. The draft paper was recently submitted to the EIS national Education Committee and distributed to Local Association Secretaries.

7. Despite considerable consultation and publicity, it seems there are certain areas in Scotland and certain groups of people unaware of their rights under the Act. The EIS notes that mediation is a requirement of the legislation and is concerned that this facility is not publicised widely enough.

8. The EIS believes that equality impact assessments should be used to support and monitor implementation of the Act to ensure all equality strands are covered.

**Amendments to the legislation**

9. The EIS agrees in principle with the Bill, which will address issues of equity by ensuring the provisions of the Act apply to all children and young people. It agrees that the deficiencies highlighted in the reports cited in paragraph 10 require to be addressed as outlined in paragraph 11 of the explanatory notes.

   “This Bill amends the 2004 Act in light of the HMIE reports, recent Court of Session rulings, the annual report from the President of the Additional Support Needs Tribunals for Scotland and informed observations in light of practice.”

10. In supporting the amendments, the EIS is concerned that placing request appeals involving a coordinated support plan by an ASNTS should not further delay what can be a lengthy process.

11. It makes sense that the host authority providing education is responsible for mediation and dispute resolution. The EIS believes that the needs of the child or young person should be paramount and would hope that this measure would not lead to an increase in rejected placing requests. The EIS is concerned that budget cuts may have an impact on out-of-area placing requests.

12. The policy memorandum and financial memorandum accompanying the bill are helpful. The EIS is satisfied with the consultation carried out by the Scottish Government.

20 November 2008
EIS appendix

Draft

Additional support for learning

Introduction

When introduced in 2004 the ASL Act aimed to modernise the previous position on support for learning to provide a system to identify and meet the needs of all pupils with additional support needs. This saw a widening of the statement of what these needs were and included within this areas not previously considered as requiring support for learning notably English as an Additional Language. The emphasis on local authorities ensuring support was in place for pupils who had additional need is at the heart of the act.

Areas of consideration

EAL

Pupils for whom English is an additional language are now covered by the ASL Act. There is the potential for parents to access additional support through this act where they understand how it works. However there appears to be more difficulties arising from EAL becoming part of ASL. The first of these difficulties comes from the paperwork situation which is arising out of LA interpretations of the Act. Schools in some areas are expected to complete paper referrals for pupils in order to access additional resources. This means the immediate needs of pupils must be met within schools who are finding it increasingly difficult to do so. The large number of new arrivals means schools are having to stretch their existing EAL resources or where no EAL specialism is in place staff are having to learn quickly how to support EAL pupils or the pupils’ needs are not met as well as they should be.

The second aspect is the changing role for EAL and ASL staff. In some cases LAs are looking to meet needs of pupils within existing staffing. Staff traditionally focussed on additional support for learning are finding their roles changing to cover EAL. Teachers used to working with pupils in EAL are experiencing changes to move away from direct teaching to a more advisory role. Local authorities looking for ways to cover more pupils with English as an additional language with no increase in funding to improve levels of staffing or other resources are using the ASL Act as a cover all. It is vital that there is recognition of the need for increased resources in EAL and that this allows for some emergency funding where local authorities experience large increases in EAL pupils during a school session.

Paperwork associated with local authority interpretations

The code of practice associated with the ASL act has in many local authorities been reinterpreted and added to in relation to paperwork whilst the Act specifies the need for CSPs local authorities are developing policies and
codes which include a variety of other levels of paperwork which sit underneath this one. These range from simple referral forms to a scheme of support plans and referrals all which simply serve to take up valuable teaching time for whilst teachers complete forms to access additional support or simply show the internal support pupils are still having to be supported within classrooms. Reviews of implementations have begun and the HMIe report on this provides a variety of areas for consideration. Whilst it is unlikely that one system would be adopted across the whole of Scotland it would be desirable the Scottish Government took a harder line with those local authorities where it was recognised that their procedures were having a negative effect on the implementation of the Act.

Training

Levels of training of staff on the ASL Act vary across local authorities. From the good practice of all staff receiving clear development in the implementation of the Act to the 45 minutes on how the ‘cover your back’ local authorities have adopted differing approaches to an area of professional development which should have been taken seriously for all staff in educational establishments. Indeed some local authorities have already realised this and are beginning to plan for fuller inter-agency training when new procedures are launched.

Workload issues

Many staff have found serious issues of workload relating to the implementation of the ASL Act. One factor is increased paperwork whether because of complicated, bureaucratic procedures or the simple increase in numbers of pupils included in the Act to be considered within ASL procedures. Staff in schools have seen an increase in non teaching related workload.

Effectiveness of procedures

Staff in schools may be less critical of some aspects of the implementation of the Act if they were seeing that procedures were leading to quicker referrals and provision of support. However what appears to be happening is that the mechanisms adopted by some local authorities have resulted in access to support being slower. Any reviews of procedures should take account not only of the paperwork but also the systems which see the paperwork acted on.
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 fulfil 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
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.\(^1\) Future numbers

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\(^1\) 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,

\[ \textit{the 2004 Act does not make and should not be construed as making any provision, in respect of a child with additional support needs who requires a CSP, for the making of a placing request to} \]

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2 WD v Glasgow City Council 2007 SLT 1057
3 Section 1(3), Education (Additional Support for Learning)(Scotland) Act 2004
4 Paragraph 81, Policy Memorandum, Education (Additional Support for Learning)(Scotland) Bill introduced 28 October 2003
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.\textsuperscript{5}

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.

\textit{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}\textsuperscript{6}.

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 Act\textsuperscript{7} 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 parent\textsuperscript{8}. 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 Regulations\textsuperscript{9} and crucially must comply with the request\textsuperscript{10} unless to do so is incompatible with its statutory duties or unduly prejudices the discharge of its own functions\textsuperscript{11}.

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

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\textsuperscript{5} Paragraph 72, WD v Glasgow City Council 2007 SLT 1057
\textsuperscript{6} Paragraph 69, WD v Glasgow City Council 2007 SLT 1057
\textsuperscript{7} Section 23(2)(a), Education (Additional Support for Learning)(Scotland) Act 2004
\textsuperscript{8} Section 23, Education (Additional Support for Learning)(Scotland) Act 2004
\textsuperscript{9} Regulation 2, The Additional Support for Learning (Appropriate Agency Request Period and Exceptions (Scotland) Regulations 2005 SSI 264
\textsuperscript{10} Section 23(3), Education (Additional Support for Learning)(Scotland) Act 2004
\textsuperscript{11} Section 23(3)(a) and (b), Education (Additional Support for Learning)(Scotland) Act 2004
\end{flushleft}
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{12}. 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{13}.

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 \textit{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{14} and the introduction alternatives to litigation assist in resolving disagreements\textsuperscript{15}.

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 the 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.

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

\textsuperscript{12} Schedule 2(b), The Additional Support for Learning Dispute Resolution (Scotland) Regulations 2005 SSI No. 501
\textsuperscript{13} Paragraph 53, Policy Memorandum 2003
\textsuperscript{14} Paragraph 41, ASL Policy Memorandum 2003
\textsuperscript{15} Paragraph 44, ASL Policy Memorandum 2003
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 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.

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16 Paragraph 45, ASL Policy Memorandum 2003
17 Section 9(2)(a)(i)-(iv), Education (Additional Support for Learning)(Scotland) Act 2004
18 Section 12 Education (Additional Support for Learning)(Scotland) Act 2004
19 Paragraph 21, Policy Memorandum accompanying Education (Additional Support for Learning)(Scotland) Bill 2008
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 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.

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20 Section 28E(5) and (6), Education (Scotland) Act 1980
21 Section 28F(6) and (7), Education (Scotland) Act 1980
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:

4.2.2 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\textsuperscript{22} and indeed the requirement now to consider the rights of the child in matters that significantly affect them\textsuperscript{23}. and the importance placed on the welfare of the child\textsuperscript{24}. 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 participation in decisions affecting them, and provision of services to meet their needs\textsuperscript{25}.

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

\textit{“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”}\textsuperscript{26}.

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,

- 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

\textsuperscript{22} http://www.scotland.gov.uk/Publications/2005/06/2393450/34518
\textsuperscript{23} Section 2(2), Standards in Scotland’s Schools etc. Act 2000
\textsuperscript{24} Children (Scotland) Act 1995
\textsuperscript{25} Paragraph 10, Policy Memorandum (original Bill 2003)
\textsuperscript{26} Paragraph ASL Policy Memorandum 2003
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 requiring the education or special facilities normally provided at that school.

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.

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27 Safeguarding our rural schools and improving school consultation procedures: proposals for changes to legislation
28 Section 28 Education (Scotland) Act 1980
29 Paragraph 6(1)(b), Schedule 2, Educational (Additional Support for Learning)(Scotland) Act 2004
30 Schedule 3(1)(a)(iii), Education (Additional Support for Learning)(Scotland) Act 2004
31 Schedule 3(1)(a)(iv), Education (Additional Support for Learning)(Scotland) Act 2004
32 Schedule 3(1)(a)(v), Education (Additional Support for Learning)(Scotland) Act 2004
33 Schedule 3(1)(b), Education (Additional Support for Learning)(Scotland) Act 2004
34 Schedule 3(1)(d), Education (Additional Support for Learning)(Scotland) Act 2004
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\(^35\). 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\(^36\).

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.
- The authority have offered to place the child in the school referred to above\(^37\).

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.

\(^35\) The Additional Support for Learning (Placing Requests and Deemed Decisions)(Scotland) Regulations 2005 SSI 515

\(^36\) Paragraph 164, Circular 4/96, Children with Special Educational Needs

\(^37\) Schedule 2, 3(1)(f)(i)-(iv), Education (Additional Support for Learning)(Scotland) Act 2004
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 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 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.

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42 Section 2, Education (Additional Support for Learning (Scotland) Act 2004
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 by a residential authority, concerns have been expressed about the availability of supports. In relation for example, to children looked after by 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, 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.

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43 Chapter 9, Children Looked After by Local Authorities: The Legal Framework
44 The Additional Support for Learning (Changes in School Education) (Scotland) Regulations 2005 No. 265
45 Regulation 3(a)-(c) The Additional Support for Learning (Changes in School Education) (Scotland) Regulations 2005 No. 265
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 assume all responsibility for the child’s education and its CSP decisions, failures etc can be referred to an ASNTS.

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.”

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.

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46 Paragraph 3, Policy Memorandum 2008
47 Paragraph 30, Policy Memorandum 2008
49 Section 1, Education (Additional Support for Learning) (Scotland) Act 1980
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. 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.

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.
- The duty where a child with support needs is excluded to make provision for his or her school education.
- The provision of transport.

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50 Section 20, Local Government in Scotland Act 2003
51 Section 11, Education (Scotland) Act 1980
52 Section 14(3), Education (Scotland) Act 1980
53 Section 51, Education (Scotland) Act 1980
7.11 As a matter of law however, an attendance prosecution can only be raised by the residential authority. 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 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.

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 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:

54 Section 36, Education (Scotland) Act 1980
55 Section 29(3) Education (Additional Support for Learning) (Scotland) Act 2004
56 Section 5(4) Education (Additional Support for Learning) (Scotland) Act 2004
57 Section 23(2) (a) Education (Additional Support for Learning) (Scotland) Act 2004
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.\(^{58}\)

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\(^{59}\). 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 rights of parents, the obligations of authorities can be further clarified in the best interests of all children with additional support needs.

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 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\(^{60}\) and serves to heighten further the possibility of dispute between authorities.

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

\(^{58}\) Section 23(1) Education (Additional Support for Learning) (Scotland) Act 2004

\(^{59}\) The Additional Support for Learning (Appropriate Agency Request Period and Exceptions) (Scotland) Regulations 2005

\(^{60}\) Section 1, Local Government in Scotland Act 2003
“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.

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

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61 Section 23(2), Education (Additional Support for Learning)(Scotland) Act 2004
Section 1

1. The provisions which seek to reintroduce a right for parents and young people to make a cross-boundary placing request are welcomed.

2. However, GLC is concerned that the criteria for determining whether the case is heard by an education appeal committee or an Additional Support Needs Tribunal are complex and confusing for parents; and that it does not necessarily lead to the most complex and testing cases being heard by the Additional Support Needs Tribunal. GLC is aware that many education appeal committee members do not feel they have the necessary knowledge or training to allow them to hear complex placing request appeals where additional support needs are involved. A simpler system may be to have all placing request appeals for special schools heard by the Tribunal, and other placing request appeals heard by the education appeal committee.

Sections 2 and 3

3. These alterations are also welcomed. Parents and young people should be able to access mediation and dispute resolution with the authority or authorities which is/are responsible for the child or young person’s school education, whether that authority is the “host” or “home” authority.

Section 5

4. GLC is concerned that this amendment does not achieve its apparent aim. If the aim is to clarify which of two authorities is responsible for a child’s education, then this amendment does not appear to exclude the “host” authority from also being responsible in terms of s.29(3)(a). It is not clear whether the Bill seeks to limit responsibility to no more than one authority at a time. If so, it is by no means clear that it achieves that aim. In any event, if arrangements are to be entered into, should authorities not be free to agree between themselves who will be responsible for a child’s school education? Why preclude the possibility that the “host” authority takes responsibility for a child’s education if that is more appropriate in the circumstances of the case?

Section 6

5. This section is welcome.

Section 7

6. Assuming that reference to the ASNTS is to be a discrete remedy for a failure to meet a deadline, then GLC agrees that there ought to be an expedited process for such references.
7. However, we question whether this type of discrete reference to the Tribunal is the most appropriate remedy for a failure to meet a deadline. In such cases, the Tribunal’s typical remedy is to impose a fresh deadline. This effectively legitimises the failure, without penalising the defaulter, and leads to further delays. There is also no remedy where the authority fails to meet the deadline imposed by the Tribunal.

8. If the Tribunal’s powers were amended to allow them to take substantive decisions in such cases (e.g. to require the opening of a CSP, or to make decisions as to the information to be contained in a CSP) this would avoid much of the delay which would still exist even with Conveners handling the references.

9. GLC has concerns about the proposal to give the Tribunal powers to review its own decisions. In particular, we would have grave concerns with a power to review in relation to new evidence or new circumstances. Due to the nature of the cases considered by the ASNTS, there would in almost every case be the possibility of obtaining new evidence which might be relevant to the outcome. Allowing Tribunal decisions to be reopened on those grounds would lead to uncertainty and, potentially, unfairness (as authorities would be more able to access fresh reports, assessments etc.).

Conclusion

10. The terms of the Bill are (subject to the above points) broadly welcomed. However, the Bill misses an opportunity to improve the 2004 Act in line with the findings of the HMIE report on implementation of the legislation. For this reason, we urge the committee to adopt the suggestions contained in the joint response which we have signed.

Iain Nisbet
Head of Education Law
18 November 2008
JOINT SUBMISSION FROM:

- GOVAN LAW CENTRE
- NATIONAL DEAF CHILDREN’S SOCIETY
- EQUALITY AND HUMAN RIGHTS COMMISSION
- SCOTTISH ASSOCIATION FOR MENTAL HEALTH
- RNIB SCOTLAND
- SCOTLAND’S COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE
- FOSTER CARE ASSOCIATES SCOTLAND
- NATIONAL AUTISTIC SOCIETY SCOTLAND
- ENABLE SCOTLAND
- SPECIAL NEEDS INFORMATION POINT
- SCOTTISH CENTRE FOR CHILDREN WITH MOTOR IMPAIRMENTS
- CHILDREN IN THE HIGHLANDS INFORMATION POINT+
- CAPABILITY SCOTLAND
- AFASIC SCOTLAND

Education (Additional Support for Learning) (Scotland) Bill

Summary of joint response

1. Scotland’s children would benefit from the following amendments to the Bill:
   1. reinstate “additional support” outside the classroom;
   2. provide assessments for children who need them, whether they have a CSP or not;
   3. make sure authorities comply with their duties to school leavers;
   4. allow the Tribunal to specify when a school placement should start; and
   5. more CSPs for looked after and accommodated children, young carers and children with mental health issues.

Introduction

2. The Scottish Government’s Disability Equality Scheme (2008-2011) commits to “a full legislative review of the Education (Additional Support for Learning) (Scotland) Act 2004” by 2008/2009 in order to improve “education and support for children with additional support needs (ASN) and disabilities”.

3. In doing so, the Scottish Government specifically committed itself to “take forward recommendations and areas for improvement from the HMIE review of the ASL Act (report produced October 2007), and issues arising from Court of Session rulings.”
4. This Bill does take forward some issues arising from Court of Session rulings, but it does not do so for all such rulings and it fails to take forward key recommendations for improvement from the HMIE review.

5. We understand that there may be changes to the regulations and Code of Practice to follow, but the measures we are proposing cannot be achieved without legislative change. This legislative review is the opportunity before us all to get the law right for children and young people with additional support needs, and we have five straightforward suggestions that will help the Scottish Parliament do just that.

Proposal one

Reinstate “additional support” outside the classroom.

Why?

6. The consultation document on the draft Bill stated that the Scottish Government did not intend to change the “thrust or ethos” of the 2004 Act. However, the decision of Lord Wheatley in the case of SC v. City of Edinburgh Council [2008] CSOH 60 did just that, striking at the central feature of the Act – the definition of “additional support needs”.

7. In paragraph 29 of his decision he stated: “The whole burden of the test of what constitutes additional support needs clearly refers to educational support, and further to education support offered in a teaching environment. This in turn must refer to the educational needs of the child, and not to anything else. It cannot refer to the social and environmental needs of the appellant herself, or indeed of the child.”

8. The idea that “additional support” is restricted to “education support offered in a teaching environment” runs directly contrary to the Code of Practice. Chapter 2, paragraph 9 states:

9. Some children and young people will require additional support from agencies from outwith education services if they are to make progress. Some examples are:

- social work support to help a young person remain drug free
- communication programme drawn up by a speech and language therapist and teacher, for implementation in the classroom
- an anger management programme delivered to a group of young people by staff from a voluntary agency
- counselling provided by a voluntary agency for a child coping with bereavement
- psychiatric support for a child with mental health difficulties
- specialist equipment support from physiotherapy or occupational therapy
9. Many hundreds of children and young people with additional support needs across Scotland require help of this sort, yet this sort of assistance is put at jeopardy by this ruling. Legislative amendment is needed in order to safeguard these essential services for those who need them most.

10. The HMIE report identified that “In only six authorities did staff at school level feel that the wider definition of additional support needs was understood fully by other agencies.” Also, “In half of authorities, there was significant scope to engage social work services more fully with the process of implementation. In these authorities, most social workers were not sufficiently aware of the implications of the Act for social work services as service providers.” These services are at risk if this point is not clarified immediately.

Case study

In a recent sheriff court case, this Court of Session ruling has been relied upon by the sheriff and, as a result, respite provision (despite recognition that it served an educational purpose) has been disregarded as a relevant consideration in that placing request appeal. We also understand, from information provided by other agencies, that some local authorities are already disengaging social work services from the ASL and CSP processes.

How?

11. In Section 1 of the 2004 Act, delete the word “educational” where it occurs in both s.1(3)(a) & 1(3)(b) and/or insert the words “(whether relating to education or not)” which are already used in the Additional Support for Learning Dispute Resolution (Scotland) Regulations 2005.

12. This amendment would underline the fact that, while the purpose of additional support is to enable the child or young person to benefit from school education, that support need not itself be educational – and is in line with the Code of Practice.

Proposal two

Provide assessments for children who need them, whether they have a CSP or not.

Why?

13. The right to make an assessment request in s.8 of the 2004 Act is one which parents can take advantage of only where there is also a process of determination occurring in relation to a CSP or additional support needs. This is unduly restrictive of parental rights, especially for children or young people who do not have a CSP. Their parents may only be able to make an
assessment request once in their child’s school career. The right to make an assessment request should be available at any time it is required.

14. Pupils with additional support needs are many times more likely to be excluded from school. Many more are subject to informal exclusions which are not recorded by the education authority. The right to request assessment would be invaluable to parents whose children are repeatedly excluded, in order to ensure that their child’s needs have been accurately identified and provided for. The right to request assessment would also be useful for parents of children with additional support needs where a new diagnosis is made.

15. This would not open the floodgates to a deluge of assessment requests that authorities would be unable to fulfil. Assessment requests are very rare in most areas (see below) and are always subject to the qualification that the authority only requires to comply with “reasonable” requests.

Assessment requests received by authority (since November 2005)+

East Ayrshire (18); Highland (21*); Dumfries & Galloway (0); Perth & Kinross (27); Scottish Borders (6); Aberdeen City (1,753); Aberdeenshire (16); East Dunbartonshire (10); East Lothian (8); Falkirk (3); Glasgow City (424); Moray (1); North Ayrshire (24); Renfrewshire (18); Shetland (2); South Lanarkshire (35); Stirling (4).

* figure includes requests to establish whether a CSP is required
+ in response to Freedom of Information request made by GLC on 20 May 2008

How?

16. In Section 8 of the 2004 Act, remove the pre-qualifications for making an assessment request contained in s.8(1)(a).

Proposal three

Make sure authorities comply with their duties to school leavers.

Why?

17. Sections 12 and 13 of the 2004 Act provide for transitional planning for school-leavers with additional support needs.

18. Chapter 5 of the Code of Practice underlines the importance of an effective transition process to post-school provision.

19. However, in many cases, transition planning simply does not occur or is ineffective.
20. The HMIE report found “Although a small number of authorities prepared children for multi-agency review meetings in advance, in most authorities, staff did not consult meaningfully with children and young people.”

21. It concluded: “Secondary school to post-school transition arrangements were less effective in meeting the needs of young people than transition arrangements at other stages due to difficulties in co-ordinating agencies and accessing adult services.” and “Children’s services were not effective in helping children to make the transition from child to adult services.”

22. At present, there is no effective remedy to ensure that the authority complies with their duties. The Code of Practice is already strong on this point (devoting a whole chapter to transition planning) and so further changes to the Code are unlikely to bring about a change. Legislative change is required to give parents and young people the rights to challenge a failure to comply with these duties.

How?

23. Amend sections 18 and 19 of the 2004 Act to allow a reference to the Tribunal to be made where there is a failure to comply with the duties imposed on an authority under sections 12 and 13 of that Act; and to give the Tribunal powers to require appropriate action by the authority to rectify that failure.

Proposal four

Allow the Tribunal to specify when a school placement should start.

Why?

24. The Tribunal’s powers when granting a placing request allows them to require the authority to place a child or young person in a particular school, but not to specify a timescale for doing so.

25. The result in such cases is that unacceptable and damaging delays in school education can occur.

Case study A

S is a child with multiple disabilities. His mother made a placing request to a grant-aided special school. This request was refused, but her appeal to the Tribunal was successful. The Tribunal’s decision was issued to parties on 24 April, but the authority did not place the child at the school until mid-August. In the meantime, the child was still attending a school which the Tribunal had determined was not able to meet the child’s needs.

Case study B (NAS)
A is a child with autism and developmental difficulties. A placing request to an independent special school was refused by the education authority but overturned following a successful appeal to the tribunal. However, the child was then not placed in the requested school immediately as the Tribunal did not specify an entry date. It took 2 months and numerous liaison and correspondence between the authority, parent and their representative and receiving school for a start date to be agreed.

How?

26. Amend Section 19(5)(b)(i) to include the words “by such time as the Tribunal may require”.

Proposal five

More CSPs for looked after and accommodated children, young carers and children with mental health issues.

Why?

27. HMIE’s report has identified provision under the Act for looked after children and young carers as one of the key areas for improvement for authorities. “Although planning to meet the needs of looked after and accommodated children was improving, practice across authorities varied considerably. Few authorities had effective provision for children and young people with mental health issues and those who were young carers.”

28. In the first two years of implementation of the 2004 Act, authorities were asked to assess all children and young people who had had a Record of Needs to see if they required a CSP. Now that period has ended, it is time for authorities to focus on these areas which are currently being neglected.

How?

29. Introduce a new Section 30A to the 2004 Act, ensuring that children and young people who are looked after and accommodated, or are young carers or have mental health issues are assessed to see whether they require a Coordinated Support Plan.

Conclusion

30. Adopting these proposals would address some of the main issues arising from the HMIE report on the implementation of the 2004; would be in keeping with the commitments made in the Scottish Government’s disability equality scheme; and would benefit children and young people in Scotland with additional support needs.
Joint submission appendix

Legislative changes suggested to give effect to the proposals:

1 Additional support needs

...

(3) In this Act, “additional support” means—

(a) in relation to a prescribed pre-school child, a child of school age or a young person receiving school education, provision which is additional to, or otherwise different from, the educational provision made generally for children or, as the case may be, young persons of the same age in schools (other than special schools) under the management of the education authority for the area to which the child or young person belongs,

(b) in relation to a child under school age other than a prescribed pre-school child, such educational provision as is appropriate in the circumstances.
(3) In this Act, “additional support” means—

(a) in relation to a prescribed pre-school child, a child of school age or a young person receiving school education, provision \( \text{whether relating to education or not} \) which is additional to, or otherwise different from, the educational provision made generally for children or, as the case may be, young persons of the same age in schools (other than special schools) under the management of the education authority for the area to which the child or young person belongs,

(b) in relation to a child under school age other than a prescribed pre-school child, such educational provision \( \text{whether relating to education or not} \) as is appropriate in the circumstances.

8 Assessments and examinations

(1) Where—

(a) an education authority propose—

(i) in pursuance of any provision of this Act, to establish whether a child or young person has additional support needs or requires, or would require, a coordinated support plan, or

(ii) to review under section 10 any such plan prepared for any child or young person, and

(b) the appropriate person makes a request that the education authority arrange for a child or young person to whom the proposal referred to in paragraph (a) relates to undergo, for the purposes of the proposal, a process of assessment or examination (such a request being referred to in this section as an “assessment request”), the education authority must comply with the assessment request unless the request is unreasonable.

(2) In subsection (1)(b), “the appropriate person” means—

(a) where the proposal referred to in subsection (1)(a) arises from a request referred to in section 6(2), 7(1) or 10(4), the person making the request,

(b) in any other case—

(i) where the proposal request relates to a child, the child’s parent,

(ii) where the proposal request relates to a young person, the young person or, where the authority are satisfied that the young person lacks capacity to make the request, the young person’s parent.

....
18 References to Tribunal in relation to co-ordinated support plan

(3) The decisions, failures and information referred to in subsection (1) are—

(f) failure by the education authority to comply with their duties under section 12(6) or 13(2) in respect of a child or young person.

19 Powers of Tribunal in relation to reference

(3) Where the reference relates to a failure referred to in subsection (3)(c), or (d)(ii) or (iii), or (f) of that section, the Tribunal may require the education authority to take such action to rectify the failure as the Tribunal considers appropriate by such time as the Tribunal may require.

(5) Where the reference relates to a decision referred to in subsection (3)(e) of that section, the Tribunal may—

(b) overturn the decision and require the education authority to—

(i) place the child or young person in the school specified in the placing request to which the decision related by such time as the Tribunal may require, and

(ii) make such amendments to the co-ordinated support plan prepared for the child or young person as the Tribunal considers appropriate by such time as the Tribunal may require, or

30A Children and young persons who are looked after, young carers or with a mental disorder

(1) This section applies to any child or young person—

(a) who is looked after and accommodated,

(b) who is a carer, or
(c) who has a mental disorder.

(2) Such a child or young person is, for the purposes of this Act, to be taken to have additional support needs.

(3) The education authority must establish, in accordance with the arrangements made by them under section 6(1), whether the child or young person requires a co-ordinated support plan.

(4) In this section—

- “the commencement date” means the date on which this section comes into force;
- “looked after and accommodated” means provided with accommodation under section 24 of the Children (Scotland) Act 1995;
- “mental disorder” has the meaning given in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003;
- “carer” is to be construed in accordance with s12AA of the Social Work (Scotland) Act 1968 and section 24 of the Children (Scotland) Act 1995; and
- “the education authority” means the education authority responsible for the child’s or young person’s school education.
1. The principal role of HM Inspectorate of Education (HMIE) is to evaluate the quality of education provided for learners in establishments and services across the education sectors. During inspections, HMIE evaluates the impact on young people of the education provided and makes recommendations about the action necessary to bring about improvement. It thus has the dual role of giving assurance and supporting continuous improvement. HMIE evaluations take into account the services provided to individual children and their parents. Its overall conclusions, however, are based broadly on all of the evidence it has relating to all children who receive the services of a local authority or school, rather than on the particular outcomes for individuals.

2. In 2006, HMIE published its report on the implementation of the ASL Act. We have forwarded this report under separate cover to the Education, Lifelong Learning and Culture Committee as evidence, along with references to other relevant reports produced by HMIE on services to young people with additional support needs. The report on the ASL Act evaluated the effectiveness with which the key elements of the Act were being implemented in authorities, and the impact to date on children and their families. HMIE reports are evidence based and focus on the observable outcomes and impact on children and young people of the education provided. Our reports use historical and current evidence derived from inspections and other evaluative tasks or investigations and a selection of our reports constitutes the evidence we have provided for the parliamentary hearing.

3. The role of HMIE before the ASL Act came into force included acting as professional advisers to Scottish Ministers and examining appeals to Scottish Ministers against the terms of Part IIIb and Part IV of a Record of Needs which related to the summary of impairments and statement of special educational needs. HMIE undertook that appeal role for many years. Having investigated an appeal, HMIE would produce a report with recommendations for the Scottish Ministers to consider and to make a final decision. HMIE had no role in deciding on placements for young people. Since the ASL Act came into force and with it the abolition of Records of Needs and the establishment of ASN Tribunals, HMIE is no longer involved in appeals relating to Records of Needs.

4. HMIE, at the request of the Scottish Ministers, can undertake investigations of Section 70 complaints, which are concerned with the failure of an education authority to discharge its statutory duties. In relation to the ASL Act, if the education authority does not carry out a tribunal’s decision, parents may make a complaint to the Scottish Ministers under section 70 of the Education (Scotland) Act 1980. To this extent, and in this context, HMIE may potentially be asked by the Scottish Ministers to investigate cases previously referred to the tribunal. HMIE has not investigated the work of the ASN Tribunal or other systems relating to appeals under the ASL Act because it may itself be called on to undertake a Section 70 complaint as described. Nor has HMIE been asked by the Scottish Government to undertake any such investigation of the work of the ASN Tribunal system. HMIE’s report on the ASL Act constitutes its main body of evidence in relation to how well the Act is being implemented.
1. Thank you for giving us the opportunity to provide written evidence on the above Bill. Our context is that of Education Services, Inverclyde Council. Inverclyde has a pupil population of 10,800 including around 300 pupils with additional support needs who attend mainstream schools.

2. We have operated within the terms of the Act since 14 November 2005. Approximately 60 Coordinated Support Plans are either already opened or are in the process of being opened. Since 2005 we have had only one case involving mediation, no cases of dispute resolution and no referrals to Additional Support Needs Tribunals at the time of writing (7 November 2008).

3. Please find below our comments:

Policy Memorandum

4. The Policy Memorandum is entirely clear and provides an excellent summary of the Bill’s objectives in section 3. References to significant Court rulings are also extremely useful.

Consultation

5. The consultation carried out was both appropriate and extensive. Inverclyde took its response to the Education and Lifelong Learning Committee for approval. The number of responses received is disappointingly low given the significance of this piece of legislation.

General principles

6. The Bill makes no reference to young people older than 17 who may still be attending special schools.

- Permitting the parents of young people with additional support needs to make out-of-area placing requests is on the one hand a sensible move towards equality but also potentially the generator of some difficulties for authorities. At the present time budgets in authorities for external placements are under significant pressure. A high number of requests for additional places would increase the pressure still further.
- An interesting area of tension might arise in the following circumstances: A parent feels the local special schools would stigmatise her son/daughter and request a place in a neighbouring authority with transport and placing cost arising? How are both the home and host authority expected to deal with that issue? Is there a high risk of legal challenge? How does the request comply with Best Value requirements?
By agreeing places from outwith an authority pressure will emerge on the receiving authority from within its own requirements. There are issues of prioritisation which authorities will have to address. These also present a risk of legal challenge.

- The early paragraphs on page 2 of the Policy Memorandum go a long way towards clarifying the relationships between and the responsibilities allocated to both the home and host authority.
- The early possible involvement of an ASN Tribunal as highlighted in paragraph 18 of the Policy Memorandum dilutes the role and significance of Education Appeal Committees.
- The Bill makes no mention of split placements and where and how placing requests could be used. Could placing requests be made to organisations contracted to authorities, such as Unity Enterprise, as well as to other education authorities?
- It is most appropriate that HMIe report back on the eventual operation of the Bill.
- It is important in the operation of the Bill that pupils have the appropriate statutory documentation prepared for them in the style of the authority in which they are being educated, that access to this by the home authority is granted and that on transfer any documentation held is made available to the receiving authority.
- Requirements to carry out reviews of CSPs in receiving authorities are appropriate.

Financial memorandum

- In paragraph 36 it is worth noting that some authorities did not accept placing request to schools in the special sector.
- In paragraph 37 there is no definition of what constitutes a “good cross section of all authorities in Scotland.” How was that cross-section determined? Were factors, such as deprivation and previous levels of recording (RoN) used? Why are no authorities in west-central parts of the country included?
- In paragraphs 39 it should be emphasised that the costs are indicative only. In reality, in a difficult year, the costs could be considerably higher to authorities.
- In paragraph 40 how can account be taken of rising costs when erratic increases in placements costs are involved (Glasgow City – increase in visual impairment placements increased by 70% in August 2008). The additional cost since August to Inverclyde alone has been £72,000 per annum.
- Funding was provided to authorities to support the introduction and thereafter implementation/maintenance of the 2004 Act not specifically for the opening of Coordinated Support Plans.
- COSLA would not have been aware of the increased costs imposed by this year (paragraph 42).
- In paragraph 45 this figure could be subject to major fluctuation. It could also be argued that if the annual figure is very high, there is little point in referring these cases to ASN Tribunals.
• With some luck authorities may have no Tribunal-related costs whatsoever. By removing some of the legal involvement which is creeping increasingly into educational matters the costs could be reduced still further.
• In paragraph 47 it is unclear how EAC costs are being calculated.
• In paragraph 50 our experience puts costs at special schools in neighbouring authorities at around £20,000 per annum each. This is close to the charges to our neighbours where they buy places from us.
• In paragraph 51 cost neutrality ceases where additional support is needed e.g. authority time.
• Paragraph 52 represents a best case scenario. Parents pursuing placements out of the area may be more inclined given new legislative backing to pursue cases to a Tribunal with some vigour.
• Paragraph 53 authorities will need to budget for possible mediation or dispute resolution costs. A helpful solution might be to employ a service or consultant for a purpose and building mediation into the contract at no additional cost. Our experience suggests costs would be minimal.
• The costs indicated in paragraph 55 are likely to be accurate. The cost of dispute resolution is reasonable at £355.
• Paragraph 58 is helpful. Authorities may strike a deal not to charge each other. It is often labour intensive to recover relatively low costs.
• I would agree with the aspects listed in paragraph 59, 60 and 61. These are useful additions to Act related activity.
• The costs of the Tribunal operation annually are high – it is justifiable to increase their role. It represents better value to the public.
• It is helpful to reduce legal involvement in educational matters. Education should not become an area of intensive legislation. Paragraph 73 is also useful in this context.

7. I hope the above submission is useful.

Colin Laird
Head of Lifelong Learning and Educational Support
7 November 2008
1. ISEA (Scotland) is a registered Charity established in 1998 to provide a Scotland wide advice, information, support and advocacy/representation service to parents/carers who have a child/young person with additional support needs.

2. Since 2005 we have operated two projects:

   1. **D.E.C.I.D.E** – whose main aim was to enable and empower parents throughout Scotland to Debate, Express, Consult, Influence, Discuss, Examine the Additional Support for Learning (Scotland) Act 2004. This was undertaken through a series of 38 Information/Consultation sessions held throughout Scotland in 2006, with a total of 760 parents attending and a further 402 telephone enquiries from parents who had not been able to attend. The feedback from parents showed that they knew little or nothing about the new legislation and that it had, at this time, little or no effect on them or their child/young person. In principle, parents felt the Legislation could and should enhance theirs and their child’s/young person’s legal rights and they welcomed the introduction of time limits imposed by the Act, as well as a new Tribunal system.

   2. **Scotland’s Advocacy for Education Service** – This service was established to provide advocacy/representation service for parents/carers who are in dispute with their Local Education Authority regarding the services and provision to meet their child’s/young person’s additional support needs.

      From April 2005 to March 2008 the project received 4,503 telephone enquiries from parents, and an additional 1,208 enquiries from professionals. The project undertook direct case work of 457 individual children’s/young people’s cases. The most intensive area of work has been assisting 128 cases lodging references to the Additional Support Needs Tribunals for Scotland. All of these references were represented by a member of the project at Tribunal.

3. I.S.E.A. (Scotland) knowledge and expertise of the implementation of the Additional Support Needs Legislation throughout Scotland is unique as we are the only organisation that works directly at grass roots level providing a holistic service to parents throughout Scotland on every aspect of the legislation.
General Principle of the Bill

4. I.S.E.A. (Scotland) has provided a very full written response to the Scottish Government’s consultation process. However, our views on the general principle of the Bill are somewhat mixed. We agree that legislation amendments are required but we do not feel this bill addresses some of the most fundamental flaws that have been highlighted since the implementation of the Additional Support for Learning (Scotland) Act 2004 (as per our response to the consultation document).

Financial Memorandum

5. The Financial Memorandum accompanying the bill is in our opinion, fundamentally flawed in that the figures presented are based on current figures of children/young people with Co-ordinated Support Plans – that being 1881. However, as alluded to in paragraph 41 of the Explanatory Notes “it was expected there will be around 11,2000 to 13,700 CSPs at any one time”. This figure has not been realised and this in our opinion, is due to the reluctance of Education Authorities to open CSPs as was the case with Records of Needs. Through our experience of working with many families, it is also very clear that there is no uniformity in how the criteria for a CSP is applied by each authority.

6. Furthermore, the financial figures produced in paragraph 46 of the Explanatory Notes are, in our opinion, well underestimated with us seeing an increase in Local Authorities engaging advocates as their representatives, as well as commissioning ‘expert’ reports. In these cases where an advocate is employed by the Local Authority, the Tribunal can take anything from 5 to 8 days plus preparation time. Extra costs incurred will also be the number of witnesses which can be from 4 to 6, plus the local authority official and supporter.

7. In paragraph 47 of the Explanatory Note, figures are again underestimated as we are aware that one Local Authority had an award of expenses made against them for nearly £60,000. This did not include their own expenses. It appears the figures in this section reflect a cost to an authority, but does not divulge the extra cost awarded against the LEAs when the parents are successful.

8. The same applies in Court of Session cases where the parents’ appeal is upheld and the costs are being meet by the LEAs.

9. In paragraph 55 of the Explanatory Note, figures are well underestimated bearing in mind that all children/young people identified with additional support needs can access these services (figure given at number 45 as 36,518). Our own recent survey of parents showed that over 75% of parents were unaware that they could request Mediation services, and that nearly 80% had poor or no information on their right to request the Dispute Resolution service. Therefore,
the number of estimated parents requesting mediation and dispute resolution is based solely on those parents with knowledge on how to access these services. We believe if more parents were informed of their rights to access Mediation and/or Dispute Resolution, then many more would actively pursue these routes.

10. The statement, In paragraph 50 of the Explanatory Note, regarding there being no evidence to suggest that authorities were refusing to accept placing requests for children with additional support needs who were resident in another authority’s area, is contrary to the experiences of parents contacting our service who have informed us that either their own authority have actively stated that the parents can not make a placing request for another authority, or the parent has been informed by the host authority that they do not accept placing requests from out with their area.

11. The issue regarding who should be responsible for the financial costs - home or host authority when a parent makes a successful placing request is, in our opinion giving more reasons to local authorities to refuse out of authority placing requests as they will in all probability, have to look carefully at the financial burden placed on them and their local council tax payers if they accept an out of authority placing request. According to the figure in paragraphs 55 and 57 of the Explanatory Note, this could be as much as £800 for mediation, £2,995 for Dispute Resolution and a yearly review of the CSP at £800 per placement. It also, in our opinion establishes another inequality in that where a home authority agrees to place a child/young person in another authority, then the home authority is still responsible for the cost incurred in mediation, dispute resolution etc. Therefore the host authority does not have the same financial burden imposed on them.

12. In paragraph 60, the cost of £2,800 per case to local authorities for the new expedited paper based Tribunal appears somewhat escalated as, according to paragraph 46, the cost to a Local Authority at an oral hearing, with representation which usually last at least one full day, was given as £5,000?

13. We find the statement in paragraph 72 absolutely ambiguous. If there is a cost to Local Authorities regarding references made to the Additional Support Needs Tribunals, how is there no costs to parents. The Scottish Parliament rightly gave parents and young people access to the new Tribunal system, mediation and dispute resolution.

14. However, we have to remember that the parents accessing these systems do have financial costs to bear which include loss of earnings and/or using annual leave to attend hearings. The Tribunal child care allocation is based on normal child care costs and, as many of the children have very complex needs, parents either have to use up their allocation of respite services to enable them to attend or, as in one case, the child had to stay in his bed the whole day so the mother
could attend. There are financial costs to parents in relation to photocopying, postage, accessing education and health files, telephone conference calls.

15. Where the education authority is being represented by an advocate or senior solicitor, some parents have employed a solicitor by taking out a loan or in one case, selling her personal items on eBay to raise the necessary funds in order that she could provide some equality in representation. However, most parents cannot raise the necessary funds and therefore the success of their reference is seriously diminished by having lay representatives. This of course can be substantiated in that no parental reference has been successful against an advocate. In most cases parents cannot afford to employ expert witnesses or have a report prepared. However, Local Authorities use tax payers’ money (which ironically the parent has usually contributed to) to employ advocates, commission expert reports and engage anything from 4 to 6 witnesses to support their case, as well as having direct access at any time to their legal department. We have, on many several occasions, represented the parent who had no witnesses (not through choice) and the local authority brought in 3 to 6 in support of their case.

16. The optimum words in this section are “the Tribunals are intended to be a family-friendly process where legal representation will not be a necessity”. However the last two annual reports from the President of the Tribunals show clearly the increase in the number of local authorities being legally represented.

**Paragraphs 61 and 73 of the Explanatory Note**

17. We can see the merit in the Tribunal being able to review its decision but, once more, it clearly states in both sections, on a point of law. Again the parents are put at a clear disadvantage from Local Authorities who have unlimited access to their legal department or advocates. Parents are expected to know about points of law?

18. Currently, parents can access an Advocates opinion on the possibility of a point of Law if they qualify for legal aid or use their own finances. If a Court of Session action is raised, the Advocates argue the point of law. However, under this proposed new system, parents will be expected to argue the point of law either raised by them or by the local authority, and we have no doubt that the education authority would be represented by an Advocate.

19. Although the Tribunals have striven to be user friendly, the reality is that it is legalistic and bureaucratic and many of the parents have described the Tribunal as a mini court of law.

20. The question of inequality of arms and Human Rights being infringed has been raised by many of the parents and our organisation.
21. We are more than happy to provide further information or clarification on our written evidence and our response to the consultation paper at any time.

Lorraine Dilworth
Advocacy Manager
I.S.E.A. (Scotland)
SUBMISSION FROM ISEA (SCOTLAND)

Education (Additional Support for Learning) (Scotland) Bill

1. I refer to the Education, Lifelong Learning and Culture Committee meeting held on Wednesday 17 December 2008 at which I gave evidence on the Additional Support for Learning (Scotland) Bill.

2. Margaret Smith MSP asked if I could write to the committee giving examples of children who have additional support needs and require special support but who do not have CSPs.

3. The following examples are from our current and past case work with parents:-

   • Child who attends a local authority special school (for autism) and had a Record of Needs and still receives weekly input from a speech and language therapist, has monitoring and review by an occupational therapist and mental health service, as well as weekly support from social work department – parents were told that the child did not require a CSP because all the services were being provided.

   • Another child (belonging to the same authority as example 1) who had a Record of Needs, with a diagnosis of Asperger’s Syndrome, attends mainstream secondary school. They had the involvement of a speech and language therapist in school as well as another speech and language therapist outwith school. Also 25 hours of auxiliary support and access on a weekly basis, to the support for learning unit and every three months visits a child psychiatrist. Parents told that, because the child was in mainstream, they did not require a CSP. These are only for children in special schools.

   • Child attended mainstream primary school, has a severe visual impairment and language difficulties, but never had a Record of Needs. Transferred to a unit attached to a secondary school which provides a small class, specialist teacher, visiting visual impairment service, speech and language therapy and mobility officer – was informed the child did not meet the criteria for a CSP.

   • Young person attends mainstream secondary school (which was the young person’s third secondary school), had been referred to the Children’s Reporter for non-attendance (which was due to a medical condition ie M.E. and severe migraine), had involvement of learning support, educational psychologist, paediatrician, mental health service and recently a diagnosis of Asperger’s Syndrome – was informed did not qualify for a CSP and could not stay on at school past S4.
4. I hope the above is helpful to the committee and would be happy to expand on any point or give further examples.

Lorraine Dilworth
Advocacy Manager

13 January 2009
SUBMISSION FROM COLIN JARDINE

Education (Additional Support for Learning) (Scotland) Bill

1. Having read the Scottish Parliament website I came across the following consultation paper ‘Call for evidence on the Education (Additional Support for Learning) (Scotland) Bill (SP Bill 16)’ and the request for opinions about how to extend support to the young persons concerned, both within and outwith educational situation.

2. Speaking as a 46 year old who is a wheelchair user with cerebral palsy the views expressed reflect my experiences of life as a wheelchair user.

3. When I became of school age in November ’68 I lived with my parents and sister in Hawick.

4. However, because I have a disability and the non-existence of disability friendly schools regarding access, wheelchair accessible toilets and personal assistants to help with daily activities such as note taking, feeding and toileting I was separated from my family and sent to a residential school in Edinburgh which was called ‘Westerlea School for Spastic Children.’ The very name, which was positioned at the front door on a main road, reflected an era of disability apartheid and made one feel isolated and separated from loved ones.

5. This separation from loved ones created the rebel in me who was questioning authority.

6. When my parents asked about me being allowed to go home at the weekend and being returned before classes began on Monday morning they were expected to drive 100 miles return journey on a Sunday afternoon in order to return me to school that day.

7. Following school I attended a residential college in Coventry for those with a disability, because, like my school days, no college, within what was then called Borders Region, existed that was disabled friendly.

8. In 1983 we as a family moved to Edinburgh, in 1985 I began to realise that my parents were not getting any younger and could not look after me forever, so I started looking into alternative accommodation where I could live independently like my able-bodied sister and yet receive 24/7 support for daily activities such as dressing, toileting and preparation of food. I received no training or guidance at school regarding how to look into the existence of suitable accommodation or support or how to apply for or receive funding for my care costs I only found out that such accommodation and funding existed because I asked my Occupational Therapist at the time what the procedure was, and she pointed me in the right direction.

9. In order that extended support be implemented properly then I would recommend the following steps be taken.
- Pupils be informed where funding for care costs can be obtained from, i.e. social work which is devolved, or Independent Living Fund, which is reserved, and how to apply.
- Told who to apply to for necessary equipment, i.e. hoists, shower beds/chairs or electric chairs.
- Pupils are trained how to budget for when they receive funding which goes into their personal bank account.
- Potential service users look into leaving the parental home before they have to, as it can take years from applying for funding for care costs to actually getting it in place.
- Apply for funding long before it is needed so that a decision can be appealed if necessary.
- Consider local amenities, such as access to shops, restaurants and public transport before accepting tenancy/occupancy.

10. Support within the educational system be extended by eliminating educational apartheid and enabling service users to attend the same school as their able-bodied siblings. This can be achieved by providing personal assistants who provide assistance with feeding/drinking, toileting and note-taking.

11. If the above factors are taken into account when preparing the Education (Additional Support for Learning) (Scotland) Bill then future generations might be more prepared for life when they leave the parental home.

Colin Jardine
27 October 2008
Comments on general principles of the Bill

- We agree with the policy objectives of the Bill as described in item 2 and 3 in the policy memorandum.
- It also ensures that this Bill is not inconsistent with other legislation affecting the education of children and young people.
- The general principles of the Bill are sound and key issues have been addressed, particularly with regard to the young people and families involved.
- Subsequent changes to the Code of Practice will be important in ensuring that the amended Bill can be implemented fully.

Responses to the question: How helpful do you find the policy memorandum and financial memorandum?

- The memorandum is set out clearly and it outlines the key findings of the consultation and their implications.
- It clearly states the access to mediation and dispute resolution following an out-of-area placement request and addresses previous inequalities in this area.
- It clarifies the right for a tribunal to be given the power to review its decisions.

Response to the question: Do you have any comments on the consultation the Scottish Government carried out prior to the introduction of the Bill?

- The consultation with young people happened rather late in the process.
- The use of Enquire was a good vehicle, but other methods could also have been used e.g. facilitated groups to encourage and model the engagement process with young people.
- During the consultation meetings, discussion time was short and one person or point of view sometimes dominated the proceedings.

19 November 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 THE MORAY COUNCIL

Education (Additional Support for Learning) (Scotland) Bill

1. Many thanks for the opportunity to submit written evidence on the general principles of the above Bill.

2. The principles do address an anomaly in the original legislation and we would not see any major implications arising for Moray in relation to the outlined proposals.

3. However, in the longer term we would suggest that further amendments are still necessary to address issues surrounding integrated working and joining up ASfL and GIRFEC.

4. Recommendation 8 in *For Scotland’s Children* stated that “the Scottish Executive should commission the development of a modular information and assessment format for use by all agencies working with children in Scotland (this could build on the work already underway in relation to individual services and electronic formats).”

5. In the intervening years we have developed a statutory framework of CSPs with the focus on “school education” and a non-statutory GIRFEC framework that focuses on the rest but fails to integrate the CSP. The ASfL legislation failed to address the above recommendation and, arguably, has set back the process of creating a single modular assessment format. The Bill misses the opportunity to address this problem.

6. Once again many thanks for the opportunity to provide evidence.

G Richard Donald
17 November 2008
SUBMISSION FROM NATIONAL AUTISTIC SOCIETY

Education (Additional Support for Learning) (Scotland) Bill

About us

1. The National Autistic Society (NAS) Scotland is part of the UK’s leading charity for people affected by autism. Today we have over 1,000 members and 14 branches across Scotland and we provide a range of services, including information and advice services, a range of family support programmes, a specialist day and residential school, Daldorch House, for children with autism, and education outreach services. Our Advocacy for Education service has supported over 500 families from every local authority in Scotland since it was established two years ago.

2. A local charity with a national presence, we campaign and lobby for lasting positive change for those affected by autism in Scotland.

What is autism?

3. Autism is a lifelong developmental disability that affects the way a person communicates with, and relates to, other people. It also affects how they make sense of the world around them. It is a spectrum condition, which means that, while all people with autism share three main areas of difficulty, their condition will affect them in different ways. The three main areas of difficulty (sometimes known as the ‘triad of impairments’) are:

- Difficulty with social interaction. This includes recognising and understanding other people’s feelings and managing their own. Not understanding how to interact with other people can make it hard to form friendships.

- Difficulty with social communication. This includes using and understanding verbal and non-verbal language, such as gestures, facial expressions and tone of voice.

- Difficulty with social imagination. This includes the ability to understand and predict other people’s intentions and behaviour and to imagine situations outside of their own routine. This can be accompanied by a narrow repetitive range of activities.

4. Some people with autism are able to live relatively independent lives but others may need a lifetime of specialist support. People with autism may also experience some form of sensory sensitivity or under-sensitivity, for example to sounds touch, tastes, smells, light or colours.

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1 We use the term autism here to cover all people on the autism spectrum, including autism, Asperger syndrome and other diagnostic terms used for autism spectrum conditions.
5. Over 50,000 people in Scotland have autism. Together with their families they make up over 200,000 people whose lives are touched by autism every single day. Despite this, autism is still relatively unknown and misunderstood. That means that many of these 200,000 people get nothing like the level of help, support and understanding they need.

**Autism and education**

6. Previous NAS research has highlighted the barriers which children with autism in Scotland face in accessing an appropriate education.³

7. Our research found that children with autism experience difficulties in receiving the appropriate support, both inside or outside the classroom, to enable them to access the curriculum and become active members of the school community. Our survey found that teachers and other school staff are not being sufficiently trained in autism to enable them to meet their legal duties under the *Special Educational Needs and Disability Act 2001*⁴ to make ‘reasonable adjustments’ so children with autism can learn. Only 35% of parents of children in mainstream schools were satisfied with the level of understanding of autism across the whole school.

8. Where a child with autism is not receiving sufficient support at school, this can have a seriously negative impact on the child. Our research found that where there is insufficient support for children with autism, this can lead to increased levels of stress and anxiety for these children. Such increased anxiety levels can have repercussions for a child’s behaviour and ability to learn. These tensions can often lead to formal or informal exclusions. Recent Scottish Government statistics revealed that the rate of exclusion of pupils with a disability was 60% higher than among other pupils.⁵ Similarly, the Office for National Statistics found that 27% of children with autism in Great Britain have been excluded from school at some point and most of these children (23% overall) have been excluded more than once, compared to just 4% of other children.⁶

9. The Education (Additional Support for Learning) (Scotland) Act 2004 (the ASL Act) is therefore an extremely important piece of legislation to ensure that the needs of children and young people with autism are identified and that they receive the support they need to meet these needs. Unfortunately, however, almost three years after the ASL Act came into force, many children and young people with autism still struggle to access support. Furthermore, the third annual report of the President of the Additional Support Needs

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⁴ *Special Educational Needs and Disability Act 2001* (c.10), ss11-13.
Tribunals for Scotland (ASNTS) found that greatest number of referrals to the ASNTS concerned children with autism.\(^7\)

10. We welcome the Bill and appreciate the opportunity to respond to the call for evidence. Our key considerations about the Act are outlined more fully below. The NAS Scotland also fully supports the joint response submitted by the Govan Law Centre, NAS Scotland and others.

**Limits of the definition of education**

11. The implication of recent case law is that educational support only refers to that which is conducted in a teaching environment. A recent decision by Lord Wheatley\(^8\) on a placing request appeal stated that “[t]he whole burden of the test of what constitutes additional support needs clearly refers to educational support, and further to education support offered in a teaching environment.”

12. We are extremely concerned about the ramifications of this decision. By limiting considerations to educational support in the teaching environment, we are concerned that the wider needs of the child will be overlooked. This approach would seem to go against the original principle of additional support for learning to look at the holistic needs of the child to enable them to benefit from their education, and to co-ordinate support from other agencies.

13. As autism is a social and communication disorder, children and young people with autism may require support from a wide range of services to enable them to make the most of their education – for example they may need input from speech and language therapists or occupational therapist. Such support may not be limited to educational support, nor may it be delivered in a teaching environment, yet its delivery is crucial for that child or young person. Similarly, children with autism may require support outwith the traditional ‘teaching environment’ of the classroom, for example during break-times, extra-curricular clubs and school trips.

14. We are very concerned that this decision will limit the extent to which children and young people with autism can access support under the ASL Act unless the opportunity is taken now to address this in legislation.

**Right to request assessments**

15. Currently parents can only request assessments in relation to identifying additional support needs (ASNs) or to request or review a co-ordinated support plan (CSP). If a child’s needs or circumstances change, or further information such as a new diagnosis becomes available, there is no opportunity within law to request reassessment. If a child is not entitled to a

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\(^8\) SC v City of Edinburgh Council (2008) CSOH 60
CSP then the assessments used to first determine their ASNs could inform the rest of their time in education.

16. In particular we believe that there is a strong case to review the support put in place for a child who is considered to be at risk of exclusion. Children with autism are disproportionately affected by exclusions from schools, and rates of exclusions are alarmingly high. In our experience exclusion often occurs due to a lack of appropriate support being put in place. A right to request a re-assessment could help to ensure that children receive the most appropriate support and would help to minimise the disruption to their education caused by an exclusion.

17. The pressures placed on children with autism who do not receive the appropriate support at school should not be underestimated. Families frequently report to us that the strain of trying to conform and fit in at school leads to what is sometimes described as the “3 o’clock timebomb”, when all the frustration and stress of struggling to cope at school comes out as soon as they come home. These experiences must be taken into account when considering the additional support needs of the child.

Transition

18. As a result of their disability, many children and young people with autism find change and transitions particularly difficult. Many parents contact our Advocacy for Education Service with concerns about upcoming transitions in their child’s education, particularly starting secondary school (larger school with different subjects and different teachers) or leaving school. Indeed many contact us well before the statutory time limits with their concerns. Yet, we are aware that often duties in relation to transition are not being met. For example, one child was forced to remain in primary school until a suitable secondary school was identified. The proposed school was unsuitable and the parents were not involved in the decision. We would like to see greater clarity and emphasis on the importance of these duties, and greater recourse for parents where these duties are not met.

Time limits on placing requests

19. There is a clear case to introduce a time limit, which are available for all other decisions, on placing requests. This is made apparent by a recent case which came to us. Following a successful placing request appeal to the tribunal, a young person with autism was then not placed in the requested school immediately as the Tribunal did not specify an entry date. It took two months and considerable correspondence between the education authority, parent and their representative and receiving school to finally be resolved. Such delays are unacceptable and need to be addressed.

Recourse where a tribunal decision is not implemented

20. We are aware of a number of cases where parents have been successful at tribunal but the education authority has failed to implement the decision. In
one case a parent appealed to tribunal against the failure to produce a CSP. The tribunal set a new deadline but this was not adhered to. Taking cases to tribunal is a very stressful experience for families who are often already under considerable strain. It is vital that the tribunal has “teeth” to ensure that its rulings are enforced.

Transparency of appeals system

21. We believe that the current system of referring and transferring appeals between the Additional Support Needs Tribunal Scotland, the Education Appeals Committee and the Sheriff can be confusing for parents and may result in excessive delays. This is particularly the case where they are seeking an immediate placing request. We have had a number of cases come to us where it is unclear where the placing request refusal should be appealed to.

22. Parents of children with autism face considerable pressures and some have to fight for almost every piece of support, often as a result of a low awareness of the needs of people with autism and their families and a lack of appropriate services. A significant number of parents we work with are put off appealing because they are “battle-weary”. The complexity of the system is likely to exacerbate this. Furthermore, there are concerns over the ability of education appeals committees to hear placing request appeals, particularly compared with Tribunal where staff and trained and there is clear legislation governing its operation. Some parents have expressed concerns over the impartiality and experience of education appeal committee members. In one case which came to our Advocacy service, a parent was told that they could not call a witness because they had been present at the whole hearing, but had not previously been advised of any such procedures.

23. We would like to see a clear and transparent route for parents to appeal decisions, and particularly placing requests. It is vital that parents are able to have confidence in any system which is in place.

Parent and child involvement

24. Despite good practice in the Code of Practice there is too frequently a failure to involve parents in discussions or decisions about their child’s education. An alarming number of parents remain unaware of their rights under the Act; this is particularly true in terms of information about parents’ right to appeal decisions. We are aware of cases where education authorities have failed to invite parents to key meetings about whether to open a CSP, have given wrong information such as telling a parent their child already had a CSP and telling them they do not need to consult a child with a CSP, or failing to ascertain either the child or the parents’ views when drawing up a CSP. Given the failures by education authorities to follow the Code of Practice in this area, there is a real need for a greater emphasis on working with families and providing families with relevant information.

25. In particular, while children and young people who lack capacity to make decisions should be consulted on issues relating to CSPs, currently there is a
requirement to involve children and young people who lack capacity in relation to ASN
s only “as appropriate”. We firmly believe that all children and young people should be involved in decisions which affect them, and should have the right to support and advocacy just as parents and other young people.

20 November 2008
NDCS is the national charity dedicated to creating a world without barriers for deaf children and young people. We represent the interests and campaign for the rights of all deaf children and young people from birth until they reach independence.

2.6 in every 1,000 children are deaf. NDCS estimates that there are around 3,000 deaf children with a severe to profound hearing loss in Scotland today. 1,800 of these will be of school age. There will be many more who have mild to moderate losses.

NDCS uses the term deaf in this response to mean any form of permanent or temporary hearing loss. This could be a mild, moderate, severe or profound hearing loss, and could refer to children who communicate orally or through British Sign Language (BSL). We also include children who have a hearing loss in one ear (unilateral deafness).

We thank the Committee for the opportunity to share our views on the Amendment Bill. NDCS Scotland is also contributing to a joint evidence paper with partners from the Govan Law Centre and others. We commend that joint submission and its recommendations to the Committee. In this response, NDCS Scotland will focus on specific issues and experiences of deaf children and their families in Scotland in relation to the Additional Support for Learning framework.

NDCS Scotland has shared this response with RNID Scotland, who have endorsed our views.

1. Comments on the Education (Additional Support for Learning) (Scotland) Bill - We welcome the increased rights that the Bill as published will give parents of deaf children with Co-ordinated Support Plans (CSPs) in place to make out of authority placing requests and references to the Additional Support Needs Tribunal where they have cause to appeal a refusal.

1.2 However, NDCS Scotland believes that this right should be available to parents not only of those deaf children who have CSPs, but to any deaf child, particularly those with a severe to profound hearing loss. HMIE has identified huge variation in the criteria which local authorities use when issuing CSPs¹, and we believe that many deaf children are not accessing these statutory plans. (See section 2 below for further detail). The Bill does not address this.

1.3 NDCS Scotland believes that access to an independent tribunal should be based on a deaf child’s needs, and not on inconsistencies in local authority decision making processes. Most parents of deaf children initially want them to attend schools close to home. It is only when they feel that provision is not

¹ HMIE, 2007
meeting their child’s needs and they feel that limited educational progress is being made that they may seek alternatives out of authority. Where such a request is refused, NDCS Scotland believes that the ASNT should have the power to assess how the deaf child’s educational needs are best met.

1.4 NDCS Scotland believes that whilst the proposed Bill is a welcome step forward, it falls short of the full legislative review of the Education (Additional Support for Learning) (Scotland) Act 2004 that was promised in the Scottish Government’s Disability Equality Scheme 2008-2011. We believe that a wider review of the legislation is required, and expressed this view in our earlier submission to the consultation process. Specifically, we feel that a wider review should consider access to statutory entitlement to support, monitoring pupil progress, transitions, early years support, and information available to parents.

2. Access to CSPs and statutory entitlement to support – We believe it is essential that all deaf children be classified as having additional support needs. However, a recent informal survey of deaf children numbers in Scotland revealed that the vast majority of deaf children are not getting access to CSPs, or indeed Individualised Education Plans (IEPs). In one local authority area alone, we have established that whilst there are over 180 deaf children identified as receiving support from the authority, less than a fifth (31) of these deaf children have a CSP or an IEP in place2.

2.2 NDCS Scotland is aware of a number of other forms of plans currently in place for deaf children, such as Personal Learning Plans, Additional Support Plans, Individualised Learning Plans, Individualised School Plans, and Co-ordinated Care Plans3. None of these have any statutory bearing under the terms of the Additional Support for Learning Act. However, as a statutory plan, a CSP carries with it rights and entitlements for children and their parents. Without a CSP, these legal rights are just not there for the majority of parents of deaf children in Scotland today.4

**CASE STUDY 1:** “The teachers are wonderful and the whole ethos/environment meets my child’s needs exceedingly well. My child is doing very well at school - and a result of this, despite his severe hearing loss we have been told that he doesn't need a CSP or an IEP. We were told that he would need to have additional needs apart from his deafness to get a CSP or IEP. To be honest we haven’t pushed this (we have had other battles to fight!).5

2.3 We believe that access to CSPs and the wide variety of alternative non-statutory plans in existence is an issue that must be discussed at the earliest opportunity, and not just be picked up in a later review of the Code of

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2 NDCS Scotland research, 2008
3 NDCS Scotland research, 2008
4 See also HMIE, 2007, p.16
5 Direct quote from parent of deaf child, NDCS Scotland, 2008
Practice\textsuperscript{6}. It is clear that Guidance is not effective in this regard and that legislative intervention may therefore be required.

3. Impact on planning services and monitoring pupil progress. - The Committee will be aware that the annual school pupil census \textit{Pupils in Scotland} and the SQA \textit{Attainment and School Leavers Survey} only records the existence and the S4 attainment of those deaf children who have a CSP or an IEP in place. In relation to 2 above, this means that there are almost 150 deaf pupils in one local authority area who are not being picked up by official recording mechanisms\textsuperscript{7}. The current pupil census records only 905 deaf pupils in Scotland\textsuperscript{8}.

3.2 Such gaps in information make it very difficult to monitor how well deaf children are performing, and whether services are effectively meeting need. The following case study demonstrates the impact that this is having on service delivery:

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\textbf{CASE STUDY 2:} NDCS is aware of a Scottish local authority which is currently looking to cut its Educational Audiologist Service on the basis that the current post holder has only 11 deaf children on the case load, and none under the age of 3. The feeder NHS audiology department reports however that they are currently working with 50 deaf children, some aged under 3, the vast majority of whom would benefit from the interventions of an educational audiologist.
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4. Early years - NDCS Scotland believes that the engagement of health and social work agencies in the delivery of early years support under the legislation is another area which requires review. Section 5 of the 2004 Act sets out the circumstances in which the authority has a duty to provide additional support to under 3s (i.e. where the child is disabled and has an additional support for learning need, \textit{as agreed between the health board and the authority}). Two pages of Chapter 3\textsuperscript{9} of the Code of Practice set out further generic guidance for agencies to work together to take this forward.

4.3 This in effect means that local authorities \textit{can} provide support to the pre-3 age group but are not under a legislative obligation to do so for all children with additional support needs. As with access to CSPs, the decision as to whether a child under 3 has a significant additional support need arising from their disability rests with the local authority concerned.

4.4 Again, this does not necessarily mean that parents of deaf babies and toddlers are not accessing the support they need. But as there is currently no statutory right to early years support, if support is withdrawn or not offered, parents have no legal right to contest this, nor any recourse to the Tribunal.

\textsuperscript{6} Scottish Government, \textit{Analysis Report: Consultation on the Additional Support for Learning Amendment Bill 2008}, p3, para 9

\textsuperscript{7} For further details, see \textit{www.ndcs.org.uk/pickanumber}

\textsuperscript{8} Pupils in Scotland 2007

\textsuperscript{9} Supporting Children’s Learning: Code of Practice, 2005 p.33-35 inclusive
**Case Study 3:** NDCS Scotland is aware of a 14 month old deaf baby, who is just about to be fitted with a cochlear implant. Since diagnosis, the family has received a visit from a qualified ToD once or twice a fortnight to support their child’s development. However, the baby’s mum has just discovered that when their current ToD retires later this year, there will be no replacement. The family has no legal right to challenge this, and they are very worried that the impact on their child’s development could be severe.

4.5 Early years support for a deaf baby is vital in order to develop access to language and therefore the curriculum in later life. An undiagnosed deaf child aged 3 will have a vocabulary of around 25 words, compared to 700 words for a hearing child of the same age\(^\text{10}\).

4.6 To complement the delivery of the forthcoming Early Years Strategy, NDCS Scotland believes that the statutory requirement to enter the process of establishing additional support for learning needs for a deaf child should not begin only once that child enters pre-school education – if it does, then the intended benefits of early intervention following diagnosis at birth could potentially be lost. We believe that this should be a statutory requirement for deaf children, underpinned by reference to the Tribunal and complemented by national standards for multi-agency professionals working with deaf children in the early years in order to inform parents and professionals alike, as already exists in England and Wales\(^\text{11}\).

4.7 This could require sections 18 and 19 of the 2004 Act to be amended to allow reference to the Tribunal to be made where there is a failure to comply with the duties imposed on an authority under Section 5 of that Act; and to give the Tribunal powers to require appropriate action by the authority to rectify that failure.

5. **Ensure that authorities comply with their duties to deaf school leavers.** Sections 12 and 13 of the 2004 Act provide for transitional planning for school leavers with additional support needs, including those who are deaf. Chapter 5 of the Code of Practice underlines the importance of an effective transition process to post-school provision. However NDCS believes that in many cases, transition planning for deaf children is ineffective, or simply does not happen.

5.2 Deafness is not a learning disability. There is no reason why, with the appropriate support, deaf children should not be achieving on a par with their hearing peers. But lower educational attainment amongst deaf children\(^\text{12}\) has a profound ability on their ability to achieve their full potential as an adult. RNID research\(^\text{13}\) has found that only 63% of deaf and hard of hearing people are currently employed, compared to 75% of the population as a whole.

\(^{10}\) Yoshinaga-Itano (1998)

\(^{11}\) Developing Early years intervention/support services for deaf children and their families. DfES 2003

\(^{12}\) See results of the Achievements of Deaf Pupils in Scotland project, SSC, 2000-2005

\(^{13}\) Opportunity Blocked: The employment experiences of deaf and hard of hearing people RNID, 2006
5.3 At present, there is no mechanism to ensure that the authority complies with their duties to deaf school-leavers. NDCS believes that further legislative change is therefore required.

6. **Information available to parents** - Whilst Chapter 8 of the Code of Practice accompanying the 2004 Act emphasises the key role of parental involvement in a child’s education, NDCS Scotland is aware of many parents of deaf children who have real concerns that they are not involved in decisions made by agencies about their child’s education. Worse still, many are not aware of their rights under the 2004 Act.

6.2 NDCS Scotland therefore believes that there is a pressing need for clear, unbiased, fully accessible and impartial information about their rights under the ASL Act and what that means for them and their deaf child.

7. **Conclusion** - NDCS Scotland welcomes the limited content of the Bill. However, we believe that the current review should go further, particularly around a) greater transparency and consistency in the system, with a strengthening of statutory entitlement and access to data; b) transition arrangements; c) enshrining access to early years support; and d) improved information for parents, to ensure that the framework is getting it right for every deaf child.

20 November 2008
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 QUARRIERS

Education (Additional Support for Learning) (Scotland) Bill

1. Thank you for giving Quarriers the opportunity to submit evidence to the Education, Lifelong Learning and Culture Committee on this Bill. Quarriers is one of Scotland’s largest social care charities, providing practical care and support for children and adults with a disability, children and families, homeless young people, people with epilepsy, and carers. Through more than 120 projects in Scotland and south west England, we challenge inequality of opportunity and choice, to bring about positive change in people’s lives.

2. Quarriers operates several different projects upon which the impact of the Additional Support for Learning (ASL) Act has been significant. These include Quarriers Seafield School, which is a residential school within the wider spectrum of social care and education services, providing a positive and motivating environment where pupils, who are referred from a number of different local authorities across Scotland, benefit from social, psychological and educational opportunities which constructively contribute to their well-being and development. In addition, Quarriers Opt-in Project works directly with St. Paul's and Hillpark secondary schools and their associated primary schools within the greater Pollok area, to provide a comprehensive transition programme for P7 classes in ten different primary schools. Quarriers also provides a range of accommodation, support and respite services for children and young people with complex disabilities.

3. We would generally support the principles of the Bill to address gaps between policy intention and actual implementation of the Act. The original aim of this legislation was to ensure that all children and young people should be able to access the support they need. It is disappointing that so much of the focus of implementation at local level appears to have been on setting up bureaucratic barriers to resources rather than meeting those needs.

4. We would agree that parents of children with additional support needs should have the right to make an out-of-area placing request, in the same way that parents of children without additional support needs can. This additional provision adheres to the spirit of the Act, that every child should have access to the support they need, regardless of where that may be provided. There are instances where local authorities have used ideological or legal reasoning to justify a decision to refuse an out-of-area request. It appears in some cases that referrals outwith a local authority’s own area are not made due to financial constraints, regardless of where the needs of the child may best be met. This is borne out by the fact that current referrals to Seafield School and other residential schools are decreasing as local authorities apparently face financial difficulties.

5. Parents can also find it difficult to access information on what provision might be available outwith their own area. There is no central resource, which might provide information and guidance on specialist provision, to inform parental choice. So, whilst giving parents the right to make an out-of-area
placing request is a welcome move, consideration also needs to be given to empowering parents to make informed choices.

6. There are also instances where children with behavioural difficulties are moved from one school to another, without any real attempt being made to address the difficulties. A clear example is of a child being moved to three different schools, all within their own education area. The parents were encouraged to view each move as a “fresh start” for the child, without being advised that the child’s particular difficulties might be better addressed by alternative, specialist provision.

7. There also appears to be increasing use of part-time timetables for lengthy periods of time, to enable mainstream schools to cope with children who have behavioural difficulties yet avoid the need for exclusion. Whilst we accept that excluding a child from school is far from ideal, we have concerns that keeping a child on the school roll by providing the minimum 3 hours tutoring per week is simply masking a very real need for additional support. If the child is then referred to a specialist school, having spent a lengthy period of time on a part-time timetable makes the adjustment to full-time education far more difficult, at a time when the child is already having to adjust to the challenges of a different school.

8. We also have concerns that CSPs are not being utilised in the way intended by the Act. In 2004, there were 14 children and young people attending Seafield School with a Record of Needs. There are currently only 2 pupils with CSPs, from a total of 43 children. These are children who are affected by a range of challenges, including dyspraxia, being looked after from age 2 with no parental contact, significant learning difficulties and PTSD. Given the high level of difficulty faced by these children and the degree of support they require, a CSP would provide an essential framework for their well-being, and would establish accountability and the ability to more easily lever in the additional support services required, which range from mental health provision to simple befriending services.

9. As well as providing a co-ordinated and considered approach to children’s needs, the CSP would also establish the necessity for future planning, which was an integral part of the Record of Needs, but which now seems to be omitted for many of the children we support.

10. For many children, particularly those with Additional Support Needs, transition is a time of particular stress and anxiety, but support for transition appears very patchy. There are many key issues which are therefore not addressed and allowed to become problematic. For example, behavioural difficulties which were manageable in primary school become exacerbated in the move to secondary school but support during the transition period would have helped, and if the child had a CSP then specialist support would have been made available. There are examples of good practice by individual head teachers, but this is inconsistent.
11. This legislation is welcomed, but its effectiveness will be limited without additional resources and more robust monitoring of implementation.

12. Overall the consultation process was useful, but it may have been more effective to have had more opportunities for parents and children to participate. The policy memorandum provided a useful and clear explanation of the proposals.

13. I hope that the above is helpful but would be happy to provide further information if that were useful and to discuss further the work of Quarriers and the people we support.

Kate Sanford
Policy Manager
5 November 2008
1. This call for evidence offers the council the opportunity to express views relating to any aspects of the Education (Additional Support for Learning) (Scotland) Act 2004 and the Education (Additional Support for Learning) (Scotland) Bill. Renfrewshire Council would wish to take this opportunity to reflect upon:

- arrangements for inter-authority placements including Section 23 of the Education (Scotland) Act 1980;
- a perceived encouragement/promotion of adversarial approaches in additional support needs; and
- the design, content and tone of the consultation paper on the proposed amendments and, in particular, the unnecessarily negative and pejorative language of some of the questions in relation to local authorities.

2. Renfrewshire Council, for the most part, welcomed the Act but, in common with COSLA and other local authorities, expressed grave concern on the level of clarity on arrangements for inter-authority placements and on the potential of the way the legislation was being presented to promote a litigious and adversarial approach to relationships between parents and local authorities which would be at best unhelpful.

3. In relation to the first of these matters, Renfrewshire Council believes that the placement of children with additional support needs is best managed through professional assessment accompanied by dialogue with parents to ascertain appropriateness of provision. This will include consideration of placement outwith the home authority when the home authority cannot meet the child or young person’s needs within its continuum of provision. Such arrangements allow both the home and host authority to work collaboratively in the best interests of the child and to make the necessary budgetary and staffing arrangements to support the placement.

4. Renfrewshire Council supports the amendment to the legislation which will allow young people with additional support needs and the parents of children with additional support needs and, including children with CSPs, to make out of area placing requests but would argue that without a review and strengthening of Section 23 of the Education (Scotland) Act 1980, this amendment might have undesirable outcomes for local authorities.

5. First of all, the access of children and young people with additional support needs to out of authority placements in mainstream schools through the parental request route is already placing considerable burdens on receiving schools. For example, when a youngster with sensory impairment needs, with classroom assistant support, technological equipment etc transfers authorities under a parental placing request, the receiving authority has to replicate the level of support with the ineffectual fall-back on Section 23 of the 1980 Act to support it. Invariably the burden falls on the host authority.

6. The problem is further exacerbated in relation to the parental request route being used to access an authority’s continuum of provision. Renfrewshire Council has
made considerable investment in developing a high quality and broad range of alternative provisions.

7. These provisions, in most cases, are small-scale with intensive staff support. The authority has to monitor closely the additional support needs profile of the council area, to ensure there is adequate provision within the continuum, based on the current criteria for placing requests. This has the potential to affect detrimentally the authority’s planning in this area, since a placing request accepted at one point in time, could in future years seriously inhibit the authority’s ability to respond to its own needs.

8. In relation to the second point above, Renfrewshire continues to believe that there is an unhelpful emphasis on adversarial approaches within the sphere of additional support needs. It is clear from our monitoring procedures that the whole structure/system established to resolve disputes under the Act is underused and largely unnecessary.

9. Finally, Renfrewshire Council has a number of issues in relation to the national consultation process which has a bearing on the parliamentary review.

10. The design of the questions was such that debate is limited and respondents are directed into a response which left no room for discussion.

11. This was an opportunity to review and clarify issues such as support for host authorities from external agencies to deliver a CSP; clarification of terms such as ‘significant’ in relation to needs; and the exclusion of young people with agreed additional needs. The opportunity was missed.

12. Additionally, there was a tone which ran throughout the consultation document, which appears to be critical of local authorities. This criticism becomes explicit in the wording of questions 10 and 11 where the repeated use of the term ‘fails’ is completely unhelpful.

13. Renfrewshire Council has a significant commitment to providing a rich and effective support framework for all our children and young people. Any improvements in legislation are welcomed when developed in the context of government and local authority partnerships that recognise the quality of provision already made in this area.

Education and Leisure Services
26 November 2008
SUBMISSION FROM RNIB SCOTLAND

Education (Additional Support for Learning) (Scotland) Bill

1. RNIB Scotland is pleased to have the opportunity to submit written evidence to the committee to assist with scrutiny of the Bill.

2. RNIB Scotland is also contributing to a joint evidence paper with partners from the Govan Law Centre, ENABLE, Capability Scotland, NDCS Scotland’s Commissioner for Children and Young People, the Commission for Equality and Human Rights, and the National Autistic Society. We commend this joint submission and its recommendations to the Committee.

3. There are around 180,000 people in Scotland with sight problems. RNIB Scotland delivers a wide range of services in the fields of education, employment, family support, social care, access to information and the built environment. We campaign for full civil rights for people with sight loss.

4. There are over 2,000 children and young people in Scotland with severe sight problems. Many of these have additional complex needs. RNIB Scotland is the largest voluntary organisation working with children and young people with visual impairment in schools, further education colleges and universities.

5. RNIB Scotland welcomes the proposed changes in the Education (Additional Support for Learning) (Scotland) Bill introduced in the Scottish Parliament on 6 October 2008. However, we believe that there are further opportunities to benefit blind and partially sighted children and young people in Scotland through additional amendments to the Bill. These are:
   1. Reinstate “additional support” outside the classroom
   2. Ensure that authorities comply with their duties to school leavers
   3. Allow the Tribunal to specify when a school placement should start

6. The Scottish Government’s Disability Equality Scheme (2008-2011) commits to “a full legislative review of the Education (Additional Support for Learning) (Scotland) Act 2004” by 2008/2009 in order to improve “education and support for children with additional support needs (ASN) and disabilities”. We believe it is essential that all children and young people who are blind or partially sighted should be classified as having additional support needs.

7. Specifically, the Scottish Government is committed to “take forward recommendations and areas for improvement from the HMIE review of the ASL Act” (report produced October 2007). The Scottish Government is failing to take forward key recommendations for improvement from the HMIE review.

8. RNIB Scotland understands that there may be changes to the regulations and Code of Practice to follow, but the measures we are proposing cannot be achieved without legislative change. This legislative review is an opportunity...
to get the law right for children and young people with additional support needs, and we have three suggestions that will help the Scottish Parliament do just that.

Proposal 1 - to reinstate "additional support" outside the classroom

9. The consultation document on the draft Bill stated that the Scottish Government did not intend to change the “thrust or ethos” of the 2004 Act. However, the decision of Lord Wheatley in the case of SC v. City of Edinburgh Council [2008] CSOH 60 did just that, striking at the central feature of the Act – the definition of “additional support needs”.

10. In paragraph 29 of his decision, Lord Wheatley stated: “The whole burden of the test of what constitutes additional support needs clearly refers to educational support, and further to education support offered in a teaching environment. This in turn must refer to the educational needs of the child, and not to anything else. It cannot refer to the social and environmental needs of the appellant herself, or indeed of the child.”

11. RNIB Scotland considers that the concept of “additional support” should be restricted to “education support offered in a teaching environment” runs directly contrary to the Code of Practice.

12. Some children and young people who are blind or partially sighted will require additional support from agencies other than education services if they are to make progress in areas such as mobility and independent living skills. These are essential support services if young people are to become independent citizens. However, very few education authorities in Scotland employ mobility education specialists. In 2007, RNIB commissioned the National Foundation for Educational Research (NFER) to carry out an online survey of local authorities in England, Scotland and Wales on the issue of assessment and provision of mobility education. This study found that there was no standard pattern or approach to assessment or provision. Where mobility training was achieved, it most often was delivered in the home area, after school and during the holidays.

13. The pattern is similar for the teaching and learning of independent living skills. Again, this additional support which is essential for the development of visually impaired young people is most often delivered outside the classroom environment and by a non-education agency.

Proposal 2 - Ensure that authorities comply with their duties to school leavers who are blind or partially sighted

14. Sections 12 and 13 of the 2004 Act provide for transitional planning for school leavers with additional support needs, including those who are blind and partially sighted. Chapter 5 of the Code of Practice underlines the importance of an effective transition process to post-school provision.
15. However, RNIB Scotland believes that, in many cases, transition planning is ineffective or simply does not occur at all.

16. The HMIE report found that “although a small number of authorities prepared children for multi-agency review meetings in advance, in most authorities, staff did not consult meaningfully with children and young people.”

17. The report concluded: “Secondary school to post-school transition arrangements were less effective in meeting the needs of young people than transition arrangements at other stages due to difficulties in co-ordinating agencies and accessing adult services.” The report also found that “Children’s services were not effective in helping children to make the transition from child to adult services.”

18. Research conducted by RNIB indicates that 75% of people of working age who are blind or partially sighted are unemployed. RNIB Scotland believes that, if the transition process is not handled effectively, these young people are much less likely to progress to meaningful further education and employment.

19. At present, there is no mechanism to ensure that the authority complies with their duties. The Code of Practice is already strong on this point (devoting a whole chapter to transition planning) and so further changes to the Code are unlikely to bring about a change. Legislative change is required to give parents and young people the rights to challenge a failure to comply with these duties.

Proposal 3 - Allow the Tribunal to specify when a school placement should start

20. When granting a placing request, the Tribunal is empowered to require the authority to place a child or young person in a particular school. However, the Tribunal has no power to specify when this placement should commence.

21. In some cases, this results in unacceptable and damaging delays in the school education of blind or visually impaired children.

22. Other Issues - Impact on planning services and monitoring pupil progress.

23. RNIB Scotland further believes that amendments to planning services should be made so that the progress of all pupils with a visual impairment can be monitored. The Committee will be aware that the annual school pupil census Pupils in Scotland and the SQA Attainment and School Leavers Survey only records the existence and the S4 attainment of those blind and partially sighted children and young people who have a CSP or an IEP in place. As many children and young people who are blind or partially sighted have neither a CSP or an IEP this means that there are a great number whose progress is not being monitored. RNIB Scotland is concerned that this effectively discounts many pupils with visual impairment getting appropriate and timely support. Official figures are based on registration and as was found
from the Children's Eyecare Review 2006, many children and young people are not registered either blind or partially sighted

**Early years**

24. RNIB Scotland believes that the engagement of health, education and social work agencies in the delivery of early years support under the legislation is another area which requires review. Local authorities can provide support to the pre-3 age group but are not under a legislative obligation to do so for all children with additional support needs. As with access to CSPs, the decision as to whether a child under 3 has a significant additional support need arising from their disability rests with the local authority concerned.

25. This does not necessarily mean that parents of babies and toddlers who are blind or partially sighted are not accessing the support they need. But as there is currently no statutory right to early years support, if support is withdrawn or not offered, parents have no legal right to contest this, nor any recourse to the Tribunal.

James Adams
Policy Manager
20 November 2008
1. The SCAJTC wishes to advise the Committee that under paragraph 14(2) of Schedule 7 to the Tribunals, Courts and Enforcement Act 2007 they are empowered to scrutinise and comment on legislation, existing or proposed, relating to tribunals or to any particular tribunal. Consultation on proposals for primary legislation affecting listed tribunals or statutory inquiries, or on rules for statutory inquiries other than those referred to earlier, is not mandatory, but usually takes place and is welcomed by the SCAJTC.

2. The Scottish Government’s Support for Learning Division failed to include the SCAJTC on the consultation list for the Education (Additional Support for Learning) (Scotland) Bill. The SCAJTC is disappointed that our involvement was so disregarded by a department which, through contact regarding the setting up of the Additional Support Needs Tribunal for Scotland (ASNTS), had prior knowledge of the Committee’s existence.

3. With regard to the SCAJTC’s views on the general principles of the Bill.

4. The Committee welcomes the increased ease with which cases would be able to move between the ASNTS and the Education Appeal Committees, and between the tribunal and the sheriff. However in our opinion it is still overly complicated from the point of view of the user and the whole topic of related jurisdictions needs to be looked at in much more detail (from the point of view of the user and not just the judicial structure). This could be simplified to a certain extent by having ALL placing requests for special schools, irrespective of whether or not there was a Care Support Plan, heard by the ASNTS instead of being referred back to an Education Appeal Committee or Sheriff.

5. Continuing the theme of making the whole system more straightforward and streamlined for the user, the Committee would also suggest that the ASNTS should have jurisdiction over cases of exclusion involving a Care Support Plan. At present these go to an Education Appeal Committee that lacks, in the Committee’s view, the expertise and training to deal sympathetically and effectively with such cases.

6. Additionally we welcome the proposals in Sections 2 and 3 regarding mediation and dispute resolution as well as clarification of the arrangements between education authorities at Section 5.

20 November 2008
1. School Leaders Scotland wishes to make the following observations.

2. We welcome the amendments to the 2004 Act. Anomalies, including apparent discriminatory practices, have emerged as the legislation evolved from abstract statute to actual cases involving young people and their families often generating landmark legal judgements as a consequence. The observations made by interested parties in May and June 2008 confirmed a dissatisfaction with aspects of the Act, which was not operating in the way intended. The amendments are thus a sensible response to these anomalies.

3. We think it is entirely right and proper that authorities should adhere to procedural timescales for responses and actions and there is a strong hint given to authorities that they should engage closely with a family’s concerns rather than keeping them at arm’s length. We think it is right and proper for a family to have increased access to Additional Support Needs Tribunals for Scotland.

4. We think it is entirely right and proper that a family can make an out-of-area placing request and can appeal a refusal of a placing request to establish equality of opportunity with other families not seeking a CSP. We note the concern that this might lead to frivolous appeals but do not think such a hypothetical argument should carry much weight when the establishment of a CSP is such an emotive issue.

5. We accept the logic of the host authority accepting the costs of mediation and dispute resolution when that authority accepts a placing request. We think it is in the interest of the child for a CSP to be reviewed or established immediately on their arrival in the host authority.

6. We read the financial memorandum with some interest but with some scepticism in relation to the figures on display. There is a degree of confident extrapolation in this memorandum which we did not share: the legislation is still bedding in and is not still widely known or applied by parents who might well have a legitimate claim to make on an authority. The projections are decidedly conjectural but we concede that it was the correct thing to attempt.

7. We have some general observations to make with regard to funding of pupils with additional support needs. All the financial references appear to be inter-authority: we saw no reference at all to the actual and potential demand on school budgets caused by the original legislation nor by the proposed amendments.

8. There are, regrettably, several consequences of the creation of a bureaucratic system to give support to these young people and their parents. One of these is a reduction in the time available to support these young people in schools. We feel school support is being stretched very thinly
indeed: increased legal rights have not been matched by equivalent funding. A second consequence is a reluctance of staff to apply for promoted posts in the learning support area – the bureaucracy is a disincentive. Bluntly, where pupils move schools there must be funding and support that follows them.

9. We are aware of current arrangements between authorities – for example where one authority has specialist provision which is not available within a neighbouring authority and a child lives in one area yet is educated in another – where funds change hands to cover the cost of this arrangement and which are passed down directly to establishment level in the hosting authority. We would welcome clarity and reassurance on this matter for future inter-authority arrangements.

10. We also see nothing explicit in the legislation to ensure that where the host authority accepts a placing request that adequate funds will flow from the host authority to the establishment that educates that pupil. We would welcome clarity and assurance similarly on this matter for the future: it is unreasonable to champion an inclusive approach without supplying the funds to make it workable.

11. Finally, we think the earlier consultation was valuable as it led to new insights on the viability of the proposals and smoothed the way for amendments to the Bill before it reached the current stage. We think this is a model worth consideration for other legislation in the future and would undertake to engage with such consultation.

Ronnie Summers
Education Convenor
10 November 2008
1. Please find the following responses to the questions posed in relation to the general principles of the Education (Additional Support for Learning) (Scotland) Bill.

2. How helpful do you find the policy memorandum and financial memorandum accompanying the bill?

3. We have found the Explanatory Notes useful and propose to forward a more detailed response to the Financial Memorandum through our multi-agency partnership by 10 December to the Finance Committee as required.

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

5. We welcomed the opportunity to attend the consultation event and to submit a written response on the proposed amendments.

Barbara Peardon
18 November 2008
Introduction

1. Sense Scotland is a leader in the field of communication and innovative support services for people who are marginalised because of challenging behaviour, health care issues and the complexity of their support needs. The organisation offers a range of services for children, young people and adults whose complex support needs are caused by deafblindness or sensory impairment, physical, learning or communication difficulties. Our services are designed to provide continuity across age groups and we work closely with families and colleagues from health, education, social work and housing. This breadth and depth of approach to service delivery helps us take a wider perspective on the direction and implementation of new policies.

General comments

2. Sense Scotland welcomes the consultation on the Education (Additional Support for Learning) (Scotland) Bill. We understand that the main objective of the Bill is to re-align the ASL Act with its original policy intention. To some extent the Bill succeeds in doing this, and we support most of these measures. We especially welcome the fact that the Minister has moved quickly to address problems resulting from recent legal judgments that interpreted the ASL Act differently from policy intention.

3. We remain somewhat dismayed at the limited scope of the Bill, seeking only to further strengthen legal technicalities. The measures being taken seem far removed from improving practice for most children and young people with additional support needs. The Bill falls short of Committee Convener Karen Whitefield MSP’s statement regarding children in Scotland who require additional support to benefit from education and realise their potential. The Bill will not “ensure that the proposed measures will meet the needs of these young people.”

4. We look forward to learning about other measures that may be introduced to address the concerns raised in the HMIE report on implementation of the ASL Act two years on.

Specific comments

General principles of the Bill

Timing of placing requests and role of ASN Tribunal Scotland

5. We agree with the proposed amendment to allow out of area placing requests to be made for children and young people with ASN, including those where a CSP is in process with the home authority. We agree too that the ASN Tribunal for Scotland should hear refusals of such requests where a CSP is being considered.

6. We have some concern that placing requests are now covered by several acts of Parliament. We are concerned that legislation to amend the ASL act will not address underlying problems with placing requests. A number of anomalies exist
which will only be addressed through scrutiny of the whole area. We would support a full review of the legislation on placing requests.

**Mediation and dispute resolution**

7. We support the proposal that, in relation to placing requests, parents and young persons have the same rights of access to mediation and dispute resolution that are available in relation to internal placing requests.

**Home and Host authority: reviewing a CSP**

8. We understand the concerns over a host education authority making available mediation and dispute resolution services, in relation to placing requests, and not being able to recover the cost of these services from the home authority. We foresee possible difficulties with this proposal if a parent makes a placing request to a special school in England. As the authority in England could not be covered by the ASL Act it would not be appropriate or possible for it to assume responsibility for the CSP and so could not be a host authority under the Act.

9. Some authorities will be affected disproportionately in terms of costs as a host authority compared to others. Those authorities e.g. Glasgow and Edinburgh, which may receive a higher number of out of authority requests, would carry the costs of education, of reviewing CSPs and of paying for mediation and dispute resolution services.

10. We appreciate that this is a complex area for analysis – for example we understand that East Renfrewshire receives a high number of placing requests for children living outwith the authority. However, these relate mostly to pupils with dyslexia whereas placing requests to attend Glasgow and Edinburgh are more likely to be for pupils with complex additional support needs. The costs the latter case are higher than in the former. The Minister may wish to consider an in-depth analysis of costs for educating pupils with additional support needs. This analysis would be informed by and could contribute to an operational definition of ‘significant’ (discussed below).

11. Finally, in the case of a split placement that includes both a home and host authority it would seem appropriate for the home authority to assume responsibility.

**Transfer of responsibility from home to host authority**

12. Measures proposed in the Bill regarding transfer appear to deal with children starting at a new school. But the concerns of home and host authority responsibility for a CSP come into sharp focus for a young person who will leave school in the next two years. At this point the host authority would be responsible for engaging with transitions and we have seen examples where this leads to difficulties.

13. We are aware that many authorities do not deal well with the process of transition from school. Difficulties for young people relate to poor planning frameworks and lack of communication between agencies. We are not clear that the host authority is in a position to plan effectively for the young person’s future at a time when the focus of planning turns to the role of home social work and careers services. We can foresee an anomaly where the home authority could become an ‘appropriate agency’ under the act, even though the young person lives there. Joint responsibility between home and host authority should begin 12 months before the child is due to leave school.
Policy intention signalled by Policy Memorandum

14. Comments are dealt with in the relevant sections of our response.

Financial memorandum

15. Earlier we drew attention to the possibly anomalous situation where some authorities will be affected disproportionately in terms of costs of being a host authority compared to others. Those authorities e.g. Glasgow and Edinburgh, which may receive a higher number of out of authority requests, would carry the costs of education, of reviewing CSPs and of paying for mediation and dispute resolution services.

16. Costs to host authorities will be different depending on the type of support need being addressed e.g. the costs to a host authority of educating a pupil whose support needs are a result of dyslexia will be different from those of a pupil with complex communication and other support needs.

Comments on consultation carried out prior to the Bill

17. The consultation that took place around the Bill could not compare in scope or in depth with that which surrounded the consultation on the ASL Act itself which was a model of involvement, seeking views and taking account of them. We were witness to several changes that took place during the framing of the original Bill and were involved in producing the Code of Practice. In contrast the current Bill has been pushed through quickly, with little opportunity for consultation. However, as its focus is on legal technicalities we can understand why there has been a need for a speedy process.

Accessibility of consultation document

18. The consultation response forms are not easily accessible to people with physical or visual impairments. There is a particular difficulty with the Respondent Information Form. The form can only be completed by handwriting or using a typewriter. Neither the respondent information form nor the response form has been produced in Word compatible format or in accessible PDF format, which would have allowed respondents to complete it using a computer and keyboard. Given the topic of the consultation, and that the ASL Act itself allows for a permanent record to be made by means other than handwriting (e.g. for assessment requests), the Scottish Government could reflect good practice in this area.

19. We are aware that the Scottish Government published its Disability Equality Scheme 2008-11. In our view the practice represented by the Respondent Information Form runs counter to that scheme.

Other comments

Thrust and ethos of the Act

20. The amendments referred to in the Bill are for the most part highly technical and specialised. We appreciate why this is the case and why the Scottish Government wishes to address these particular points with some urgency. Nonetheless we note that this narrow focus encourages the feeling that amendments are being driven by court cases. In our view, the amendments run contrary to Paragraph 41 of the
Scottish Government’s consultation document which notes that the proposals do not affect the original thrust and ethos of the ASL Act. In our view they do.

21. The six original principles on which the ASL Act was founded were:

- Applies to all children who face barriers to learning.
- Focuses on outcomes for the child.
- Modernises the system for identifying and addressing needs to make a difference to children.
- Aims for less bureaucratic, integrated services.
- Promotes partnership with parents.
- Aims to implement extra safeguards like mediation services, dispute resolution and appeals tribunals.

22. The proposed amendments might be in line with improving rights for parents, but it is difficult to see how they reflect the ethos and thrust of the ASL Act. They will not reduce bureaucracy or lead to improvements in integrated services.

Planning frameworks

23. Improved consistency is needed to reduce confusion on the range of non-statutory education planning frameworks introduced by some authorities. The HMIE\(^1\) report into the ASL Act also drew attention to the number of frameworks being used in addition to statutory Coordinated Support Plans CSPs and individualised education programmes (IEPs).

24. Our understanding is that education authorities are expected to operate two main planning instruments in relation children and young people with additional support needs – the IEP and CSP. These form part of the system of staged intervention presented within for example in the document Supporting Children’s Learning Code of Practice.

The term “significant”

25. Following Lord Nimmo-Smith’s ruling clarification is needed regarding the term “significant”. We appreciate that the term ‘significant’ is likely to be re-considered following the HMIE report into implementation of the ASL Act. We propose that the Scottish Government consider the approach developed by the late Prof. George Thomson and his colleagues which introduced the term ‘Educational Support Needs’ and which we drew to the attention of the then Scottish Executive in our early responses to the review of Record of Needs legislation and to the Riddell Commission on Severe Low Incidence Disabilities. The terms ‘additional support needs’ and ‘communication support needs’, now in common currency, can in large part be traced back to Thomson’s work.

26. The term ‘significant’ could draw on this body of work allowing the term to be operationalised within both educational and wider support service contexts. It also

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has the advantage of now having a currency within the Further Education sector\textsuperscript{2}. We would be happy to discuss this further.

**The term 'appropriate agencies'**

27. It would be helpful to clarify what constitutes an “appropriate agency”. Clarity would be helpful for two reasons:

1. An increasing number of local authority departments are restructuring with education and social work services becoming a single agency within the authority. Whether social work is then acting as an agency of the authority as distinct from the authority exercising its education functions is then blurred. If education and social work are part of one service, and interagency working practices do seem to encourage this model of service delivery, the role of social work as a separate agency of the authority is called into question. This affects one of the three conditions that needs to be in place for a Co-ordinated Support Plan to be opened. The question arises whether a pupil does not need to have a CSP opened because that authority happens to have a single education and social work services agency.

The question of what constitutes an ‘appropriate agency’ also arises for home versus host authorities. A home authority might split its education and social work functions leading to the child having a CSP. But the host authority might operate these as one function. Under the revised Act, if the child is the subject of a placing request that host authority would assume responsibility for the child’s education. And yet for other children with similar support needs that authority might not require a CSP.

2. The second reason for seeking clarity is that an agency might be construed as an appropriate agency by reason of the level of support it offers and how significant that support is. For example, a parent might request an agency to carry out an independent assessment. That assessment might be formative, rather than summative in nature. In such circumstances, the parent might argue that the agency, in carrying out an assessment, should be considered an “appropriate agency” under the ASL Act. In receiving help from an appropriate agency, the child or young person might then qualify for a Co-ordinated Support Plan. To some extent the decision would be based on the meaning of ‘significance’ (see earlier section).

28. It would be helpful to have clarification on both these matters relating to appropriate agencies.

**Multi-agency planning**

29. Health and in particular social services need to be made aware of their duties under the Act. The Act’s focus of coordination is to support other agencies to fulfil their duties, instead of which support should be directed to the child.

30. Despite a number of years having passed it remains unclear what is happening with the broader planning framework and how the revised Act will link to that

framework. It would be helpful to have updated guidance that sets out how Getting It Right For Every Child (GIRFEC), Looked After and Accommodated Children (LAAC), and Individual Education Plans (IEPs) and other plans link with the CSP. Currently there is extensive duplication of effort.

31. At present most effort seems to be going into integrating SEEMIS (education management information software) with GIRFEC and LAAC planning. These are essentially a focus on IT arrangements and transferability of data. Improving data transfer is only effective if the systems that electronic transfer are implementing are themselves effective. In any case given that some education authorities have standardised on Phoenix it is not clear how they will benefit from work done on integrating SEEMIS.

**The CSP: a new lever on resources?**

32. The intention of the CSP was to become a coordinating working document. It was not intended as a gateway to resources in the same way that a Record of Needs was regarded under the Education (Scotland) Act 1980. In early consultations on the Act the CSP was presented as just another planning document around educational objectives that brought together inputs from multiple agencies involved with the child. It was never intended to be a lever on resources though it is clear that that is the way many parents regard it. We are concerned that we are replacing one lever on resources with another.

33. The actual identification of children, of resources and making provision should be the same regardless of what planning document is in place. Instead, because it is the only legal document of accountability, many parents now try to secure a CSP, authorities set the bar for obtaining a CSP ever higher, and the Additional Support Needs Tribunal Scotland (ASNTS) expands its role.

34. We are aware that some health boards have been reluctant to provide significant or ongoing support to some pupils with additional support needs. Without significant or ongoing involvement local authorities do not need to produce CSPs, reducing administration costs.

**Views of children and young people**

35. We supported the proposals to amend the legislation in response to Question 3 of the Scottish Government consultation on the Bill. This referred to Lord Wheatley’s decision regarding a placing request from W. Dunbartonshire for a pupil to attend a school in Glasgow.

36. Neither the court’s judgment, nor any of the proposed amendments, picked up on another issue relating to that case – hearing the views of the child. In that case the pupil asked both the authority and the Court, to be allowed to present the reasons why he wanted to make the placing request. On each occasion the pupil was refused the opportunity to present views The court’s refusal to seek views runs counter to what the ASL Act states about young people’s views being sought and taken account of.

37. Equally, the Code of Practice contains much that is positive on the need to seek the and take account of views of children and young people. There seems little point in having legislation and a code of practice that is then ignored by the legislature.
Revising the Code of Practice

38. We understand that additional work will take place in future to bring the Code of Practice up to date. We also understand that one possible approach to updating the code is to issue a revised version for a combined audience of both professionals and parents. As the current code was designed to address its main audience, professionals, we have some concerns with this proposal.

39. Some of the difficulties with interpreting the code have been the result of authorities treating it as Guidance rather than a Code of Practice. The latter has greater weight and while not a statement of the law, is referred to by both the ASNTS and by the courts. Like other codes of practice, Supporting Children’s Learning grew out of an apparent need for practitioners to have a clear statement of their duties. As such it is a Code for practitioners or professionals on their duties under the Act, while the Act itself is a statement of duties on authorities.

40. Its principle target is not parents and, while parents may choose to read it, and this is to be encouraged, there would be a danger of producing a watered down code of practice that is subsequently ignored. As contributors to one section of the code, on involving parents, we are well aware that substantial sections of this part of the code are, in the main, ignored in practice. A revised code is unlikely to improve matters. We do of course support revisions being made to the code in line with the outcome of the current consultation.

Transitions

41. The Bill has little to say about transitions – especially when young people with ASN are in the process of leaving school. This is an area that requires urgent attention. We are aware of over 25 young people whose transition planning arrangements are in effect in breach of the Act. Neither the requirement to seek information about appropriate post-school arrangements at least 12 months before school leaving nor the requirement to provide information 6 months before school leaving have been met. We hope that the Committee will give close consideration to this matter.

Conclusion

There is a better way

42. We appreciate that the Scottish Government regard the changes set out in the Bill as the first stage in introducing other changes. We are concerned however that the Act has become an unwieldy bureaucracy driven instrument with an emphasis on formal processes to resolve difficulties. The key principles on involving parents, set out in the Support for Learning Code of Practice should be applied by authorities. The move towards formal processes of dispute resolution – in particular tribunals and independent adjudication – do little to achieve better educational outcomes for children and young people. A commitment to involvement that is enshrined in HMIE inspection criteria within How Good Is Our School self-evaluation would help to underpin good practice.

43. We now have clear evidence that there is another way to do things and that it can be effective. The recent Children in Scotland/Enquire study of the implementation of the ASL Act in one authority, North Ayrshire, shows that it is possible to get things right for children’s education. More than this, however, there has not been a single case brought to formal dispute resolution procedures in that authority. Why?
44. North Ayrshire’s aim is to resolve difficulties early, to work closely with parents so that any difficulties do not become cases for formal referral to dispute resolution processes, staff seek to make relationships with parents and build on them.

45. Like ourselves North Ayrshire recognises that the only winners in formal procedures are lawyers and those who seek to drive a wedge between authorities, schools, teachers and parents. The Code of Practice presents detailed, evidence-based information on what constitutes good practice with parents. As far as we know only two authorities have implemented both the spirit and the letter of these arrangements. We have a concern that any revised code will omit these important measures.

46. Costs of servicing these formal processes are escalating. We note that where an ASNTS hearing was expected to take a half day, many are now taking 5 days. Each of these cases has required staff to spend in some cases up to 3 weeks preparing for the case. There are no winners. The proposals mean that more work will be directed to ASNTS. We have grave reservations at the direction this legislation is taking. After all any money spent on addressing a case must result in less money for something else - usually frontline services.

Dr Stuart Aitken
Senior Consultant
20 November 2008
Introduction

1. Shelter Scotland welcomes the opportunity to contribute to the Scottish Parliament’s Stage 1 inquiry into the Education (Additional Support for Learning) (Scotland) Bill.

2. Shelter is working hard to make lasting changes to policy and practice which will protect children from homelessness, as well as mitigate the impact of homelessness and bad housing on children. Housing is fundamental to the quality of children’s lives and the fulfilment of their statutory rights. Children need a home to feel safe, keep warm, stay healthy, and to play and learn. Too often bad housing and homelessness have a profound impact on children’s abilities to learn and fully participate in school life. The additional support needs of children experiencing housing difficulties must be addressed if the Bill is to help all children receive the support they require.

Impact of homelessness on children’s education

3. Children can spend anything from a few weeks to several years living in temporary accommodation waiting for a permanent home. It can mean children have longer journeys to school involving several buses, which may also be unaffordable for parents who are already struggling financially. Cramped conditions may mean children do not have a quiet space in which to do their homework or the necessary equipment. Some families will move a number of times before they are re-housed permanently, sometimes forcing children to change schools and to cope with the resulting loss of friends, familiar teachers and their own support networks.

4. Furthermore children living in temporary, overcrowded, poorly repaired or inadequately heated housing are more likely to suffer health problems and be bullied. They are a third more likely to suffer respiratory problems such as chest problems and asthma than other children, and may also have difficulties sleeping and have feelings of depression and anxiety. It is harder for them to have friends over making them more vulnerable to bullying and affecting their self-esteem and social skills. These factors all hinder children’s chances of enjoying and succeeding at school. Research confirms this, finding that homeless children have lower levels of achievement and higher levels of absence than other children.

5. Frequently children experiencing housing problems are also coping with other challenges such as living in poverty, family breakdown, parental alcohol

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1 Shelter (2006) Against the Odds: An investigation comparing the lives of children on either side of Britain’s housing divide.
or drug misuse, parental mental or physical health problems or have fled domestic or racial abuse.

**Shelter’s educational support services**

6. In light of the negative impact homelessness can have on children’s learning Shelter recently developed an education support service to minimise the adverse affects of homelessness on children’s education. We have four education liaison workers who provide tailored support to children aged 5 - 16 years who are experiencing homelessness to help them learn and achieve. Types of support may include working with the child to help them develop a positive attitude towards learning and build their self-esteem; organising one-to-one educational support at home or at school; helping parents to engage with schools and advocating for children to receive appropriate support to help them achieve. It is a pilot service currently running in Edinburgh, Glasgow, South Lanarkshire and Dumfries, funded for three years by the Big Lottery Fund and the Paul Hamlyn Foundation.

7. In our experience of offering education support to homeless children we have found that educational professionals are often unaware of the housing circumstances of some of their pupils, how this can affect their learning and how to support these children to achieve their potential. This means that homeless children tend to miss out on additional support they are eligible for under the Education (Additional Support for Learning) (Scotland) Act, 2004.

**Conclusion**

8. It is of paramount importance that when making amendments to the Education (Additional Support for Learning) (Scotland) Act, 2004 the Committee takes into consideration the learning barriers faced by children experiencing homelessness and the additional support they require.

19 November 2008
1. The Scottish Traveller Education Programme (STEP) welcomes this opportunity to provide the Scottish Parliament’s Education, Lifelong Learning and Culture Committee with comments on support for children and young people with additional support needs from Gypsy and Traveller communities.

2. STEP’s evidence does not address issues relating to ‘placing requests’, ‘mediation and dispute resolution services’ as, to date, no Traveller family or young person has submitted a case to the Tribunals system. Importantly, this does not mean that no Traveller children have additional support needs, or that some may need a Coordinated Support Plan and the associated individual education plan.

3. Gypsy and Traveller children and young people able to attend school regularly are no more or less likely to have additional support needs than learners from any other background. However, many Gypsy and Traveller learners do experience significant interrupted learning (due to short term and long term circumstances). While the term ‘interrupted learning’ is not used in the legislation, educators have welcomed the Additional Support for Learning Act (ASfL), its Code of Practice and its conception of ‘additional support needs’, not least because it signalled a greater awareness of how social and cultural circumstances may impact on a child’s capacity to engage in school based learning.

4. Our main aim in responding to the Committee’s call for evidence is to clarify members’ understandings of the different Traveller communities living in Scotland, to identify some of the social circumstances and key systemic barriers that lead to many Gypsy and Traveller children and young people continuing to have unmet learning needs.

Traveller pupils in Scotland

5. The diversity among Traveller communities is reflected in their distinctive histories, cultures and family based life styles. For ease of reading, this account generally uses the term ‘Traveller’. STEP, funded by the Scottish Government’s Support for Learning Division, has a remit to cover all Traveller communities in Scotland. Importantly, these communities do not comprise a homogeneous community.

6. Briefly summarised these are:

- Scottish Gypsy Travellers (now legally recognised as having “ethnic origins … and therefore enjoy(ing) the protection of the (1976 Race Relations) Act” (Employment Tribunals, Hosie, October 21 2008)
- travelling show and fairground families, circus families and bargee families (Occupational Travellers)
• New Traveller families, and,
• Roma families (from a number of Eastern European countries - following the expansion of the European Community).

7. The Scottish Gypsy Traveller population is argued to be around 15,000 (data is gathered on families living in local authority sites, private sites and those camping by the roadside. No data is gathered on families living in houses), the Occupational Traveller population is around 3,000, and the Roma population is estimated to be between 1,000 and 3,000.

The Scottish Government’s annual reports on Scotland’s pupils

8. The Scottish Government annually publishes information on pupils in Scottish schools, e.g. the numbers of pupils, their rates of attendance, attainment and exclusion from school (http://www.scotland.gov.uk/Resource/Doc/233368/0063951.pdf). Schools’ gather data on a specific date in September about all pupils. Three specific categories; ‘Gypsy/Traveller’, ‘Occupational Travellers’ and ‘other Travellers’, are currently available to help schools gather information about Traveller pupils. To date there is no specific ‘Roma’ category. Data gathered by Glasgow schools about Occupational Traveller pupils is likely to be reliable. However, as many Travellers don’t disclose their identities for fear of racist treatment, the records cannot provide an accurate picture of a school’s Traveller pupil profile. Some Travellers, registered on the school roll, may leave shortly after the census day.

9. A school’s budget is largely allocated on the basis of its pupil roll, local economic and social disadvantage, and informed by the authority’s particular audit of its pupils’ additional support needs. Such funding arrangements are a major disadvantage to pupils with significant patterns of interrupted learning. For example, although travelling showground families make contact with schools in advance of travelling, they frequently report poor support for their children’s learning needs.

10. In practice, one main category is used to record a pupil’s information. The complexities shaping Traveller children’s support needs (and indeed the complexities shaping many other pupils’ support needs) cannot be reflected in a statistical account. A relatively new data category has been introduced, ‘interrupted learning’, which reflects policy makers’ increasing awareness of the range of additional support needs experienced by Scotland’s pupils. The 2007 report includes figures showing that 290 pupils were recorded as having ‘interrupted learning’, figures that are unlikely to include Traveller children. Does this category point to a general need to improve support for a ‘mobile’ pupil and his/her learning and progress in the education system?

The role of ‘family’ and education in Traveller communities

11. A common feature across Traveller communities is the centrality of ‘family’ to everyday life. Children learn the skills and knowledge they need to maintain family life, e.g. about the family’s business or occupation, and the
family’s place in Traveller communities, from their parents and relatives. Generally, a Traveller’s sense of identity is strongly felt and highly valued. Importantly, having a Traveller identity does not depend on whether he/she lives a mobile life-style, but on his/her sense of belonging to a cultural community.

12. Scottish Gypsy Traveller pupils are increasingly likely to attend primary schools – albeit with ‘intermittent attendance’ largely determined by a family’s need to ‘shift’ from one area to another, for employment, family or other reasons. Many secondary aged Scottish Gypsy Travellers either do not register at a secondary school or stop attending secondary school well before the school leaving age of 16.

13. However, Scottish research suggests that more Scottish Gypsy Traveller learners and families are seeking access to learning and teaching, i.e. access to a more flexible and relevant curriculum that is supportive of their culture. Gypsy Traveller young people choose to learn many of the skills they need for employment, and for caring for their families from their parents and extended family members. The centrality of ‘the family’ in Gypsy Traveller cultures has a significant impact on education – when a family funeral or wedding takes place, or if there is trouble between families, for example on a Traveller site, the whole family is likely to ‘shift’ i.e. move on to another site or part of the country. With the result that a number of children from one extended family – siblings and cousins – may exit one school and turn up unexpectedly in another.

14. The ‘family group’ is also highly significant for travelling show and fairground families (the majority of whom over-winter in the East End of Glasgow – frequently living in extended family groups in what are called ‘yards’. Families live in chalets situated alongside their showground rides and equipment). Travelling show and fairground families form a strongly networked business community around which their distinctive culture has flourished for many years, in Scotland and beyond. Unlike Gypsy Traveller families, these families’ mobility is largely predictable as they follow a pattern worked out well in advance of travel. Learning the family business from a very early age, travelling show and fairground children and young people are generally knowledgeable and confident members of their family’s particular niche on the fairground. Travelling show and fairground families’ keen interest in and active support for their children’s education, is demonstrated by families’ proactive engagement with their children’s base schools. Generally, base schools provide mobile learners with distance learning packs, Glasgow’s Interrupted Learning Service also provide a designated teacher to support the children and schools, particularly when travelling. A number of travelling show and fairground children and young people have participated in Glasgow’s ‘Laptops for Travellers’ project.

15. Little is known about New Travellers as families make minimal use of schools and largely prefer to ‘home educate’, (i.e. parents take formal responsibility for their children’s education). Anecdotal reports from staff describe Roma families as being delighted with the welcome their children
have received in Glasgow’s schools, which contrasts with the discriminatory treatment received in their countries of origin. Funded by Oxfam and carried out by the University of the West of Scotland, a research report, ‘Report on the Situation of the Roma Community in Govanhill, Glasgow’ notes Roma children’s lower levels of attainment and the likelihood of their experiencing significant interruptions to their learning.

16. Gypsy and Traveller children are educated in a range of settings; schools, houses, trailers on local authority and private Traveller sites, community centres, urban event settings (i.e. the Meadows - when the fair comes to the Edinburgh Festival), and by roadsides all over Scotland. By definition these learners will have additional support needs. Who takes responsibility for their education? How is their education delivered? Does the quality of learning and teaching provided meet a Traveller child’s learning needs?

**Racism against Travellers in Scotland**

17. Albeit for different reasons, learners from Traveller families commonly experience racist name-calling and bullying by non-Traveller pupils. Various terms of abuse are used, but mainly they refer to being a ‘Gypsy’. The following example illustrates how negative stereotypes of ‘the Gypsy’ shape Travellers’ lives.

18. Late this summer, a secondary aged boy from a travelling show and fairground family reported being called a ‘dirty pikey’ by a group of non-Traveller pupils at the local secondary school. The boy had attended the school for four years and his family had never taken him travelling during in school time. The boy considered that school staff responded quickly and fairly in addressing this incident. However, his racist treatment by his peers resulted in his unlooked for engagement in time consuming and shameful processes, thus interrupting his learning.

19. Scottish Gypsy Travellers frequently report that many school staff blame them unfairly for any ‘trouble’ that results from similar kinds of incidents. Wishing to avoid facing racist attitudes and treatment at school, Scottish Gypsy Travellers are particularly unlikely to self identify as a Traveller. While the travelling show and fairground children generally receive better treatment at school, many face negative treatment and verbal abuse while on the fairgrounds.

20. Travellers’ desire to avoid racist treatment, particularly racism towards their children and young people, is frequently a reason given for non-engagement in school based learning. The cultural, and possibly linguistic, differences between these communities require that educators (along with other policy and professional and public service providers) be sensitive to these distinctions. Particularly, with respect to how those differences impact on a family’s willingness and capacity to access educational services designed to meet the needs of a settled population.
Increased demands for flexible education

21. STEP's analysis of national pupil data indicates a gradual increase in the number of Scottish schools recording Travellers on their school rolls; 250 in 2006 to 278 in 2007. Reflected in their increasing use of primary schools, Scottish Gypsy Traveller families' are concerned about changes in employment opportunities for Travellers, particularly for those with few literacy skills. Scottish Gypsy Traveller families' traditional suspicions of secondary schools and schooling largely persist, although families and young people are increasingly requesting access to a flexible and relevant curriculum i.e., not necessarily accessed through schools. Travelling show and fairground families also have concerns for their children's education, particularly in the current economic climate where families face difficult decisions about their economic futures as showmen and women. However, for the immediate future, children’s and young people’s access to education while travelling continues to be high on the community's agenda.

22. This necessarily brief overview is provided to show the distinctions between and highlight some common features of belonging to a Traveller community in Scotland (For more information, see www.scottishtravellered.net). [link is no longer active]

Education authorities' and schools' responses to Gypsy and Traveller learners additional support needs.

23. Many schools remain ambivalent about their Traveller pupils. Anecdotal reports highlight their concern to dilute the impact of Travellers' 'intermittent attendance', 'absence' and 'unauthorised absence', and 'exclusion' on their official returns. The national data, for example, suggest that with the exception of pupils recorded as 'Black Caribbean' and 'Black other', figures for exclusions show that pupils from Traveller backgrounds experience higher rates of repeated exclusion from school than pupils from other ethnic groups. More positively, anecdotal reports also describe schools' innovative use of curriculum for excellence approaches for including Traveller pupils.

24. Scotland has examples of excellent educational services, sensitive to and designed to meet the educational needs of Traveller learners. However, engagement with Scotland’s 32 education authorities reveals wide variations in the kind and quality of educational support provided. Some education authorities interpret ‘educational inclusion’ to mean they provide flexible access to the curriculum, as long as a Traveller learner attends school. Other education authorities interpret ‘educational inclusion’ more broadly. Some education authorities provide either or both designated teachers of Traveller pupils and Community Education and Youth workers. Some however provide neither. Mobile families experience these differences as confusing.

25. Designated teachers have a remit to form trusting relationships with Traveller families, in order to support Traveller parents' use of schools. Families need encouragement to overcome concerns for their children's safety and welfare while at school. Some parents lack literacy and may have
difficulties in form filling or in accessing information about the school and how it delivers education. Designated staff also support and advise schools on effective ways to engage with Traveller families. They also work with schools in developing strategies for delivering a more inclusive learning experience for all pupils. A few education authorities offer ‘education outwith school’ for Scottish Gypsy Travellers.

26. Designated staff frequently have multiple teaching remits and have found that increased demands to meet the additional support needs of other learners e.g. those with English as an additional language, have eroded the limited time formerly allocated to Traveller children and young people.

27. No research has been carried out to date into the impact of the ASfL Act and its Code of Practice on Gypsy and Traveller children’s and young people’s additional support needs. Anecdotal evidence from designated teachers and other support staff working with Gypsy and Traveller communities, suggests that despite considerable professional training relating to additional support needs, Gypsy and Traveller learners, particularly those who are mobile or ‘education outwith school’, continue to have unmet learning needs. Importantly, flexibility of approach is a key requirement for meeting a Traveller child’s additional support needs, as in practice a child’s needs and circumstances vary considerably.

28. In summary, education authorities, schools and designated support staff working with Travellers, face the following challenges.

29. Scottish Gypsy Travellers’ desire to preserve their family based cultures and life-styles – and families’ concerns’ for their children’s and young people’s safety at school raises questions about their access to and relevance of the curriculum.

30. Registration remains an area of concern for Scottish Gypsy Traveller families – many of whom perceive formal systems as a means of tracking that is perceived as an intrusion into their family business. This issue becomes particularly significant at a point where pupils are expected to make the transition from primary to secondary school.

31. Families’ reluctance to be involved in official systems also leads to poor or non-existent pupil records, with the added difficulty that a class or designated support teacher rarely has access to a mobile pupil’s records.

32. Mobility also affects access to up-to-date records for children from all Traveller communities, and indeed for mobile children from other backgrounds. With the result, highly mobile children and young people are likely to experience over assessment. Travellers are frequently assessed with culturally inappropriate resources. Such assessments fail to recognise a child’s existing skills and learning with the result that he/she may be inappropriately placed in class learning groups.
33. Inaccurate assessment details may lead to allocation of inappropriate **learning support**, and the creation of tensions around a perceived wasting of precious resources. Anecdotal reports describe some teachers and non-Traveler parents as questioning the entitlement of Traveler children to attend schools.

34. A conclusion emerging from this discussion, which we hope will be of relevance to the committee’s deliberations, is that a tension exists between education authorities’ and schools’ duty to meet **individual** children’s and young people’s additional support needs, and its current methods of allocating support for ‘groups’. STEP understands that its comments are not directly feeding into the Committee’s current concerns, however, it is important that its comments (we are acutely aware that these some comments are based on anecdotal evidence albeit from trusted sources) be placed in the public domain. However, our engagement with education authorities suggests an improving awareness of their duties regarding the education of Gypsy and Traveler children, and their interrupted learning needs. Indeed, since STEP’s last research in 2004, the numbers of education authorities with a recognisable educational service for its Traveler children have increased. Finally, the Scottish Government’s Equalities Unit has this week announced its’ funding of a facilitator post to take forward a pilot project, supported by Glow services, involving a partnership between a number of education authorities, who will develop and deliver an e-learning community for Gypsies and Travellers. Involving interactive communications technologies this innovation should help reduce the degree of interrupted learning and teaching currently experience by mobile pupils and their teachers.

Dr Pauline Padfield  
Director  
20 November 2008
SUBMISSION FROM STIRLING COUNCIL CHILDREN’S SERVICES

Education (Additional Support for Learning) (Scotland) Bill

Part 1

General comments on the amendments

1. Stirling Council Children’s Services gave a detailed response to the amendments proposed within the Bill during the consultation process. While there was broad agreement with the main points contained within the amendments, there were a number of issues which we felt were not addressed:

   Out of authority placing requests: Legislation difficulties can create conflict between authorities in terms of funding, both for costs of placements (specialist provision) and in terms of specific support required to meet additional needs of out of authority pupils. This issue is not resolved by the amendments suggested.

   GIRFEC: This Bill could perhaps have been an opportunity to take forward the intention to move to ONE PLAN; again, the amendments contained within the Bill do not address this.

Explanatory Notes

2. Paragraph 16: Placing requests. This section was unclear in relation to children and young people for whose school education any education authority are responsible.

3. Paragraph 27: not clear who is responsible for costs.

4. Paragraph 29: may have implications for officer’s time.

Policy Memorandum

5. We appreciated the plain English contained within the Policy memorandum; it provides a clear and concise summary with all salient points suitably detailed.

6. Paragraph 48: age. In terms of this statement, does this mean that young people who are still in education at 18 do not require a CSP? Also, if the young person will reach the age of 18 before his/her school education ends, it will not be necessary to open or continue a CSP, as it would not be planned for a year.

Financial Memorandum

7. There were a number of concerns around how these figures were reached.
8. The memorandum states that a survey of 6 local authorities was carried out to estimate costs and that there was considerable variation. Para 40 also states that there is a measure of unpredictability in assessing costs. This could mean that a small authority could face a substantial resource costs far in excess of the estimated “overall additional costs to all of the 32 authorities...is likely to be below £55,000 per year.”

9. Paragraph 24 deals with contributions not recoverable in respect of certain services. The Bill does not deal comprehensively with recovery of costs between home and host authorities. It leaves the host authority with the certainty of additional costs – dispute resolution/mediation costs, which are referred to, but there are also costs related to placing requests appeals to the EAC, sheriff or tribunal; the administration of trying to recover the costs from the home authority.

Consultation process

10. It was widely felt that the consultation process was very rushed, and did not give enough time for widespread consultation within authorities before the due date for responses.

Sharon Johnston
Service Manager Inclusion and Additional Support
27 November 2008

Part 2

1. In any amendment of the current legislation, it is important that any changes should continue to ensure equality, consistency and clarity across a number of areas.

2. Where a child does not have a CSP or is not being assessed for a CSP, the placing request should continue to be dealt with through the parental appeals panel route.

3. Where a request is made to another authority, this request would be dealt with as a standard placing request unless:-

   • The child / parent is disputing the decision not to create a CSP. In this case, initially the home authority should have opportunity to make representations as to whether or not a CSP is justified prior to any judgement of the placing request.

   • it is clear that the school being requested has appropriate specialist provision similar to that named in the CSP.

4. Where the grounds for refusal of the placing request are on the basis of a physical restriction (either requirement for an additional classroom or the
employment of an additional teacher) the request should be heard by the Parental Appeals Panel to ensure consistency with other placing requests that have been made.

5. Home authorities should co-represent at Tribunal, indicating the provision that they would make for a home child.

6. Where a child is successful in making a placing request, the home authority should continue to provide resources for that child, as they would have above.

7. The home authority should remain responsible for the provision of mediation services.

8. Transition arrangements should only be made with another local authority by mutual agreement, or where it is clear that a space will exist, in order to reduce potential confusion for parents, and additional work for local authorities.

9. It is not clear from the consultation document if a Tribunal decision on an out of authority placing request would be final, or a recommendation which would go back to the Home Authority for consideration.

Mary McNicol
Service Manager Planning and Performance
27 November 2008
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 over-arching 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
1. Please note that the comments made are in relation to those amendments with which we have identified particular issues. Those not commented on are recognised as necessary and appropriate.

**Placing requests**

2. In principle, West Lothian Council has no difficulty with parental placing requests from parents who reside outwith the authority area.

3. A potential difficulty however, is perceived in relation to the availability, and quality, of essential information relating to the additional support needs of the particular child, when the placing request originates from the parent rather than as a request for assistance from the home authority.

4. A worst case scenario would be that a parent submits a placing request by letter stating additional learning need but providing no detail as to what those needs are and how they arise. This would not be in the best interests of the child and would inhibit the host authority from making an informed decision based on professional assessment.

5. A further difficulty in this instance is the period of time allowed for responding to a placing request. Regulation would be required in terms of the timescales or point at which necessary reports and background information, sufficient to allow the authority to make an informed decision, should be made available to the host authority, and in relation to who has responsibility for ensuring that the host authority receives such information. The host authority responding to such a placing request will be placed in the position of dedicating substantial resources if they are responsible for seeking and collating such necessary information. This could lead to delays in responding to the placing request and could result in the host authority being unable to deal with a request within the legislative timescales.

6. In the instance of placing requests for children with Co-ordinated Support Plans (CSPs), there will be a requirement on the host authority to review the CSP as soon as practicable, but there is currently no corresponding obligation on the home authority to provide the CSP and necessary information to enable the host authority to do that. In this respect a timescale is required within the legislation.

**Additional Support Needs Tribunals for Scotland**

7. Whilst there is no issue with the tribunal having the ability to review its decisions, it is suggested that the review ought to take place by a freshly constituted tribunal or convener, appointed for that purpose, to ensure impartiality.
General timescales in relation to the process

8. It would be more appropriate for timescales to be expressed in terms of working days, with the provision that periods of school holidays are specifically excluded from the calculation of the timescales. This is because placing requests and reviews of CSPs can be extremely difficult to deal with timeously where they coincide with school vacation periods, in particular during the summer vacation.

Definition of significant

9. It is noted that there is no attempt to set out a workable definition of what constitutes significant in terms of additional support needs. It is considered essential that this is done. The current dubiety and uncertainty is counter productive and in some situations can inhibit consideration of the child’s needs.

Gordon Ford
Director of Education and Cultural Services
19 November 2008
Education, Lifelong Learning and Culture Committee

Education (Additional Support for Learning) (Scotland) Bill

Note of informal roundtable discussion session – 26 November 2008, 10h00, Committee Room 6

Background

1. The Education, Lifelong learning and Culture Committee held an informal roundtable discussion session on 26 November 2008 to assist its scrutiny of the Scottish Government’s Education (Additional Support for Learning) (Scotland) Bill¹.

2. Those in attendance were:
   - Jonathan Sher, Director of Research, Policy and Practice Development, Children in Scotland
   - John McDonald, Chief Executive, Scottish Society for Autism
   - Dr Stuart Aitken, Principal Officer, Sense Scotland
   - Chris Ratcliffe, Director, National Deaf Children’s Society Scotland
   - Nicola Smith, Solicitor, Enable Scotland
   - Maureen Fraser, Parliamentary Advisor, Barnardo’s Scotland
   - Dr Pauline Padfield, Director, Scottish Traveller Education Programme
   - Ann Auchterlonie, Policy Officer, Afasic Scotland
   - Alison Gough, Policy Manager, Quarriers
   - Faye Gatenby, Campaigns, Parliamentary and Policy Manager, Capability Scotland (part of For Scotland’s Disabled Children)
   - Moira Thomson, South East Representative, Dyslexia Scotland
   - Colin Young, Young People’s Information and Advocacy Worker, Special Needs Information Point.

General conclusions

3. The Education (Additional Support for Learning) (Scotland) Bill 2008 was generally welcomed and there was wide support for its provisions and their likely effect, should the Bill be enacted. The Education (Additional Support for Learning) (Scotland) Act 2004, to which this Bill makes amendments, was widely considered to have been successful and necessary. General support was expressed for the spirit and intention of the Act. However, significant issues in terms of implementation were raised.

4. The general view expressed was that the Bill did not go far enough and many argued that there was a need for a more wide-ranging review of the Act. A view was expressed that the practical experience across local authorities was very patchy and a ‘postcode lottery’ had developed in terms of how additional support needs were being met. Many felt that the 2004 Act had aimed to

reduce bureaucracy and deliver better outcomes for children and that this has not happened as well as had been hoped.

5. The roundtable session considered the two main issues that the Bill addresses in turn, followed by a general session on any other issues.

Out of area placing requests

6. The following views were expressed by participants:

- The discussion ranged beyond placing requests with key themes being difficulties in getting a CSP and the need for early intervention. Those present felt it was encouraging that local authorities are making efforts to fulfil their responsibilities in relation to the Act. However, many felt that the time normally taken to complete an out of area placing request still needed to be reduced and that the legislation needed to be framed to make this possible.

- Although not addressed in the Bill, there was discussion about the criteria for CSPs. Many felt that CSPs were overly complex and confusing for children and young people and parents. Some felt that people who did not have CSPs were being “lost in the system.”

- A number of participants noted that, under the Act, CSPs could be established where ‘significant’ support needs existed. However, there was no definition of ‘significant’ in the Act, and none is provided in the Bill. Some felt that the lack of a definition of ‘significant’ was a problem which gave rise to a patchy provision across local authorities.

- Concern was expressed that the provisions of the Bill could lead to prospective host authorities rejecting out of area placing requests because of potential cost and resource implications possibly taking priority over the educational and emotional needs of the child or young person.

- Many felt it was unhelpful that some local authorities were putting a variety of non-statutory plans in place, beyond the IEP recommended in the code of practice, to deal with out of area placing requests and related issues.

- Specific issues were raised with regard to looked after and accommodated children. Some felt that such children were not well served by the Act and that the Bill did not redress this. Some felt the Bill should be amended to provide a right for looked after children to have someone to speak on their behalf.

- Some felt the Bill should contain measures to strengthen the provision of advocacy and promote parental involvement by imposing relevant duties on local authorities. It was felt this would help create a greater degree of equity between services users and providers.

- Examples were given of where the additional support framework did not fit with other educational frameworks. Behavioural problems may stem from additional support needs, but may be dealt with by excluding the child from
school rather than tackling the underlying additional support needs. There was a general view that early intervention needed to be improved.

- It was generally agreed that resource issues were central to the successful provision of ASL and placing requests. A view was also aired, however, that by pursuing a placing request parents are effectively saying that they do not consider the local authority’s own provision to be adequate. This implied criticism might make it difficult to progress out of area placing requests.

- Concern was expressed that different specialisms that had been developed in ASL in a number of local authorities could lead to an imbalance of placing requests between authorities and could mean that disproportionate costs could fall on certain host authorities.

- Many felt that mediation should be used more frequently resolving disputes relating to out of area placing request issues and that the Bill should contain measures to promote and monitor the use of mediation.

- Some participants raised the problem of under-reporting of the numbers of children with particular additional support needs – such as hearing impairment, dyslexia and autism.

- In general, it was felt that interaction between the health service and education service needed to be improved – particularly for children below school age. The point was made that the bill has an education framework, but additional support needs are lifelong.

### Additional Support Needs Tribunals

7. The following views were expressed by participants:

- Participants noted that although Tribunals were intended to be supportive to children and their parents, they had, in fact become quite adversarial. It was felt this was not in keeping with the spirit and intention of the 2004 Act. Many also held the view that if a case went to Tribunal the system had failed.

- While some felt that it was important that parents had access to suitable legal representation when attending Tribunals, in the context of local authorities being supported at the Tribunal by a full legal team, concern was also expressed that this could make Tribunals increasingly adversarial. It was also felt that the problems addressed by the Tribunal should, wherever possible, have been identified and addressed earlier in the process.

- The needs of parents who themselves had communication difficulties was also raised. For example, if a parent has dyslexia, they will find it very difficult to work through the paperwork to get the support needed for their child.

- Others felt Tribunals were necessary as a last resort and final voice and the amendments to the 2004 Act contained in the Bill were appropriate. However, some felt the Bill gave an implicit message that more cases would go to
Tribunals and that the Bill was making it easier for this to happen. Many agreed that Tribunals were not a solution and felt the Bill should be amended in ways which would put the emphasis on encouraging resolution without the need for a Tribunal.

- Some felt that Tribunals needed more powers to “punish” local authorities which had refused out of area placing requests and where discrimination by the local authority against the children concerned had been shown.

- Some participants believed that the Bill should be amended to impose a duty on local authorities to pay for the provision of advocacy and support services.

- Some felt the Bill should be amended to provide for deadlines to be set in respect of the implementation of Tribunal decisions. However, others felt that the timetable should be in relation to consideration of the needs of the child and that imposing a deadline could be counter productive.

- Some participants expressed concern at Tribunals being able to review their own decisions in certain circumstances and were concerned over possible questions of impartiality.

Any other areas

8. The following views were expressed by participants:

- Many felt that HMIe had reported on the Act too soon, before a clear picture of issues arising from its implementation had emerged.

- Many felt it was not helpful for the Scottish Government to consider possible changes to the Code of Practice after the Bill has gone through the Parliamentary process rather than before.

- Many felt that more support was needed for children at the early years stage. Participants felt the Bill should have been explicit about who was responsible for the coordination and delivery of services for early years.

- Some felt the Bill should have contained provisions intended to ensure multi-agency engagement and participation in community planning.

- Many felt the Bill should have contained provisions relating to the transition between school and adult life in respect of young people with additional support needs and that specific duties should have been placed on local authorities in this regard.

- It was noted that current additional support needs data recording captures only limited information as it only counts children for whom there are CSPs or IEPs. An example given was that only one third of deaf children were captured by the data.
It was stated that FE colleges were not covered by the 2004 Act although many children with additional support needs studied at colleges. The Committee was encouraged to remember all the children who are not being served by the Act – those who were not known about or were absent.

Nick Hawthorne
Senior Assistant Clerk
Education, Lifelong Learning and Culture Committee
2 December 2008
1. I am writing to follow up on points raised when Scottish Government officials gave evidence to the Education, Lifelong Learning and Culture Committee on the Education (Additional Support for Learning) (Scotland) Bill, on 3 December 2008.

2. There were four points raised during the evidence session on which we promised to get back to the Committee:

- The Committee requested a full list of the members of the Co-ordinated Support Plan Short Term Working Group that was mentioned
- The Committee asked how many parents have found it necessary to utilise Section 70 of the Education (Scotland) Act 1980.
- The Committee requested further details on the work currently being undertaken in relation to looked after children
- The Committee wished to know if the Scottish Government has made any successful determinations under Section 23 of the Education (Scotland) Act 1980.

3. On the first point, a full list of the members of the Co-ordinated Support Plan Short Term Working Group can be found at Annexe A.

4. On the second point about the number of parents who have found it necessary to utilise Section 70 of the Education (Scotland) Act 1980, since the commencement of the Education (Additional Support for Learning) (Scotland) Act 2004 (the 2004 Act), 16 cases have been referred to Scottish Ministers.

5. On the third point regarding the work currently being undertaken in relation to looked after children, a number of products were launched in September aimed at improving outcomes for looked after children, young people and care leavers. These were: *These are Our Bairns* - a guide for community planning partnerships on being a good corporate parent; *The We Can and Must Do Better* training materials for professionals involved in the lives of looked after children and young people; *Core Tasks for designated managers in educational and residential child care establishments in Scotland*; and research into the ways educational attainment of looked after children and young people can be improved.

6. Additionally, the Scottish Government is currently consulting on revised Looked After Children (Scotland) Regulations. The revised regulations more accurately reflect the requirements for all looked after children, whatever their care setting, through the looked after system.

7. On the fourth point regarding the number of successful determinations made under Section 23 of the Education (Scotland) Act 1980, since the 2004 Act was commenced, eight cases have been referred to Scottish Ministers for
determination. The eight cases were all submitted at the same time and involved the same two education authorities. Following determination by Scottish Ministers, all eight cases were subsequently referred to the Court of Session. A ruling on these cases was issued by Lord Penrose on 12 December 2008 ([2008] CSOH 175). Lord Penrose found in favour of the home authority and it is clear from Lord Penrose's judgement that the Scottish Ministers were entitled to determine the issue of quantification in this case and in cases such as this.

8. Finally, in the interim, a further eight cases have been referred to Scottish Ministers for determination by the same education authorities and are under active consideration.

Susan Gilroy
Support for Learning
18 December 2008
ANNEX A

Membership of the CSP Short Term Working Group

Janice Masterson (Clackmannanshire Council)
Mike McKean (Dumfries and Galloway Council)
Susan Gow (East Renfrewshire Council)
Brenda Wallace (Glasgow City Council)
Allan Cowieson (North Ayrshire Council)
Jane Mallinson (NHS Lothian)
Maggie Smith (Learning Teaching Scotland)
Annmarie Shields (Service Manager for Child Care)
Donald Ewing (Allied Health Professions and Education Working in Partnership Project)
Nicola Robinson (Allied Health Professions and Education Working in Partnership Project)
Mike Gibson (Support for Learning)
Robin McKendrick (Support for Learning)
Susan Gilroy (Support for Learning)
Seth Chanas (Support for Learning)
SUBMISSION FROM THE SCOTTISH GOVERNMENT

Education (Additional Support for Learning) (Scotland) Bill

1. I refer to the letter that I wrote to you on 18 December 2008 to follow up on points raised when Scottish Government officials gave evidence to the Education, Lifelong Learning and Culture Committee on the Education (Additional Support for Learning) (Scotland) Bill, on 3 December 2008.

2. With regard to the number of successful determinations made under Section 23 of the Education (Scotland) Act 1980, since the commencement of the Education (Additional Support for Learning) (Scotland) Act 2004 (the 2004 Act), it has come to my attention that the information provided in my letter is not entirely accurate.

3. Initially 18 Section 23 cases were referred to Scottish Ministers for determination. All 18 cases involved the same two authorities. However, in 17 of these cases, the periods specified in the complaints spanned the introduction of the Education (Additional Support for Learning) (Scotland) Act 2004 (14 November 2005). Scottish Ministers issued determinations in 17 of these cases in favour of the authority that was providing the additional support for the children (the host authority). The remaining case was withdrawn prior to determination because the authority in which the child was resident (the home authority) met the cost of the additional support provided by the host authority.

4. Subsequently, the host authority referred 8 of these cases to the Court of Session (these are the 8 cases referenced in my previous letter to you).

5. In November 2008, an additional 8 cases were referred to Scottish Ministers for determination. These cases involved the same two local authorities and are under active investigation.

6. Please accept my apologies for any inconvenience this may cause you.

Susan Gilroy
Policy Officer
Support for Learning Division
16 January 2009
Note: (DT) signifies a decision taken at Decision Time.

**Education (Additional Support for Learning) (Scotland) Bill**: The Minister for Children and Early Years (Adam Ingram) moved S3M-3506—That the Parliament agrees to the general principles of the Education (Additional Support for Learning) (Scotland) Bill.

After debate, the motion was agreed to (DT).
Education (Additional Support for Learning) (Scotland) Bill: Stage 1

The Presiding Officer (Alex Fergusson): The next item of business is a debate on motion S3M-3506, in the name of Adam Ingram, on the Education (Additional Support for Learning) (Scotland) Bill. I must ask members to stick pretty closely to the times that they are given. I call Adam Ingram to speak to and move the motion. Minister, you have 13 minutes.

14:34

The Minister for Children and Early Years (Adam Ingram): I begin by thanking Karen Whitefield and the Education, Lifelong Learning and Culture Committee for their careful and considered scrutiny of the Education (Additional Support for Learning) (Scotland) Bill and for preparing their stage 1 report. I also thank the groups and individuals who provided oral and written evidence to the committee and those who provided information and opinions to the Government—not least in response to our consultation exercise on the proposed changes to the Education (Additional Support for Learning) (Scotland) Act 2004. The bill deals with complex matters and I am sure that the whole Parliament acknowledges their contribution.

The 2004 act commenced operation more than three years ago, and the intention has always been to revisit the additional support needs legislation and the code of practice to reflect on what we have learned from our experience of implementing the 2004 act. The bill does not alter the ethos or the fundamental building blocks of the 2004 act, which is aimed at a broad group of children and young people with additional support needs. The bill amends the 2004 act in the context of our current policies, such as the getting it right for every child programme, the early years framework and the curriculum for excellence.

The 2004 act, which is aimed at a broad group of children and young people with additional support needs. The bill amends the 2004 act in the context of our current policies, such as the getting it right for every child programme, the early years framework and the curriculum for excellence.

The proposals in the bill will strengthen the rights of children with additional support needs and their parents.

Rhona Brankin (Midlothian) (Lab): Will the minister please provide some clarity? A commitment was made to review the legislation. When giving evidence on the bill, the excellent witnesses told the committee that a wider-ranging review than the bill affords is needed—bigger and wider issues need to be examined, such as the fact that only a fraction of youngsters have co-ordinated support plans. Does the minister mean that he is not prepared to have a wider-ranging review of the legislation in the future?

Adam Ingram: No—I propose to build on the evidence that has resulted from three years of implementation of the original 2004 act. As I said, our intention has always been to consider the options for review. What we propose is the appropriate option to present to Parliament. We have given significant consideration to the evidence that was presented to the committee and we will lodge amendments at stage 2 that we hope will reflect the weight of that evidence. I am always prepared to listen and to consider other amendments that are lodged. Our response is entirely appropriate and proportionate.

The bill will give parents and young people access to mediation and dispute resolution from the host authority following a successful out-of-area placing request. Most important, it will strengthen the rights of children with additional support needs and their parents by providing the parents with the same rights as others have to make placing requests to local authorities that are outwith their area. The bill will increase the rights of parents and young people to access tribunals to deal with failures by education authorities.

As members may know, when giving evidence to the committee, I shared with it three additional amendments that I am minded to explore further. The first would enable all appeals about placing requests for special schools to be heard by the tribunals. The second would ensure that parents have a right to request an assessment of their child’s needs at any time. The third would enable tribunals to specify when a placing request should start.

The code of practice will be amended in due course and will be laid before the Scottish Parliament. The redrafted code will place the 2004 act in the context of our current policies, such as the getting it right for every child programme, the early years framework and the curriculum for excellence.

I am aware that a number of those who provided evidence to the committee asked for clarification of the term “significant”, as used in the phrase “significant additional support”, the need for which is one of the criteria for a co-ordinated support plan. Our intention is to develop further the redrafted code and to clarify the definition of “significant”. We are working with stakeholders to develop further guidance on the meaning of “significant”. The code will also clarify the process of making placing requests.

As members may be aware, we held an extensive consultation on the draft bill. I also met the Convention of Scottish Local Authorities and various other stakeholders. Most stakeholders
were very supportive of the proposed amendments to the 2004 act. I was pleased to note that, in its report, the committee, too, said that it was content with our consultation.

I warmly welcome the committee’s broad support for the amendments to the 2004 act. I am grateful for its support for the general principles of the bill and its recommendation to the Parliament that the general principles be approved. I am pleased to note that the committee recognises that the Government’s intention has always been for parents of pupils with additional support needs, regardless of whether those pupils have a co-ordinated support plan, to be in the same position as others in relation to placing requests—not only requests to the home authority but out-of-area requests.

I note the committee’s recommendation that the Scottish Government is to have regard to stakeholders’ views in its revision of the “Supporting Children’s Learning” code of practice and any secondary legislation that results from the implementation of the bill. I assure the Parliament that an extensive consultation will be conducted in due course.

However, I recognise that making parents aware of their rights is a key issue, particularly with regard to services for resolving disagreement. To help to address that, consideration is being given to amending the Additional Support for Learning (Publication of Information) (Scotland) Regulations 2005 to place local authorities under a duty to publish information on the procedures for dispute resolution.

Members may also be interested to know that the Scottish Government already provides substantial funding to support Enquire, our national additional support for learning helpline and information service, whose key aims include outreach to support effective implementation of the 2004 act and consideration of new ways to heighten the profile of additional support needs issues among parents, young people and children. At present, we are funding the service to the tune of around £400,000 per annum.

We are currently working with Enquire to refocus our marketing strategy with the aim of improving parental awareness of their rights under the 2004 act. To assist us with this aim, Sir Jackie Stewart, the motor-racing legend, has very kindly offered his services and involvement in any action that we take forward to make parents aware of their legal rights under the act. His international stature and well-known commitment to improving the lives of children with additional support needs will certainly help to raise the profile of any such promotional work.

Similarly, I was delighted to hear that Muriel Gray, the broadcaster and journalist, has become the first patron of Scotland’s additional support needs mediation services forum. The forum, which is part of the Scottish Mediation Network, helps to resolve disputes between parents or young people and education staff. I recently attended the communication is the key mediation event that was held in the Parliament. I was encouraged to hear Muriel Gray and a panel of speakers stress that effective communication can be the first step on the route to resolving any disagreement. I assure members that I, too, share that view.

The committee requested that I clarify my position on Lord Wheatley’s ruling, in which he states that additional support should be related only to “the teaching environment”. Our policy intention is clear: the purpose of additional support is to allow children and young people to benefit from school education. The nature of that support should not be limited to the support that is offered in a school environment; it can involve not only educational but multi-agency services such as health and social work services and those provided by voluntary agencies. However, given that Lord Wheatley’s opinion cast doubt on the interpretation of the 2004 act, we are considering lodging an amendment to clarify the definition of additional support.

Margo MacDonald (Lothians) (Ind): Who will decide whether extra school support should be provided and what form it should take?

Adam Ingram: That is part of the process of identification and assessment of children’s needs that local authorities are under a statutory duty to accomplish. The member may or may not know that we are also extending the rights of parents to request an assessment for their children at any time.

As I said, we are considering lodging an amendment to clarify the definition of additional support. We intend to make the 2004 act as clear as possible to meet the policy intention reflected in the “Supporting Children’s Learning” code of practice—that additional support is support that enables a child to benefit from school education, and that such support is not confined to the teaching environment.

As members know, the purpose of today’s debate is to discuss the general principles of the bill, not to provide a detailed response to all the points that have been made. However, I assure members that we will consider and reflect carefully on the committee’s report and the points that members make in today’s debate.

I hope that all members present in the chamber today will follow the recommendation of the
Government and the committee and support this piece of legislation.

I move,

That the Parliament agrees to the general principles of the Education (Additional Support for Learning) (Scotland) Bill.

The Presiding Officer: I advise members that I have just been informed that a bit of time is available in the debate. Members should feel free to take interventions, if they wish. If that becomes a problem, time can be added for speeches.

14:47

Karen Whitefield (Airdrie and Shotts) (Lab): It is fair to say that almost everyone agrees that the Education (Additional Support for Learning) (Scotland) Bill is needed. It is probably also fair to say that almost everyone agreed with the general principles of the Education (Additional Support for Learning) (Scotland) Act 2004, which were effectively the same as those that underpin the bill that is before us today. It will, therefore, come as no surprise that the Education, Lifelong Learning and Culture Committee supports the general principles of the bill.

As members will be aware, the bill seeks to amend the 2004 act in such a way as to ensure that the spirit of the act is reflected in the actions of local authorities. Many of the criticisms that were made of the 2004 act were not about its aims or aspirations; rather, many people thought that local authorities were following the letter, rather than the spirit, of the law. There was also a court ruling that required the Government to act. To put it bluntly, there was an urgent need to improve the letter of the law.

I understand the problems that local authorities face in relation to additional learning support, almost all of which boil down to funding. However, funding problems should never be allowed to impact on the quality of education that is provided to children with additional learning support needs.

Before commenting on the detail of the bill, I begin, as tradition demands, by thanking all those who helped the committee to prepare its stage 1 report. First, I thank all those who gave evidence to the committee, both in writing and at committee meetings. I also thank the individuals and organisations that attended our round-table discussion session, which helped to focus committee members’ minds on the task in hand. I thank the Minister for Children and Early Years and members of the bill team for their co-operation and assistance in what has been a fairly consensual process—something of which the Education, Lifelong Learning and Culture Committee cannot always be proud. I thank the staff of the Scottish Parliament information centre for their assistance in getting committee members up to speed on the background to the bill and the key issues that it tackles. Last, but by no means least, I thank the committee clerks for their efforts in helping the committee to bring its report before the Parliament today.

The policy intention behind the bill is to clarify the 2004 act and strengthen its ability to deliver the original policy intention, which was to provide for any need that requires that the child or young person be given additional support to enable them to learn. Since the act was implemented in 2005, it has become clear that it fails to deliver fully on its key policy aspirations and, as our report makes clear, although local authorities have generally made provision for children with additional support needs under the act, they have not always been in tune with what some witnesses considered to be the spirit of the act. There was broad committee support for that conclusion. Evidence from organisations such as Independent Special Education Advice (Scotland)—ISEA—and Govan Law Centre clearly showed that, despite the 2004 act, families of children and young people with additional support needs, and, indeed, the children and young people themselves, felt less than empowered when dealing with local authorities. That is why the committee welcomed the proposals in the bill and the additional commitments that the minister gave during its stage 1 scrutiny.

Rhona Brankin: Would it be true to say that many of the witnesses said that they would like there to be a wider review of the legislation but, because of the scope of the bill, it was not possible for the committee to take such evidence?

Karen Whitefield: There were witnesses who made representations for the whole issue to be scrutinised properly. The committee may return to the matter, particularly to do post-enactment scrutiny of the bill to find out whether it delivers what we hope it will deliver.

It is worth pointing out that concerns were expressed that the bill might make an already complex area of law even more complex. That is a particularly important point when we consider how disempowered parents already feel in relation to accessing additional support. Govan Law Centre stated that it had

"a general concern that the ASNTS [Additional Support Needs Tribunals for Scotland], associated procedure and applicable education law seems to be getting more and more complex. As an over-arching principle, we should strive to make the law as simple and accessible as possible at all times. This is fundamentally important if parents, pupils and educationalists are to be able to understand and apply the law. The level of detail and complexity in this field of law is in danger of becoming beyond the reach of most people."
As it was often beyond the reach of committee members, too, we need to consider that point.

Members will be aware that the main proposal in the bill is to allow parents of children with additional support needs—including those with statutory co-ordinated support plans—to make out-of-area placing requests. The key issue is that the parents of children with additional support needs should have the same rights as others to make such placing requests for their children. Despite the concerns that some local authorities raised, the committee agreed with the Scottish Government and the policy intention behind the 2004 act that all parents should have equal rights to make out-of-area placing requests.

The committee took a great deal of evidence on the process of appealing such placing requests, and many organisations commented that the bill’s proposals on that did not go far enough. Therefore, the committee welcomed the minister’s announcement that the Scottish Government would consider lodging an amendment at stage 2 to ensure that all appeals for out-of-area placing requests that relate to special schools would be heard by a tribunal, regardless of whether a CSP was involved. The charities that represent children with additional support needs have also welcomed that announcement.

However, following Govan Law Centre’s comments, the committee remains concerned that, despite the proposed improvements, the out-of-area placing request procedure and appeals mechanisms will remain complex and difficult to understand. Therefore, it is vital that the parents of children and young people with additional support needs have a clear understanding of which body will hear an appeal and under what circumstances. That is why we asked the minister to consider the following proposals: that the tribunal takes placing requests relating to special schools only; that it takes all placing requests when the child has additional support needs; and that it takes placing requests when the reason for the request is the child’s additional support needs.

The committee also heard evidence on the proposal in the bill for a CSP to be reviewed following a successful out-of-area placing request. As members will be aware, the bill proposes that the host authority is responsible for reviewing any CSP in such circumstances and that that will take place as soon as is practicable after the date of transfer. However, concerns were raised by organisations such as ISEA about potential delays created by that approach, particularly when the host authority is unwilling to work in partnership with professionals and the home authority. The committee noted the potential benefits of the approach set out in the bill and ISEA’s concerns, and recommended that the Scottish Government consider those concerns before drafting any secondary legislation. It is important to note that the committee understood and recognised the difficulties that local authorities could face, so it asked the Government to take on board the points that were raised by the Association of Directors of Social Work and the Association of Directors of Education in Scotland on this area.

On mediation and dispute resolution in relation to an out-of-area placing request, the committee heard strong evidence that certain groups in society are not aware of their rights. I welcome the minister’s support for raising awareness of rights and the involvement of our great racing legend in that endeavour. It is particularly important that we ensure that certain groups are aware of their rights, notably low-income families, looked-after and accommodated children, Gypsy Travellers, and children with parents in the armed forces, who all require special attention to ensure that they are fully aware of their rights. In our report, we specifically request that the Scottish Government addresses that issue as a matter of urgency.

The committee also felt that, in providing parents with support in the tribunal system, the emphasis should be on advocacy, mediation and dispute resolution rather than on legal support. Concerns were also raised about when a placement should commence following a decision by the tribunal. We welcome the stated intention of the Government to lodge an amendment at stage 2 to allow tribunals to specify when a placement should start, but we recognise that some flexibility is likely to be required. Finally, the committee noted concerns raised by Govan Law Centre relating to the provision of additional support needs outwith educational support, and we have asked the minister to clarify his position on that.

There are issues that come before Parliament in which party politics plays little part, and I believe that this is such an issue. We all agree that parents of children with additional learning support needs deserve to have all the support and assistance that the state can provide, although we can disagree on some of the fine detail about how to achieve that. Realistically, we all know that, regardless of which party is in government, that is never going to be a cheap or easy endeavour. However, we agree on the key aim of providing proper support to parents so that their children have every opportunity to live fulfilling and rewarding lives.

The committee believes that some issues must be re-examined during stage 2, and I highlighted some of them during my speech. However, I am pleased to state that the Education, Lifelong Learning and Culture Committee supports the general principles of the Education (Additional Support for Learning) (Scotland) Bill.
Ken Macintosh (Eastwood) (Lab): I confirm Labour’s support for the general principles of the bill. In fact, as I suggested in committee, I am happy to acknowledge the constructive approach that the minister and all committee members took during stage 1. It was reassuring to find during our final evidence session that the minister had identified three issues that the committee had also identified and that he was willing to lodge amendments at stage 2 to address those concerns.

I will return to those amendments, but before this turns into a love-in I should highlight that Labour also believes that clarification is required on several issues before stage 2. Furthermore, we have concerns about issues that are missing from the bill altogether, such as funding and the need for a wider review of the additional support for learning legislation. Let me outline a few of our concerns.

First, the bill has quite a narrow focus. It has been introduced in response to a number of court decisions that we all agree have been against the spirit and intention of the original Education (Additional Support for Learning) (Scotland) Act 2004. It is interesting to note that several of the organisations that gave written or oral evidence expressed their support for the principles behind the 2004 act but emphasised that, in practice, the act was not working in the way that had been envisaged. For example, it emerged during our witness sessions that the number of pupils with a co-ordinated support plan is very low—far lower than had been anticipated. The Scottish Parliament information centre advises that there are currently just under 1,900 CSPs, as opposed to the 11,000 to 14,000 that were originally expected.

Furthermore, the 2004 act appears not to have provided a vehicle to help identify the number of pupils with hitherto hidden or unrecognised needs. Children in Scotland points out that, to date, the number of children who officially receive services and support under the 2004 act has risen modestly, from 5.1 to 5.6 per cent of all students. That increase—of approximately 2,000 pupils nationwide—is far below the number of new beneficiaries that was expected.

A second point that emerged from the committee’s evidence is that, although there has been a clear reduction in confrontation between parents and local authorities over special needs, the new appeal tribunals can still be the pinnacle of a system that is overly adversarial. That reflects what has been described as an imbalance of arms—that is, too many lawyers against the parents—in the system. Many of our witnesses said that they wanted a greater emphasis on mediation and dispute resolution and that parents should be made more aware of, and be able to assert, their rights. In his evidence to the committee, the Minister for Children and Early Years was sympathetic to that approach. He suggested that, at stage 2, he would consider “strengthening the obligation on authorities to provide information”—[Official Report, Education, Lifelong Learning and Culture Committee, 21 January 2009; c 1916.]
to parents. Can he clarify whether he intends to lodge such an amendment at stage 2?

Adam Ingram: I think that the member caught in my remarks the fact that we are considering amending other regulations to put local authorities under a duty to publish information on mediation and dispute resolution services.

Ken Macintosh: That is very encouraging. The minister hinted that to the committee, but it is good to hear that confirmation, which I think will be welcomed by all committee members.

Another issue that is not addressed in the bill is funding, which remains the big, unspoken subject that many families feel unduly influences decisions. Local authorities are both the providers of support and the gatekeepers to it; they are, and will remain, the guardians of the public purse. Many families worry that decisions are too much based on resources—for example, on what provision is available locally—rather than on the needs of their children. That can create further inequities in who can access support. It is difficult to be sure who wins that lottery, but it is certainly true that the least articulate, the most put upon needs of their children. That can create further inequities in who can access support. It is difficult to be sure who wins that lottery, but it is certainly true that the least articulate, the most put upon needs of their children. That can create further inequities in who can access support. 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Adam Ingram: The working group is still working; the third meeting is tomorrow. I hope that any report and recommendations that come to me will be fed into the legislative process, as I indicated to the committee at our recent meeting. I can give no undertakings about what will be in the report, but the committee will be informed of the recommendations.

Ken Macintosh: I welcome that assurance. The reason why I ask the question again now, and the reason why the timeframe matters—a point to which I will return—is that as we go into stage 2 we need to know whether we need to amend primary legislation rather than put something into the code of practice. The suggestion that the minister made in committee and is making today refers to the later stages of the legislative process. I am not sure whether that means leaving it until stage 3, or until the code of practice, which is also part of the legislative process. The committee would welcome as much information as possible—even early thoughts—on those issues as we go into stage 2.

Presiding Officer, may I check my time please?

The Presiding Officer: You may carry on until I tell you to stop, Mr Macintosh. [Laughter.] I can happily give you another two or three minutes.

Ken Macintosh: I am in the fortunate position of having to give our winding-up speech, to the depression of my colleagues on the back benches.

Those who gave evidence to the committee repeatedly expressed anxiety about the code of practice. Well-intentioned though that document is, what really matters to parents and practitioners is what is filed in statute—the legal rights that parents and pupils enjoy.

Earlier, the minister quoted the example of the on-going disquiet over the term “significant”. As the minister stated, to open a CSP, it must be demonstrated that a child’s needs arise from complex or multiple factors that require significant additional support that goes beyond the educational. In its response to the consultation, ISEA, one of the most effective parental advocacy groups in the field, described the term as the “most contentious issue within the legislation”.

ISEA highlighted the variation between local authorities about the meaning of the term “significant”, and the even more varied interpretation in the other agencies involved. Other witnesses also suggested that the threshold used for the term “significant” by health boards in particular is too high. ISEA concluded that “the word significant is the main reason why so few children and young people have a CSP.”

In his evidence to the committee the minister said that the working group would consider the question of an agreed definition, and he went on to say—and confirmed in his opening remarks today—that he was minded to deal with the issue through the code of practice. Can he assure us that he will, if he can, bring forward a definition before stage 2 for the very simple reason that, as I argued earlier, we need to know whether it should be in legislation or not?

A number of outstanding issues are to be addressed and resolved before the bill becomes law but, given the Government’s and the committee’s approach to date, I am optimistic that we can do so, and that we can meet the needs and aspirations of families across Scotland. I am happy to offer Labour’s support for the general principles of the bill.

15:09

Elizabeth Smith (Mid Scotland and Fife) (Con): First, I put on the record how much we support the principles of the bill. It is absolutely vital that we get it right. At a time when so much of the media is focusing on the other aspects of the Government’s education policy, it would be a great tragedy if we took a back seat on the issues in the bill, because it is one of the most important issues that we face and we must get it right.

There can be no disagreement about the need to ensure that each child with ASN receives the appropriate help in an efficient and timely manner, and that that support extends to the home and local community, as well as to the teaching environment. It was good to hear the minister’s assurance on that. Support must be holistic and fully co-ordinated across social, health and educational areas.

We must acknowledge that specialist care also means the provision of specialist services. It is not always possible to ensure that those can be provided in every local authority, so it is important that there is a facility for out-of-area placing requests. At the same time, we must ensure equality of opportunity, equality of treatment before the law and recognition of the administrative and financial responsibilities for parents, for the host and home local authorities and for the support carers.

We fully support the Government’s intention to reduce the complexity of the legislation; to speed up the decision-making process; to ensure that the various parties are fully aware of their rights and responsibilities; to provide better mediation and advocacy; and to provide better cover for those who are at school but who may be over 18, and for those who are the most vulnerable excluded pupils—for example, looked-after children or...
young carers. We must not forget them in this process.

Margo MacDonald: The member referred to children who are still in care but who are over the age of 16. Is she satisfied that the bill properly addresses the issue of those people who need support post-school?

Elizabeth Smith: Ms MacDonald asks a good question. I am not satisfied—there are issues that go well beyond differences in age. It is always difficult to provide clear definitions, but the issue extends well beyond those people who are in a school environment.

We need to focus on two things. First, we need to ensure that the bill is as watertight as it possibly can be with regard to reducing the loopholes in current legislation. Secondly, we need to reduce the wide variation in local authority interpretation of the code of practice. I make it clear that the second is just as important as the first, particularly with regard to reducing the scope for buck-passing and addressing the perverse financial incentives that sometimes lead to the wrong decisions being made.

With regard to the bill, it is essential that there is legislative tightening up of important definitions, not only of the term “significant”, but of the term “complex needs”. There needs to be a clearer understanding of the difference between long-term and temporary needs. Evidence from HMIE, West Lothian Council, the City of Edinburgh Council, the Scottish Government schools directorate and Consumer Focus Scotland—and from the Minister for Children and Early Years—makes it clear that the lack of tight definitions often cloud the issue of whether a CSP is required, which can be crucial in providing the correct support.

That is one of the most important concerns that we face, and the minister has promised that the working party on CSPs will further inform the later stages of the bill process.

Robert Brown (Glasgow) (LD): I hear what the member says—and she is right—about definitions and getting the legislation right. Will she accept, however, that the central issue—which we should keep our eye on—is not whether people have CSPs, but whether they get the right support in school when they need it?

Elizabeth Smith: The member is right—the issue concerns not only CSPs. If we were to get the situation right, we would not, in an ideal world, have quite as many CSPs in the beginning. If earliest intervention took place, there would perhaps be no need for some of that.

I turn to some of the detailed evidence that was given to the Education, Lifelong Learning and Culture Committee. It is clear, as the committee’s convener said, that the current legislation is too complex in relation to establishing who is responsible for what, specifically with regard to the costs that are involved. That was one of the strongest pieces of evidence that we heard, and came from groups such as Govan Law Centre, School Leaders Scotland, Barnardo’s Scotland and Sense Scotland. Those organisations made it clear that there are issues about responsibility and costs.

Three other aspects of the legislation need improvement. The first concerns the issue of representation and advocacy. Throughout the process of evidence taking, we heard several times that, under the current situation, children are often not well represented, both because their parents do not have access to good advocacy—partly because they do not always have the right information or financial resources—and because section 11 of the 2004 act does not confer on them a statutory right to advocacy. When that is set against the situation for local authorities, which often have the ability to pay for representation, there is a problem. It is appropriate at this stage to flag up the fact that the child at the centre of a placing request is currently unable, in a legal context, to express their own views, which is very much at odds with other aspects of Scots law.

The second issue is that the tribunal process is viewed as unnecessarily adversarial, which can be a disincentive for parents to come forward. We heard worrying accounts of that, and I hope that we can address the matter.

Thirdly, we heard compelling evidence from Children in Scotland, the Royal National Institute for the Blind and Sense Scotland that the current legislation should be amended in order to ensure that the responsibilities and duties of local authority education departments continue beyond the time when the person reaches 18, so that there is an affirmative obligation to develop a transition plan for the older student to pursue into the post-school environment.

It is all very well to improve the current legislation, but we must also ensure that its interpretation within the local authority code of practice also improves. From the beginning of this debate, it has struck me that there is presently far too much scope for buck passing and for local authorities to hide behind some of the complexities of the legislation instead of facing up to their true responsibilities.

Let me be quite clear—and this might go back to the point that Robert Brown raised. If there were a proper, graduated response to the needs of the child in the very first instance, and if there were a proper relationship between parent and partnership officer from day 1—as there is in many local authorities in England and in countries such
as Australia—then there would not be quite such a need for so many CSPs to be brought in, especially when the problem is already too far down the road. We should not forget that the cost of tribunals—of around £8,000 or £10,000—could instead pay for 20 hours a week of classroom support for the child. That is a strong message for us to hear.

During one evidence session at the committee, I was appalled to hear that some local authorities do not provide comprehensive information to parents about their rights and the support available. Such information was lacking, so it was good to hear the minister's comments about raising the profile of that information.

Rhona Brankin: Does the member agree that some local authorities—notably, the City of Edinburgh Council—will take Queen's counsel to tribunals, at huge expense to council tax payers, thus putting parents at a huge disadvantage?

Elizabeth Smith: Ms Brankin makes that point clearly. It is true, and we must address it. The playing field is not level. In other countries around the world, the situation is a bit better than it is in Scotland. There are lessons to be learned. It is unacceptable that wide variations exist in local authority provision. As I say, we can do something about that.

I said in my opening remarks that this bill is one of the most important before Parliament. I firmly believe that to be the case, because of the enduring principle of promoting the best interests of the child in providing them with the holistic support mechanism that gives them the best possible chance in the future. As the convener of the Education, Lifelong Learning and Culture Committee said, this is not a party-political issue—for once. It is about our commitment to the futures of those children and of the families and carers who support them. That is why the Conservative party will support the Government.

15:17

Margaret Smith (Edinburgh West) (LD): I welcome the opportunity to speak in the debate, and I put on record the support of the Liberal Democrats for the bill.

I would like to thank all the individuals and organisations who have given both formal and informal evidence to the Education, Lifelong Learning and Culture Committee to date. I include the Minister for Children and Early Years, whose input has been very constructive. I welcome the three amendments that he identified before committee members had the chance to twist his arm. I look forward to his lodging those amendments at stage 2, together with some others that I will mention later. The minister has also shown willingness to address other concerns relating to CSPs, the Wheatley judgment, and other matters.

Most of the people who gave evidence to the committee support the bill, as does the Education, Lifelong Learning and Culture Committee itself. However, many people also want the bill to go further. Even if we amend the bill, the need to keep the legislation under constant review has been highlighted to us, to ensure that the systems that we put in place actually work, throughout the country, for children with special needs and additional support needs, and for their families.

The people whom the committee heard from included parents who know exactly how stressful bringing up a child with additional needs can be—parents who time and again have to fight and hassle and harry local authorities and health services for the support that they need so that their children can enjoy a decent quality of life.

As the minister said, there is clearly a need to strengthen and clarify the ability of the 2004 act to deliver on the original policy intention to provide for any additional support to help a child or young person to learn. Such clarification is needed in the wake of a number of Court of Session judgments as well as in the wake of the first few years of implementation.

We must make the bill as watertight and understandable as possible, and there is a reasonable call from many parents and others, such as Govan Law Centre, for a simplification of the process. I am sure that my committee colleagues would agree that it is not simple at present. It is incredibly complex for us all, and I can only guess how complicated it is for parents who are caught up in the middle of it all, given the other stresses and strains on them.

Despite the best efforts of Enquire and other organisations, there is a real concern that parents are not aware of their rights under the present legislation, even though there is a statutory duty on councils to inform parents of them. We urge the Government to address that and to ensure the provision of proper advocacy and mediation support for children and their families. The Liberal Democrats warmly welcome the involvement of Sir Jackie Stewart in trying to get that message across to parents.

The committee also identified the particular needs of key groups, such as looked-after children, who are in the unique position of having the local authority as their corporate parent, as well as the needs of young people beyond 16 and at points of transition. Some members thought that those should be reason enough for taking matters to a tribunal if people have concerns.
We welcome the main proposal of the bill, that parents of children with additional support needs—including those with CSPs—will be able to make out-of-area placing requests, bringing them into line with other parents. That seems to be eminently sensible and fair. It also makes clear the intent of the 2004 act.

The bill also proposes that, when there is a CSP or when one is under development, appeals on placing requests should go to the tribunal. That is a complex area, but we need to clarify the position in the light of the Dorian judgement. Some witnesses expressed concern about the central role that is given to the CSP in decisions about where requests and appeals are held, given the on-going concerns about the low number of CSPs in existence compared to the number that were anticipated by the 2004 act. The committee has asked the minister to give further consideration to whether all placing requests relating to special schools should go to the tribunal, as suggested by the tribunal president, or whether all ASN placing requests should go to the tribunal. Both of those options have some merit if we are serious about trying to simplify the system.

I welcome the fact that the minister has set up a working group to look into CSPs. A number of people have raised concerns about the production of CSPs, the timescale associated with that and the way in which councils are handling requests for CSPs to be put in place. If there is any sense in which the CSP is seen as the key that unlocks additional services and that, as a result, parents are being denied those services, that does not fit with the spirit of the 2004 act, the spirit of the bill or the views of the members of this Parliament.

There remains concern about the councils’ role as gatekeepers in some instances, and HMIE highlighted the fact that different approaches are taken around Scotland. Frankly, we must address that.

Adam Ingram: I emphasise the fact that we do not view CSPs—nor should they be viewed—as passports to services. The passport to services is the identification and assessment of additional support needs. CSPs can help with the coordination of that support. I make it very clear that CSPs are not a replacement for the record of needs, or the statement of needs in England.

Margaret Smith: I welcome the minister’s statement of that position. We will be in a slightly difficult position if we start to make CSPs part of the reason why certain matters do or do not go to tribunals. That issue was raised—perhaps surprisingly—by the City of Edinburgh Council. We have already heard about that, so I will not dwell on it today.

We touched also on the need for proper and timely co-ordination between councils when a placement has been given the go-ahead. That is very important, as are the cost implications, which I will not dwell on in detail. That is an important matter that we will have to return to.

We would like the tribunal to be given the power to state when a placement will start, and I welcome the minister’s willingness to lodge an amendment on that. I also believe that a strong case can be made for parents’ being able to refer cases back to the tribunal if action has not been taken. We heard enough about the current system of dispute resolution through section 70 of the Education Act 1980 for us still to have some concerns about how that is working for parents.

We are particularly keen for the issue of definitions to be reconsidered by the Government. The issue was raised with me only a few days ago by a parent of a girl whose need for support had been questioned on the basis of a lack of a definition of the term “significant” in relation to additional support needs. The 2004 act was quite clear that it did not wish the tribunals to be dominated by legal arguments or to be adversarial. However, that is where we have ended up and the situation is very unfair. Both committees that have dealt with the matter grappled with the issue. In the situation that we have arrived at, parents are not armed with legal help but, as we have heard, they are up against QCs on behalf of councils. It is ludicrous that councils are doing that. The Education, Lifelong Learning and Culture Committee identified a need to ensure that a different spirit informs the approach that is taken. There might be merit in the suggestion of the president of the tribunal that the tribunal might be given extra legal resources so that any legal arguments from local authority solicitors or QCs might be examined fully without parents and the child being disadvantaged.

We are also concerned about Lord Wheatley’s decision in relation to the definition of additional special needs. He has narrowed the definition, which means that additional support is defined as simply education support offered in a teaching environment. That matter must be addressed by the Government, and I welcome the fact that it has been considering the issue and that the minister has—in the committee and in the chamber today—reiterated his understanding that the 2004 act covers any support that allows a young person to benefit from school education.

I look forward to hearing what the minister has to say about that important issue and others at stage 2. We will be able to address many issues as part of the legislation, but many issues of importance to parents and children will have to be left for another
day. We remain, however, committed to addressing those as well.

I have great pleasure in supporting the bill at stage 1.

15:26

Aileen Campbell (South of Scotland) (SNP): I am pleased to be taking part in this debate, largely because I am a member of the Education, Lifelong Learning and Culture Committee, which is the lead committee for scrutinising the bill, but also because, like many of us, I have constituents who will benefit from the proposed changes.

I would like to put on record my thanks to all the organisations that provided excellent briefings ahead of this debate and who eloquently put forward their ideas about how they want the bill to progress.

It is fair to say that we in the Education, Lifelong Learning and Culture Committee have had our fair share of disagreements, political differences and quibbles. However, the situation with regard to the bill was different, I believe because we all want to help the Government to move the bill forward, as it is the right thing to do and will help families the length and breadth of the country. As Karen Whitefield and Liz Smith said, the issue is above party politics.

I do not believe that the bill will change the spirit of the 2004 act; rather, it will expand the provisions so that parents of children with additional needs get more rights and protection. During our scrutiny, many witnesses told us that the 2004 act does not always meet the needs of families who need help or support. We heard about parents being pitted against teams of lawyers representing the council, about parents having to struggle to get their child the help that they need, and about cases dragging on for long periods of time. It was vexing to hear about parents who already have to cope with the added life pressures that having a child with additional needs places on them also having to fight to get the help and care that they require. What we heard, unfortunately, confirmed what many members of the committee had encountered in the regions and constituencies that we represent.

Constituents of mine wanted me to attend meetings with the social work department because they were scunnered—scunnered of having to fight for their rights, scunnered of having to face more and more delays, and scunnered of not being given the support that they deserve. That is why I am pleased that the Government will try to rectify the legislation so that it adopts an approach that is more about common sense and less about the letter of the law.

The bill covers a lot of issues to do with additional support for learning and needs, so I will limit my comments to the areas that particularly interested me during the course of the committee’s scrutiny.

One recurrent theme was parents’ lack of awareness about their rights. Despite there being an obligation on local authorities to inform people of their rights, it appears that some local authorities are often not very forthcoming with relevant information. It was, therefore, pleasing to hear the minister’s thoughts about amending the information provisions in the 2004 act and working with Jackie Stewart and Muriel Gray.

ISEA noted that about 75 per cent of parents are unaware of the fact that they can request mediation and that 80 per cent have no or poor information on their right to request dispute resolution. Furthermore, ISEA’s questionnaire, which gave rise to those statistics, showed that parents do not know that when they attend a meeting, they can get papers, agendas and reports. It is regrettable that such knowledge is limited, as that no doubt severely curtails parents’ abilities to play a full and informed part in discussions about their child.

Lorraine Dilworth told us during an evidence session that some councils are good at getting literature to parents and directing them to websites where information is easily accessible, but that one local authority’s website was so poor that she could not find the name of the director of education on it. It is clear that the Government should do all that it can to improve the way in which parents are informed about their rights, to ensure that there is consistency throughout the country and that basic methods of sharing information are followed.

I hope that the Government will also consider the specific problems that are faced by Gypsy Traveller children, children whose parents are in the armed forces and looked-after children. The convener of the Education, Lifelong Learning and Culture Committee, Karen Whitefield, mentioned those groups. A particular issue for Gypsy Traveller children and the children of army personnel is that they experience interrupted learning and access. I can only assume that my point about the lack of parental knowledge of rights is exacerbated for those families, which have to deal with many more local authorities.

We should also be aware of looked-after children, who do not have a diligent parent fighting their corner. I welcome the moves that the Government has taken so far, such as the launch of the guide “These Are Our Bairns: A guide for community planning partnerships on being a good corporate parent”, to ensure that looked-after children are not disadvantaged. I know that the
minister intends to continue to develop policies to ensure that that remains the case.

Local authorities told us that they are aware that they need to take responsibility for ensuring that all families get equal access. That is encouraging, and I hope that that approach will continue.

I am pleased that the Government is looking to reclaim the ethos of the 2004 act. We all have a duty to ensure that no child is failed by any system and that all children are treated fairly, regardless of their background, culture or need. It is clear to me that many parents feel let down, are bewildered by procedure and jargon, and do not get the information and support that they so desperately need. Of course, that is true in relation to children who have parents, but we must not forget looked-after children, who depend on us to get the legislation and rules absolutely right.

There is a will throughout the Parliament to get things right for our children. I hope that we manage to work together to ensure that we do what is right for our bairns and for parents and young people. I want to be able to tell my constituents who have scars because the 2004 act let them down that no one intended it to be that way. I want to let them know that we are on their side and that we want to support and help them to make the situations in which they find themselves as stress free as possible. Not everyone will be entirely happy with the changes, but if we start to improve things now, the benefits will last forever.

I am happy to support the principles of the bill. I look forward to hearing what others have to say in the debate and as the bill makes its way through the parliamentary process.

15:32

Claire Baker (Mid Scotland and Fife) (Lab):
The Education (Additional Support for Learning) (Scotland) Bill is the first bill that I have worked on at stage 1 since I entered the Parliament. I found stage 1 to be constructive and focused, if quite technical for a first-time legislator such as me. Of course, I do not have the advantage of having been on the Education Committee when the Education (Additional Support for Learning) (Scotland) Act 2004 was passed, although sometimes the discussion between Ken Macintosh and the Minister for Children and Early Years became a prompting exercise on who voted for what the first time around.

During the complex committee process, I welcomed the pleas from many witnesses for the process to be simpler, clearer and more parent friendly. Useful evidence and briefings were provided during the committee’s consideration and ahead of today’s debate by Govan Law Centre, the National Deaf Children’s Society and a large number of other children’s and disability groups that contributed concise, well-thought-out arguments.

It is clear that we need to return to the 2004 act and ensure that the system is working as well as it should. The 2004 act, aspects of which the bill seeks to clarify, is an ambitious piece of legislation that aims to deliver equal educational opportunities for children and young people with additional support needs. Its fundamental principle is that decisions must be made in the best interests of the child.

There is no doubt that, in many cases, the 2004 act has delivered and is working well. However, in evidence, the committee heard concerns that the original intentions of the legislation are not always implemented. That was evidenced by a desire for a full review of the legislation, as other members have pointed out. At the informal round-table meeting of the committee and children’s organisations, there was a sense of frustration that the bill’s scope is fairly limited. We heard that other issues need to be addressed, in particular those that arise from the Court of Session’s rulings and the recommendations for improvement in the HMIE review. The revised code of practice might address some of those issues, but there are still concerns about its ability to provide the absolute clarity that is required in many areas.

The minister helpfully indicated to the committee areas in which the Government will lodge amendments at stage 2. The committee welcomed his commitments, but we are keen that he should reflect on the complexity of the process for parents and consider lodging amendments that would further simplify the circumstances in which a parent has recourse to an additional support needs tribunal.

The increasingly adversarial nature of the tribunals was a consistent theme among witnesses. In evidence to the committee, Jessica Burns, the president of the Additional Support Needs Tribunals for Scotland, reported an increase in the number of cases in which local authorities brought in a legal team when the tribunal was dealing with a placing request, although she acknowledged that that happens in the minority of cases. She said:

“Authorities … have begun to feel that a large number of successful placing requests will take a lot of money out of their education budget, and one can understand their motivation in seeking to protect their budgets.”—[Official Report, Education, Lifelong Learning and Culture Committee, 10 December 2008; c 1767.]

Ms Burns reported that in such circumstances, representatives of organisations such as ISEA, which represents the majority of parents, often feel at a disadvantage, because although they have significant experience in additional support needs
they are not legally qualified. It is clear that there is an imbalance in such hearings.

Although I am assured that Ms Burns and other tribunal members work to create a culture in which everyone is treated as a witness to the tribunal and one side is not pitted against another, it is difficult to achieve such a culture when there is a mismatch of resources. Ms Burns suggested that tribunals should have the power to appoint legal representation for parents, in limited circumstances. The committee appreciated the frustration of the ASNTS in such cases. The proposal should be given careful consideration. However, we are keen to minimise the adversarial nature of tribunals.

Ms Burns mentioned costs and funding, as did Govan Law Centre and local authorities. Although Govan Law Centre thinks that there is sufficient clarity about who bears the cost, there are concerns that worries about the additional cost to a host authority can make the authority reluctant to accept placing requests or reticent about letting parents know that they can apply to a neighbouring authority. A witness from a local authority told the committee that the system for recovering moneys from authorities is confusing and is “neither clear enough nor robust enough to withstand what may well be increased pressures between authorities.”—[Official Report, Education, Lifelong Learning and Culture Committee, 14 January 2009; c 1862.]

The Government acknowledged that, but argued that the system should be clarified in the code of practice. The committee remains concerned about the matter, and we encourage the Government to consider lodging an amendment at stage 2 to confer on host authorities a statutory right to reclaim costs.

An increasing number of local authorities are using independent mediation services. I welcome that approach, which is best practice, particularly when the needs of looked-after children are considered. The committee supports the proposal to make the host authority responsible for mediation and dispute resolution in relation to out-of-area placing requests, but we are concerned that parents do not always understand their rights in that regard. I welcome the minister’s acknowledgment of that.

Like the minister, I attended the Scottish additional support needs mediation event that was held in the Parliament during stage 1. It can be easy to get lost in the technicalities of section 70 of the Education (Scotland) Act 1980 or section 27 of the 2004 act, but the event served as an important reminder of what the bill is about: parents who are trying to do the best for their children. A panel member emphasised that it is all about people and relationships. They said that it is about communication between parents, teachers, social workers and council officials, and if all partners could be supported in making those relationships work, more adversarial routes could be avoided. The discussion brought the legislation to life for me.

I welcome the revisiting of the 2004 act and the Scottish Government’s proposed stage 2 amendments. However, like other members of the committee, I think that more improvements to the 2004 act could be considered, to enable parents to get the best for their children and to ensure that all the agencies, officials and organisations that are involved are aligned in such a way as to make the process as easy, simple and constructive as possible.

15:39

Mary Scanlon (Highlands and Islands) (Con): I am not a member of the Education, Lifelong Learning and Culture Committee, so I was surprised when a bill to address additional support for learning was introduced less than five years after the Education (Additional Support for Learning) (Scotland) Act 2004 was passed. I hope that the Parliament will not have to consider the matter again in another five years’ time because the system is still not working.

As others have said, the bill must be as watertight as it can be and understandable for local authorities, parents, schools and nursery schools. I hope that lessons have been learned about providing adequate resources to ensure that additional support for children is implemented in full.

I have also found myself in front of council officials—not Queen’s counsel, thankfully—with parents who have felt intimidated by the process that Aileen Campbell mentioned. Parents were battling to get support for their children and to do the best for them, but the council said, “What is passed in the Parliament is all very well, but we haven’t got the money.” Such resources are perhaps less accessible in many rural communities in the Highlands and Islands and throughout Scotland than they are in urban areas, so it is doubly important that those communities do not feel left out.

I spoke in the debate on the previous Education (Additional Support for Learning) (Scotland) Bill in 2004, and I am quite surprised that the points that I made then are equally relevant today. I want to ask again a question that I asked then, because I have not heard any member mention the issue: are we really doing enough to ensure that nursery staff and teachers are trained to pick up signs of learning difficulties and slow development? I welcome the recent moves by the General
Teaching Council for Scotland to provide more professional training within the teacher training programme—which I understand have been well received by teachers—but unless there is early diagnosis and early intervention, children will miss out on teaching and understanding. I am aware that sometimes children cannot catch up if they miss out at a crucial time, irrespective of what is done a few years down the road.

Adam Ingram: I could not agree more with the member’s sentiments, which is why we have spent a great deal of time and effort putting together our early years framework, the core principle of which is early intervention. Early intervention is, of course, about identifying children who need additional support. It is clear that the health service has a particular role to play in that context, but all the other services also have roles to play. The services need to work together to address the issues.

Mary Scanlon: I was the convener of the cross-party group on mental health in the first two sessions of the Parliament and I worked closely with the minister. I have no doubt that he has brought to bear that experience and other experiences, and I welcome the point that he makes.

The point was made in evidence in 2004—it was also made by someone whom Aileen Campbell mentioned—that the system in the bill was essentially the same as the system that was in place at that time, and that had that system been policed and enforced as it should have been, it would have been workable. The point was also made that the Parliament should not only pass legislation but ensure that local government implements it and is accountable. Have we not heard that said about many other acts that we have passed? It seems that local authorities and others have found ways to pass the buck, as Elizabeth Smith said, and that for many children, five years has passed with little progress and much detriment to their development and opportunities in life.

The Education Committee’s report on the session 2 Education (Additional Support for Learning) (Scotland) Bill stated:

“The Committee expects education authorities and other agencies to comply with their duties”.

We are all much more grown up now. In the light of experience, it is clear that that expectation was not fulfilled in many cases. The crucial issue is what is viewed as a statutory obligation as opposed to simply an expectation. It is clear that the Education, Lifelong Learning and Culture Committee has taken that issue on board from several key witnesses.

There is something that I almost get angry about. Is it not unacceptable 10 years into devolution how often we are told that not only the national health service and local authorities but education and social care services, the police and the voluntary sector are still not working together as they should on child protection? If services are led by children’s needs, there should be no need for the Parliament to tell agencies to work together.

It is clear from the bill and the experience of the past that, first and foremost, there must be early intervention. Parents need to know and understand their child’s condition so that they can play their part in understanding and coping with their child’s behaviour and assisting with their learning. Schools and education authorities must put in place resources to meet the unique needs of each and every child. As Elizabeth Smith said, if that were done, parents would not face constant battles with teachers and others to get their child the support that they need. It would also assist with discipline in schools and reduce exclusions, and reduce the need for mediation, advocacy and the costly and intimidating tribunals. To expect a parent to work out whether their child’s needs are complex or significant in comparison with those of other children is simply unacceptable.

If all that I have asked for were in place, six-year-old boys would not be excluded from school for four months, as happened in Inverness last week because all the specialist centres in Inverness were full; the cuts in education staff that the Highland local association of the Educational Institute of Scotland highlighted would not continue, thereby enabling services to be provided; and the parent of a child who had an appropriate support system at nursery would not have to battle for it all over again when the child entered primary, or have to start another big battle to get what their child needed in secondary school.

I welcome the bill, but I hope that I am not back here arguing the same points in five years. I welcome what members have said, the minister’s comments and the consensual nature of the debate.

15:46

Anne McLaughlin (Glasgow) (SNP): The way in which I came into the Parliament was a great shock for all of us. Before I start my maiden speech, I say that, notwithstanding the tragic circumstances, I am pleased and honoured to find myself here. I do not underestimate for a second the great privilege that it is to be elected to my country’s Parliament, and I intend always to work constructively with members from all parties to achieve what each of us, regardless of party divides, is ultimately striving for: a better Scotland.
I thank members of all parties for their many words of support. I imagine that that is me had my quota now.

When discussing additional support for learning, it is important to note that the term “additional support needs” is broader than many parents realise. For example, children with autism, a visual impairment, a particular gift or a mental health problem, or children who are being bullied or have been bereaved, can all be deemed to have additional support needs and they all deserve support, as do the children on whom I will focus. I may live to regret this, but I illustrate my point by saying, “Doamnă Profesoară, mă simţ rău!” Or how about, 

Finally, thankfully, there is, “Pan, mam nudności.” That was a demonstration of just three of the 86 ways in which children in Glasgow schools today might tell their teacher that they are feeling unwell. Yes, 86 languages are spoken as a first language in our schools in Glasgow. The ones that members have just heard were supposed to be Romanian, Urdu and Polish. I thank the Presiding Officer’s office for giving me permission to use those languages to demonstrate my point. I should probably also thank my colleague Bill Kidd for advising me not to use six.

Members will be unsurprised to hear that I will talk about English as an additional language. In 2005, Glasgow had about 6,500 children for whom English was not their first language. In the next three years, the number increased by between 3,000 and 4,000—it is difficult to get precise figures—so that now between 9,000 and 10,000 children need support. That is 15 per cent of the school population. In the same period, the number of teachers of English as an additional language dropped from 165 to 140 and the focus switched, unintentionally, from Scottish-born bilingual learners, who are mainly but not solely children with Pakistani parents, to the new migrant children, who are primarily but not only from eastern Europe.

I do not believe in sitting about waiting for things to happen. I happened to be in Brussels when I realised that children from eastern Europe accounted for most of the increase in the number of children in Glasgow schools for whom English was not their first language, so I arranged a meeting with the European Commission to find out whether Glasgow could access European funding. I am delighted to say that, at that meeting, Commissioner Orban, the European Commissioner for Multilingualism, accepted my invitation to come to Glasgow.

Last week, the commissioner and I met Glasgow education officials to consider how we can progress an application for funding to support English as an additional language provision in our schools. Of course, it is early days, but we have at least identified the funding and started the process. Having spoken to members of the Scottish National Party group in Glasgow City Council, I will certainly work with them to ensure that we do everything that we can to bring the money to Glasgow. I am very hopeful of getting cross-party support for that.

The fact that 86 languages are spoken by children of 110 nationalities in Glasgow schools should not be seen simply as a challenge; it is also a tremendous opportunity for our children to take advantage of a vibrant, culturally diverse and enriched schooling.

Where Glasgow gets the balance right, it really does work. Yesterday, I received letters from 16 children from Victoria primary school in Govanhill. They are running a tremendous campaign to save their school from closure and they have invited me to visit the school, because, as one pupil told me, “You’re really into Govanhill.”

Those children are not the only ones who are fighting to save their school in Glasgow. Given that we are talking about additional support for learning, it is worth saying that, as my colleague Bob Doris will testify, the review of Glasgow schools simply forgot that Ruchill autism unit was attached to Ruchill primary school, which is earmarked for closure. The sooner the parents and children who use the autism unit know what is happening the better.

The children at Victoria primary school have told me in the past couple of weeks that part of the reason why they love their school so much is that they have such a diverse mix, with the right level of support for children from Romania, Slovakia, Poland, Somalia, China, Pakistan and India. As I said, when that works, it works. However, the bill is about when it does not work. Its intention is to give parents who have children with additional support needs the same rights as those whose children have no such needs. More important, its intention is to give children with additional support needs the same rights as their school friends. It is that simple. The bill expands the provisions of the Education (Additional Support for Learning) (Scotland) Act 2004 so that parents have even greater rights and protections, including even better rights of appeal.

I do not want to see parents using the new legislation at all, because I want them to get the right support for their kids. It is crucial that children have the language to communicate such basics as feeling unwell—I hope more effectively than I did—but that is not enough. Every child has the
right to achieve their full potential in education. It is our job to equip teachers to ensure that that happens. It is our job to give parents the legal rights to support their children. Above all, it is our job to ensure that no child slips through the net. I know that that is idealistic, but we should never shy away from idealism when it comes to our children and young people. If there is a barrier to learning, it is our absolute duty to ensure that it is lifted and that the child concerned is fully enabled to learn. We bring these children into the world and a decent education is the very least that we owe them.

15:53

Helen Eadie (Dunfermline East) (Lab): I am grateful for the opportunity to contribute to the debate. I congratulate MSP McLaughlin on her maiden speech, which was excellent, and I warmly welcome her to the Scottish Parliament. It is a privilege to serve alongside such an able member. I also congratulate the members of the Education, Lifelong Learning and Culture Committee. I have never been a member of an education committee in the Parliament, and I always stand in awe of the work that such members do. Every member of the committee who has spoken today is a credit to the work that the committee does. This important bill is worthy of the contributions that they have made.

There is only one aspect about which I do not want to be consensual. It has nothing to do with committee members or the minister; it is to do with COSLA, whose evidence came across my desk today. All it could do was talk about the cost of the bill. We know that anything to do with equal opportunities or removing barriers and creating access costs money. I had the privilege of chairing Fife Regional Council’s equal opportunities committee for several years. During that time, one point that came home to me was that, if we want to remove barriers for people with disabilities or deal with inequalities, we must invest. Money is needed and having it is important. COSLA is now not at the top of my Christmas card list; in fact, it has just been eliminated from the list.

Many comments about the bill have landed on our desks or appeared in our inboxes in the past 24 hours from a wide spread of organisations throughout Scotland, led by Govan Law Centre. Many organisations have commented and I have been impressed by the commitment in Scotland to disability issues. I am sure that other members echo that view.

I highlight the views of Children in Scotland, the for Scotland’s disabled children—FSDC—campaign and the National Deaf Children’s Society. That is not to belittle what others said, but those organisations’ comments chimed with my experiences as an MSP. It is worth while to remind ourselves how important it is for all committees when considering legislation to read and hear what witnesses say, because their contributions are born of experience at the coalface.

We heard what Mary Scanlon said about the 2004 act. The act has been around only since 2004, which seems a relatively short time to operate before being amended. We need to remind ourselves that the act has been excellent and important and that it has done much good by giving priority to the provision of additional support for learning. Tens of thousands of children and young people with additional support needs are being helped now by thousands of dedicated and highly competent professionals and by many family members and community groups.

It is right always to review policy and to see where improvements can be made. However, we should remind ourselves of the 2004 act’s origins.

The act was aspirational and visionary because it extended rights to and eligibility for additional support for learning to all children and young people anywhere in Scotland who need extra help with their learning. It created a high standard that has not yet been fully met.

The act sought to reach out to children and young people—and to their parents—who face obstacles to success in school for short-term or long-term reasons that go far beyond those that the old definition of special educational needs captured. The Scottish version of additional support for learning still covers physical conditions and behavioural difficulties, but it also covers a range of personal obstacles to success in school, which include limited English, being a young carer, being bullied, depression, living in secure accommodation, interrupted schooling for Gypsy Traveller and Traveller children, substance abuse and family problems. The act covers any circumstance that impedes a child’s success at school.

I was fascinated by and interested in MSP McLaughlin’s point about eastern Europeans. Right away, I have discovered a common interest with her. She says that she hopes to find common ground. As my good friend Lord Foulkes knows—he shares my interest in Europe—I am just back from Macedonia. I intend to go to Bulgaria for the seventh time at Easter and I have been to Romania several times. What she said was absolutely right. We in Scotland need to do much more to help eastern Europeans who settle here and for whom English is a second language. I was surprised to learn from surveying all the universities in Scotland that Bulgarian is not taught in a single university. Perhaps we can address that in the time ahead.

I am rapidly running out of time for my speech, so I will mention just one amendment that I hope
that the committee will have sympathy for and which chimes with me because of my work as an MSP. Children in Scotland has proposed an amendment on a right to support for advocacy. Children in Scotland makes some very important points. It says:

“In practice, ‘support’ is about helping parents (broadly defined) and pupils to understand exactly how the ASL Act applies in their particular case and to gain the knowledge, skills and confidence to effectively request and secure the additional support for learning needed. This level of support significantly exceeds Enquire’s current remit and there is no other national service in place to help parents and pupils to handle specific, complex cases from start to finish.”

I hope that the Government will lodge an amendment to the bill that couples the right to support with a new duty on the Government to provide or fund it. Getting the support side right from the start will avoid conflicts and legal costs. I hope that the minister will take that on board.

16:00

Robert Brown (Glasgow) (LD): I join in the congratulations to Anne McLaughlin on her maiden speech. She did a good service this afternoon by hitting a particular nail strongly on the head. The issue is one with which a number of members have had dealings.

The Education (Additional Support for Learning) (Scotland) Act 2004 is something of an old friend to me, as Ken Macintosh will recollect. Given that I was the convener of the Education Committee when the bill passed through the Parliament, it was perhaps appropriate that I went on to play a part in implementing it as the Deputy Minister for Education and Young People. As we tend to see, things have a habit of coming round again. I have learned in the Parliament that 10 per cent of the challenge is to pass a good law and 90 per cent is to make it work effectively on the ground. All members will share in that experience.

On the whole, as Helen Eadie rightly said, the 2004 act was an aspirational piece of legislation. The bill was well conceived and well prepared by Peter Peacock, who was the Minister for Education and Young People at the time, and carefully considered by the Education Committee. The bill has been supported by significant funding and has made a step change on the ground in both culture and practice by effecting support for young people with additional support needs. However, as members across the chamber have said, a number of the practical issues on the ground that we wrestled with during the passage of the bill have led to patchy practice across Scotland. The challenge remains to spread good practice to bring the standard throughout the country up to the level of the best. The situation is still more mixed than it ought to be.

I have some important caveats to make by way of introduction, which echo the experience that we had at the outset. The first is the issue of individual rights, such as the right to appeal to the tribunal and the right to access mediation. All of that is all very well in its place—it is important and necessary—but we have to be careful that the resource that ought to go to sorting everything out at the beginning is not sucked into procedures that do not advance the educational cause in which we are all interested. Similarly, all the stuff to do with definitions and so on is all very well, but we have to embed the things that we want to see in practice in schools. Ultimately, co-ordinated support plans and all the rest are not the most necessary of measures. They are often perceived to be the drivers, but they are not the principal vehicle in that regard. Processes and facilities need to be put in place to support young people who need support.

The bill picks up on a number of issues that have emerged in practice, and I am happy to support the provisions to address those. I also welcome what the minister said about lodging amendments at stage 2.

I have a couple of other points to make on the bill. First, given Lord Wheatley’s decision in the case of SC v City of Edinburgh Council last year, we need to reinstate the concept of additional support outside the classroom as intrinsic to the additional support that is required under the bill. As we know from what he said today and in previous debates, the minister is favourable to the proposal. I hope that he will commit to lodging effective amendments on the subject. I have always thought that the school community should be regarded in the round. It is the whole lot. Obviously, it is the teachers and other educational staff, but it is also the nursery, the breakfast club, the after-school club, the school clubs, and the other bodies that work to make the school a wider and richer educational experience.

Additional support needs are an important issue for children who suffer from autism and require extra social support. As Anne McLaughlin said, the issue is important, too, for children who are not native English speakers and require extra help outside school. Indeed, in other situations, psychological and speech and language support is also required.

There are financial implications. Some of the matters that relate to additional support for learning overlap with health and other services. However, at the end of the day, the intention of the 2004 act was for children with additional support needs to get the educational and social support that they need as individuals in a way that is seamlessly backed by all services. The term “seamlessly backed” was at the heart of what we
tried to do in the 2004 act and it remains at the heart of issues that members have raised in the debate to do with how the act is working in practice.

Another issue that I want to raise is transition to work and further and higher education. The 2004 act put a strong emphasis on advance planning and building on successful arrangements at school as the young person moves forward into another, more adult sphere. Margo Macdonald highlighted the situation of young people between the ages of 16 and 18—and perhaps even beyond that—who have been in care. We need to consider specific arrangements to carry them forward, because they are the most deserving and needy group.

It is disturbing that HMIE reported that

“in most authorities, staff did not consult meaningfully with children and young people.”

Some people suggest—and the committee supports—a reference to the tribunal in such situations. That may be helpful, but I am not sure that, ultimately, it is what is needed. The key is building into the ethos of each school a focus on transition planning that works, because a remedy after the event is not the answer. The issue might bear close study by a ministerial working group or something of that sort, especially in light of the challenges that are posed by the current economic crisis, which bears most heavily on young people with disabilities or support needs.

My final point relates to out-of-area placements. It is not surprising that the issue has arisen in the committee, given Ken Macintosh’s particular interest in the East Renfrewshire-Glasgow situation. The bill deals with out-of-area placements but, as far as I can see, it does not resolve totally the issue of whether the receiving local authority can be compensated for costs, which can be quite significant for smaller councils, in particular. There needs to be a clear rule on the matter to avoid fractious disputes between councils, which are expensive, among other things, and cause worry for families who are caught in the middle. It is ludicrous that we should spend public money on such arguments. If I recall correctly, at one time there were 18 pending cases on the issue between Glasgow City Council and East Renfrewshire Council. I may be exaggerating slightly, but there were quite a few.

The principle of the Education (Additional Support for Learning) (Scotland) Act 2004 has stood the test of time and the act has made a substantial difference for many young people. The bill provides some helpful tweaking, and I hope that the minister can give the chamber comfort on some of the other issues that have been raised. However, as legislators, we should never lose sight of the fact that at the centre of these matters are individual children and mums and dads with anxieties and sensitivities about their children. Many of those mums and dads have sometimes had to batter their heads against brick walls to get things moving forward. Our job is to improve their situation. In that spirit, I back the general principles of the Education (Additional Support for Learning) (Scotland) Bill.

16:07

Ian McKee (Lothians) (SNP): I join the rest of the chamber in congratulating my colleague Anne McLaughlin on an outstanding maiden speech. I now realise what a great mistake it is to agree to speak in a debate for the SNP following her; I am sure that I will avoid doing so in the future.

If I may adapt an observation by Winston Churchill in the House of Commons in 1910—I am sure that he was quoting someone else, perhaps from ancient times—one of the tests of a civilisation is the way in which it treats those who are dependent on its services. For that reason, I express great pleasure in welcoming the bill that is before us today.

As Claire Baker said, the Education (Additional Support for Learning) (Scotland) Act 2004 was a step forward in attempting to ensure that those with additional support needs and their parents have the same rights as others. However, time has shown that, in practice, the legislation has not always achieved its intended outcome. For example, rulings at the Court of Session have shown that obstacles are placed in the way of parents who are seeking to have a child with a co-ordinated support plan placed outside the area that is served by their home local authority, even if that is their earnest wish.

The bill allows the Additional Support Needs Tribunal for Scotland to consider a placing request at any time before the final determination by the appeal committee or sheriff. When there is a dispute, the local authority that is providing education, rather than the local authority of residence, as at present, will be responsible for dispute resolution connected with that education. That seems to be a sensible step forward, given that the local authority of residence may know little or nothing about the circumstances of the dispute.

The local authority of residence will lose its responsibility to review co-ordinated support plans, which will be transferred to the authorities in the area where education is being provided. It will become easier to appeal when the responsible local authority has failed to meet a request to review or modify a co-ordinated support plan or when timescales have not been maintained. Tribunals will gain the power to review their own decisions, eliminating the greater bureaucracy and
delay of a Court of Session appeal. Those are all wise steps.

I would now have turned to points that are raised in the excellent briefing from FSDC had not the minister already made it clear that he is willing to consider reasonable stage 2 amendments. I am sure that the ones that he mentioned today are extremely welcome, especially in light of Lord Wheatley’s ruling on the 2004 act.

FSDC also made some cogent points about the inadequate and inaccurate data on children with additional support needs. For example, it argues that no one knows the number of disabled children in Scotland. In my research for this speech, I certainly found a lack of consensus on a variety of important statistics, to put it mildly. I suspect that the confusion between terms such as “complex needs” and “long-term needs” has something to do with that. Unless we tighten up our definitions and gather robust data centrally and locally, we will always be one step behind when it comes to helping vulnerable families. I gather that there is likely to be a question on disability in the 2011 census, which may help, at least as far as national statistics are concerned.

I said that one test of a civilisation is the way in which it treats those who are dependent on its services. Civilisation is not the Scottish Government—no matter how civilised our present Administration—the Westminster Government or Brussels, nor is it defined by legislation. Civilisation is defined by how we all behave, not only politicians. Therefore, I conclude by praising a body that was set up by ordinary folk, not politicians: ISEA, which has already been mentioned many times today. ISEA was set up by parents in Dalkeith in 1998 to provide free independent advice, information and support to parents of young children with special needs via its independent specialist advocacy service. It now works in all 32 local authority areas, represents families at tribunals and generally provides them with support that is manifestly lacking from more official organisations.

I take my hat off to ISEA and its body of dedicated volunteers. The families of children with special educational needs are under great stress. Many relationships founder, the outside world becomes a difficult place with which to deal and sleep is often disturbed. As a result, such people can seem at first sight to be difficult, angry or unreasonable. Who can blame them when they have so many fights against bureaucracy and an uncaring society? We must be civilised enough to have the compassion to understand a little of the pressures that they face and to give them credit for the daily strain of their lives as they cope with such challenges.

The bill is extremely welcome, but it is not the entire solution and it does not pretend to be. We must help affected families in every way possible, not only by progressive legislation.

16:13

George Foulkes (Lothians) (Lab): I, too, add my sincere congratulations to Anne McLaughlin on an excellent multilingual maiden speech. Like Helen Eadie, I share something with Anne. Although hers are rather more tragic circumstances, we were both somewhat surprised—but absolutely delighted—to become members of this Parliament.

I welcome the opportunity to say a few words in the debate. As the Presiding Officer may remember, way back in the 1970s, I was chair of the education committees of Lothian Regional Council and the Convention of Scottish Local Authorities. I am thankful that education in Scotland has changed mostly for the better and that it has moved forward a lot since then, although I hope that I will be excused if I do not understand some of the modern jargon and some technicalities.

There have been particular improvements in provision for those who have special educational needs. I am certain that we would not have been able to give the matter such detailed consideration without a Scottish Parliament, because before devolution we would never have had the time to go into it in such detail at Westminster. That is one of the advantages of devolution.

Much has been done, but the bill acknowledges that much more needs to be done. One point that worries me is the possibility that the system might become too complicated and difficult for parents to understand, and that some young people might slip through. It is essential that the system is sympathetic, as simple as possible—as Margaret Smith described well—comprehensive and parent friendly. In addition, it should establish clear rights and be proactive. In that respect, I was impressed by Children in Scotland’s representations.

Everyone has talked about consensus and being consensual. I remember saying to Donald Dewar that George Galloway was his own worst enemy, and Donald replying, “Not while I’m around, he isn’t.” Some people might think that consensus might just break down when George is speaking—I mean this George, not the other, baldy-heided one—but I hope that members will forgive me for that. However, it is the duty of the Opposition and back-bench members to point out deficiencies in existing and proposed legislation. Children in Scotland points the way forward in that regard. It
rightly says that the Government amendments do not go far enough and proposes further amendments to improve the bill. In particular, I agree with Children in Scotland about the danger that only the most confident and articulate parents will know their rights and be able to secure support and advocacy. As other members have said, we must remember the parents who are in particularly difficult circumstances.

Children in Scotland also makes other good points: that councils and schools must become more active in informing parents, carers and pupils about their rights; that the definition of “parent” should be widened in line with new United Kingdom gender equality duties; and that there should be a quick and fair system of resolving disagreements, as members have said, with the tribunal being seen as the last resort rather than the first.

As my friend Helen Eadie and other members have said, consideration should be given to funding advocacy rights so that parents are not disadvantaged financially when they are trying to make their case. Consideration should also be given to more routine and meaningful consultation during the system’s operation. Finally, the duty of education authorities to plan for young people when they leave school before 18 should be strengthened. Those are good ways in which the bill can be improved, even beyond the amendments that the minister has already agreed to.

Like others, I was greatly disappointed to receive only this morning—as Helen Eadie pointed out—representations on the bill from COSLA. All the other representations on the bill have been helpful. As I said, I used to be the COSLA education chairman, so I found its representation to be disappointing, to say the least. “This is going to cost money, so don’t consider it,” is a summary of what COSLA said, which is rather unfortunate.

I know that Scottish National Party members will say, “George is about to return to type but it is true that the council tax freeze is already resulting in dangerous cuts to local services. As clearly as night follows day, it follows that cutting the money that is available to local authorities forces them to cut services. What we see now is that local authorities are using the council tax freeze as an excuse to try to undermine much-needed improvements in services to a particularly vulnerable section of society. I hope that Parliament and, above all, the Education, Lifelong Learning and Culture Committee will put the interests of children and their families first and not accept the constraints that COSLA is trying to impose. I know that Karen Whitefield will do that and I hope that her committee will. As many members have said far more eloquently than I can, the parents of children with special needs must be considered most sympathetically. We should not accept councils pleading financial constraints, which are artificial in some cases, as a reason for not doing something that is vital.

16:19

Christina McKelvie (Central Scotland) (SNP): I am delighted to take part in this stage 1 debate. I add to the chorus of congratulations to my colleague Anne McLaughlin on her fine maiden speech—well done to her for that.

Let me also add to what George Foulkes said about the concerns around financing. The £500 million-worth of cuts that are coming from Westminster to the Scottish Government will also have an impact, which should be borne in mind in any discussion about cuts across the board.

As others have said, additional support for learning is a complicated issue, on which the committee took lots of detailed in-depth evidence from witnesses from across the board. As the issue not only causes great concern to parents and education staff, but has the potential to cause concern for the pupils involved, it is important that we get it right. Therefore, I congratulate the Cabinet Secretary for Education and Lifelong Learning and the Minister for Children and Early Years on their efforts in introducing the bill. I also record my thanks for the excellent verbal and written evidence that we received from all the organisations and individuals who contributed. For me, the committee’s round-table exercise was invaluable in providing an insight into how people deal with the issues at the chalkface. Let me also—this will probably come as a surprise to some—commend all my committee colleagues. We had a tough job in taking lots of evidence and doing a lot of detailed work, but we have come to the end of it with consensus on a plan that puts children at the centre.

The 2004 act was passed as consensual legislation—or so I am told, as I was not then a member of the Parliament, although I was aware that it was happening—but concerns were raised by parents at the time about some elements of it. Clearly, the act was a huge improvement on the previous legislation, but there is substantial anecdotal evidence that the legislation is not perfect and needs to be improved. That is why I think that it was right for the cabinet secretary to carry out a consultation and to introduce the bill to improve matters. I appeal to the Government to maintain its scrutiny of the implementation and effects of the 2004 act. I also appeal to parents and teachers to do what they do and continue to remind us about all those issues.
In the five years since the passing of the 2004 act, we have had time to see how the legislation has performed, so I hope that we will be able to see a spirit of consensus infusing our consideration of the new bill. I hope that Parliament can once again distinguish itself in its conduct in the way that it legislates. To pick up another positive point that was made by my colleague George Foulkes, we should be aware that the Scottish Parliament has really stood out on this issue and we should be proud of that. I note that the tone of the committee’s deliberations provides hope that consensus in our consideration of the bill will be achieved.

Concern is, I am sure, shared by all parties about the implications of Court of Session judgments that have interpreted the 2004 act. I was particularly concerned about the possible implications of the 2007 judgment in the case of WD v Glasgow City Council, in which the court ruled that the tribunal does not have jurisdiction to hear appeals on out-of-area placing request decisions, and that parents of children who have co-ordinated support plans cannot make out-of-area placing requests. I am sure that that was not the intention of the ministers who introduced the original bill, nor of the members who took evidence and deliberated on it.

I suspect that the court judgment also poses difficulties in cases where specialist support provision for a particular set of additional support needs cannot reasonably be provided by every local authority, which means that the proper support can be provided only by travelling across local authority boundaries. I can offer as an example Donaldson’s deaf school, which I visited with a delegation of committee members on what was an absolutely fantastic day. What a fine example that school provides of an institution that is at the forefront of dealing with children who have issues with hearing. As the school has recently moved from Edinburgh to Linlithgow, the implication of the WD v Glasgow City Council ruling is that Edinburgh parents, who could until recently have made a placing request on which the tribunal would have had the jurisdiction to hear an appeal, would no longer have that right because the issue would have been removed from the tribunal’s jurisdiction. Such a result could not have been the intention of the members who worked on the original legislation.

As someone who has always had an interest in issues affecting looked-after and accommodated children—on which colleagues from other parties have also expressed concerns—I am particularly concerned about how corporate parenting can become an issue. If a young person in care has only the corporate parent to champion their rights, any appeal that is made to the local authority involves the corporate parent appealing against the corporation. That poses some concerns for me. Such children need a champion who will speak on their behalf, as Aileen Campbell said.

Another thing that I have noticed over the years—my background is in social work—is that, for some children, at issue is their behaviour in the classroom rather than what causes that behaviour. A particular example is children who have dyslexia, who might not be able to participate in the classroom, which results in disruption that puts the focus on their behaviour rather than on supporting the child. I am therefore delighted that Jackie Stewart, who has been a true champion for the dyslexia awareness cause, is involved. Another piece of worrying evidence that came to the committee was the disproportionate number of children with problems such as dyslexia coming from financially challenged households. We need to bear that in mind.

The fundamental principle that underpins the 2004 act is that the best interests of the child should be served rather than the interests of the authorities, education and support staff or, indeed, the parents. That should be the underpinning principle that carries us through our deliberations today and during the following stages of the bill.

I was pleased to note from COSLA’s briefing, which arrived at noon, that COSLA underscores its support for the general principles of the bill, but warns of the possible consequences of putting too many new burdens on local authorities. I am sure that, although the minister intends to accept reasonable and balanced amendments at stage 2, he will keep caution in mind during his deliberations. I am sure that he and my colleagues on the committee will seek to balance the concerns of COSLA and the understandable aspirations of children in Scotland. It is the balance that is really important. We need gold-plated legislation. If we can get the balance right, that will come about.

Similarly, the position of other interested organisations, such as the for Scotland’s disabled children liaison project and the National Deaf Children’s Society, will have to be weighed at stage 2. The process will have to be delicate and thorough in order to ensure that we emerge at the other end with improved and effective legislation. We should also keep in mind the principles of the United Nations Convention on the Rights of the Child.

This morning, I had the privilege of opening a conference for teachers in Glasgow on continuing professional development. The opening act was a group of children from Merkland school. They sang songs and were fantastic, and I pay tribute to the staff and pupils at that school. I acknowledge that some schools are doing fantastic work.
In supporting the proposed legislation, I acknowledge that there is a job to be done. I am sure that, if we work together, we will get the legislation through. I look forward to working with the committee on a consensual basis at stage 2.

16:27

Hugh O'Donnell (Central Scotland) (LD): In many ways, this is not a contentious subject and not a contentious debate. It can be a good thing that Parliament revisits legislation and adjusts it where necessary, if it is found to be wanting. Based on the evidence that the committee heard and the knowledgeable speeches that we have heard from around the chamber today, there is little doubt that the legislation is wanting and, as my colleague Margaret Smith said, the Liberal Democrats are happy to support the bill at stage 1.

Although I was not elected to Parliament at the time, I remember that the genesis of the 2004 act was the inequity of access to services and the complicated, convoluted record of needs process. As the minister said in his opening remarks, that was the key to the opening of access. Part of the intention of the 2004 act was to do away with that.

Regrettably there is—as George Foulkes said—anecdotal evidence that for inconsistent and patchy financial reasons we have backed up the gatekeeper from being the old record of needs to being the assessment process. There is an issue about the extent to which having the right to ask for an assessment and achieving that assessment needs to be addressed. I have anecdotal evidence of people being diverted down a different path, so the legislative framework needs to be clear that we are going to address that. We know why it happens, and the COSLA briefing for the debate illustrated it quite carefully. The danger is that we make the current situation complicated, which we tried to avoid when we passed the 2004 act.

Liz Smith and other members referred to the fact that parents have had to face QCs. That is neither equitable nor fair, and I say with all due respect that ISEA, which I know of from long ago, does not have the expertise to act in such circumstances. One almost gets the impression that, regardless of the statutory obligations, the objective of local authorities at the outset is to defend their purse strings. That is not the case with the front-line service staff, who work long and hard—as I have experienced first hand—on behalf of the people with whom they deal. We are, however, in danger of creating a situation in which parents will still be going through the same hoops, notwithstanding the tribunal system.

The original legislation has led to a tortuous path for parents and children, and the objective has often appeared to be to obstruct access to services. I am sure that that was not the intention of the 2004 act, but the situation has to some extent moved in that direction.

The committee made a number of recommendations to the minister on the bill, and I am aware that the minister has written to Govan Law Centre and other organisations about amendments that they have suggested, so there is no point in my dealing with those.

I will comment on a couple of things to which other members have referred in passing. The issue of out-of-school support is fairly substantial, and although I take some comfort from the minister's remarks on it, there are major challenges. My fundamental concern is that when a professional team is working with a young person during the course of an educational day, week or term, that work cannot come to an end at half past three on a Friday or on the last day of term. Not only is there no continuity, but one can go back on the Monday or at the start of term and revisit the same process on which one had been working on the previous Friday on the previous term—it becomes like groundhog day.

Continued support outwith the educational day—in terms of education in its broadest sense, whether that is social or personal—will reduce the problem, and probably release resources that would have been taken up by revisiting the same agenda yet again. It was good to hear the minister say that the Government will lodge an amendment to support the reinstatement of that position.

A couple of members briefly mentioned the transition period. It is hard to get access to mainstream education services within the statutory framework for education, but it becomes a major challenge once people move out of the framework. It almost seems as if the education authorities abdicate responsibility. They might not have a strong responsibility, but those young people, who are at a difficult and stressful stage in their life, end up in a game of pass the parcel, and their parents, supporters and carers are put under enormous pressure.

We need to ensure that the planning for transition is carried out early. It comes as no great surprise that the young people must come to the end of their statutory education at some point, so there is no reason for rushed case conferences or last-minute decisions to involve the colleges. The co-ordinated support plan for the young person has to be flexible, and the relevant bodies need to be brought in and taken out in relation to provision of support mechanisms. In order to make that work, we need to give the tribunals the teeth that will allow them to enforce local authorities' responsibilities in respect of transition.
The debate has been largely consensual. I welcome the contributions from all members, and I particularly welcome the excellent maiden speech that we heard from Anne McLaughlin. She set a very high standard for her future contributions, which we will look forward to in the weeks ahead.

The debate gives us an opportunity to assess developments in the delivery of additional support for many children, young people, parents and carers. The original bill, which many of us remember, brought about welcome progress, but confusion still surrounds a number of issues. Five years on, it is surely right to try to redress the situation.

As other members have said, there has been a spirit of co-operation among the parties on this bill. That spirit has been based on the overarching principle that the needs of the child are paramount—a principle that informed the ethos of the original Education (Additional Support for Learning) (Scotland) Act 2004. We must ensure that the new bill meets the needs of children and parents, and addresses some of the discrepancies that have emerged since the 2004 act. Some of those issues were highlighted in the very fine speech from Mary Scanlon.

I will use the time available to focus on certain issues that a number of members raised. Specific concerns have been raised in relation to tribunals, mediation and advocacy. We have to be sure that the legislation on those areas is sufficient.

Currently, the tribunal process is often seen as adversarial, and parents are at a disadvantage when it comes to advocacy services. Organisations such as ISEA that are experienced in additional support needs but do not have legal experience can often be at a disadvantage when complex legal points are being argued by the parties. That often gives local authorities an unfair advantage. In evidence given to the Education, Lifelong Learning and Culture Committee, Lorraine Dilworth of ISEA stated that more and more local authorities are employing advocates to represent them at tribunals, along with their in-house solicitors and senior officials. Earlier, Rhona Brankin mentioned that the City of Edinburgh Council employed QCs. Now, I have nothing against lawyers. I am a lawyer myself and—who knows?—I might have to work as a lawyer again at some point in the future. However, it seems completely unfair to have, on the one side, parents and their advocates who are not legally qualified, and, on the other side, a highly paid legal team, put together at considerable cost to the council tax payer, fighting a case on a strict legal interpretation. That cannot be right. The issue has to be addressed.

The tribunal process must be made more user friendly. We must end a situation in which some councils are being heavy handed because they have the power, the money and the resources to do so.

What can we do to address those problems? As Cameron Munro from Glasgow City Council stated in evidence to the committee, serious consideration needs to be given to tribunals having procedures, instead of simply having a set of rules. The tribunal may well be a formal place, but it should be framed and run in a way that is clear, with each process being clearly defined and explained to parents along the way. As Elizabeth Smith said, the cost of running tribunals is high. We therefore need to ensure that our mediation services are strengthened so that more disputed cases are resolved before they reach the tribunal stage.

That leads me to my second point, which relates to advocacy and mediation. Often, children are not well represented because their parents do not have access to the right information or financial resources. That ultimately means that they will not have access to good advocacy. Children in Scotland stated as much in its evidence, referring to the lack of a guarantee on the right to advocacy for parents and children. Children in Scotland therefore described the right as nothing more than a “fairly hollow right” for parents and carers who cannot afford to pay for lawyers themselves. That leads to a further deepening of inequalities for parents and carers.

Afasic Scotland acknowledged in evidence that the mediation structure may have been well intentioned initially, but felt that it now leaves many parents and children in an unequal position. Many children and young people who have speech and language impairments are among those who are least able to advocate on their own behalf. As such, they are most in need of provision. We must therefore support the proposal in the bill that will ensure that young people and parents are given the right to advocacy and are provided with accurate and clear information on how to use those services. On this side of the chamber, we welcome the appointment of Muriel Gray as patron of ASN mediation, which is a positive step towards ensuring that that happens.

We must remember that we can improve legislation as much as we like but, in the end, success will depend on strengthening the code of practice so that we provide much better support within local authorities. I hope that such an approach would reduce the scope for children to fall through the net.

We support the Scottish Government in its intentions. I hope that this afternoon’s debate will go some way towards reducing the complexity in
the legislation, simplifying the tribunal process and improving mediation and advocacy services. I reiterate the importance of the bill that is before us. We have an opportunity to ensure that the underlying principles, which seek to protect the best interests of the child through providing appropriate and specialist services in an efficient and holistic manner, are paramount.

16:40

Ken Macintosh: This has been a remarkably consensual, good-humoured and informed debate. I do not know why I sound surprised, but perhaps Ms McLaughlin should not get used to this.

Although we have yet to complete stage 1 of the bill, a number of practical amendments have already been proposed by parents and voluntary sector organisations, many of whom have come together to share their experience and expertise. Some of those amendments have been adopted by the Government, in that the minister has agreed to lodge his own amendments at stage 2. The minister has agreed to ensure that parents have the right to request an assessment at any time. He has agreed to give tribunals the power to determine the timeframe within which an out-of-area placing request should begin. He has also agreed that all appeals on out-of-area placing requests for special schools should be heard by the tribunal.

On that last point—as on all those points—I believe that the minister is doing the right thing. However, as George Foulkes and Margaret Smith pointed out, the process is still inordinately complicated and potentially confusing. I hope that the minister is willing to follow the committee’s recommendation to look once more at the options before him with a view to making the process as simple and straightforward as possible, although I acknowledge that that will not be easy.

There are other amendments that the minister has not yet adopted, but which reflect the concerns of parents and which I hope the minister will still look to support. Several members have referred to the judgment of Lord Wheatley, who ruled that the ASL legislation applies only in an educational setting. As members have said, that does not entirely make sense, as the whole point of co-ordinated support plans is to co-ordinate the actions of otherwise potentially disparate agencies. I was pleased to hear that the minister is considering a further amendment—a fourth amendment, as it were—to clarify that issue. Nevertheless, I would welcome his comments on why the proposals that have been put forward by Govan Law Centre, which address that particular concern, would not necessarily work.

Although I am summing up the debate, I would like to introduce some new issues or issues that have been mentioned only in passing. The first of those is inter-authority payments, an issue that I am well aware of because of an on-going dispute between my local authority, East Renfrewshire Council, and Glasgow City Council. I raise the matter not to be parochial or self-indulgent, but because it has highlighted a clear weakness in the existing law. In particular, it has shown that the mechanism for resolving such disagreements does not work.

As committee members are aware, despite the bill that is before us today, the procedures, responsibilities and lines of accountability for pupils with additional support needs who are educated in another local authority remain complex. Home and host authorities are supposed to share the responsibility fairly, but that does not always happen in practice. A number of local authorities that responded to the consultation on the bill highlighted their concern and suggested that we may be making the picture even more confused. Some expressed concern that the proposals do not stipulate who should be responsible for the funding of additional support needs provision when an out-of-area placing request has been accepted, particularly given the fact that, under the bill’s proposals, home authorities will no longer be responsible for reviewing the CSP.

A few local authorities questioned whether the home or the host authority will be responsible for other costs for things such as clothing, housing and free school meals. My experience of funding is that, if we do not spell that out in the bill, some local authorities will hide behind the confusion. Under the record of needs legislation, it was clear that home authorities had to make a financial contribution to host authorities for the extra costs of meeting additional needs. On the day that that legislation was replaced, Glasgow City Council stopped all payments in support of its children with special needs who were educated in East Renfrewshire.

In evidence, the minister—and his officials before him—referred to section 23 of the Education (Scotland) Act 1980 as providing the way to resolve such matters. There have been several adjudications—Robert Brown referred to the 18 outstanding cases—and they have all been decided in favour of the host authority and have concluded that the home authority should make a contribution. Nonetheless, Glasgow City Council has ignored them. The decisions have also been upheld since then by the Court of Session, but still no inter-authority payments have been made. As several members pointed out, we should not be wasting resources on QCs, court battles and the process when those resources could be used to
support our children. This bill gives us an opportunity to resolve the situation once and for all.

The issue of transition has been raised in passing today. Many witnesses spoke to the committee about the importance of supporting young people at that point. It is deeply worrying that support often stops abruptly with the end of compulsory schooling. Many of us have heard families describing the child’s transition to adulthood—and the loss of support—as being like falling off a cliff. The committee recommended that the minister consider further whether a council’s failure to meet its duties on transition should be grounds for a referral to the tribunal. I would like to hear the minister’s comments on that point.

Helen Eadie referred to the excellent submission that was received from the NDCS. I, too, was struck by it. It pointed out that deafness is not, in itself, a learning disability and that there is no reason why, with appropriate support, deaf children should not achieve on a par with their hearing peers. However, it is clear from all the surveys that have been done that that is not happening. Research that was conducted by the Royal National Institute for Deaf People showed that only 63 per cent of deaf and hard-of-hearing people are employed, compared with 75 per cent of the population as a whole. That reflects the lower attainment and achievement rates of deaf pupils at school.

The available information about support for deaf children paints a problematic picture. The NDCS points out that in one local authority area alone, although there are more than 180 deaf children who are identified as receiving support from the authority, less than a fifth of them have a CSP or an individualised educational programme. Deaf children or children with hearing impairments are offered other forms of support, such as personal learning plans, additional support plans, individualised learning plans, individualised school plans and co-ordinated care plans, but none of those has any statutory bearing under the terms of the 2004 act.

We need to address the matter not only in terms of the statutory right to support, but in terms of how much information we have to plan and develop policy. The umbrella organisation for Scotland’s disabled children points out that, although there are approximately 70,000 disabled children and young people in Scotland—that is an estimate, as there are no national data to provide a definitive figure—recent Scottish Government data suggest that only 24,782 pupils are assessed or declared as having an impairment that gives rise to additional support needs. That figure does not even tally with the number of school-age children who are in receipt of disability living allowance, of whom there are 27,550; I should note that children who get that allowance are classed as having high or medium care needs, not low care needs. Further, more than 37,000 disabled children receive support because of an impairment or disability. In other words, the data that we have present us with a mixed picture. What is clear, however, is that some children who have support needs are not being identified and are therefore missing out.

FSDC suggests that the minister should commit to including in the bill a provision that will enable information on all children with additional support needs, particularly disabled children, to be gathered and published.

I want to make a couple of other points.

The Deputy Presiding Officer (Alasdair Morgan): You should wind up now.

Ken Macintosh: Okay.

I congratulate Anne McLaughlin on her maiden speech. She made a welcome contribution that illustrated how language can be a barrier to learning. I was particularly struck by the consensual tone of her speech. However, I should warn her that I could not tell whether Mr Doris, who was sitting right behind her, was grimacing or smiling. In any case, long may Anne McLaughlin continue in that vein.

Several members referred to the 2004 act. Like Mary Scanlon, I wonder whether, if we looked back at our speeches from that time, we would think that our arguments still apply. There are many difficulties to be overcome, but I do not think that it is just the optimist in me that says that things have moved on since 2004. There are intractable problems that will always be with us, and there will always be families with additional support needs but, as Robert Brown said, our legislation has made a difference. However, those families continue to need the support of Parliament.

16:50

Adam Ingram: I am pleased that we have had an opportunity to debate the Education (Additional Support for Learning) (Scotland) Bill. I thank the members who spoke in the debate, which was thoughtful and constructive, for bringing a degree of consensus to our deliberations. I am glad that there is widespread support for the proposals throughout the parties as I believe that that reflects the views of stakeholders.

As I said earlier, I am considering lodging amendments at stage 2 to enable all appeals in respect of placing requests for special schools to be heard by tribunals, to ensure that parents have a right to request an assessment of their child’s
needs at any time, and to enable tribunals to specify when a placing request should start. I said that I want to address by way of a stage 2 amendment the issue that was raised by Lord Wheatley’s opinion, and I am also considering amending the Additional Support for Learning (Publication of Information) (Scotland) Regulations 2005 to place authorities under a duty to publish information on procedures for the resolution of disputes.

There have of course been some minor disagreements, and some points of detail have been raised for us to consider further at stage 2. Time is short, but I will address one or two of the more important points now. No doubt we will have further discussions about them at stage 2, and I look forward to a healthy debate at that time. I continue to be willing to listen to any constructive arguments that will help us to improve the bill as it proceeds through its parliamentary stages.

Karen Whitefield rightly pointed out Govan Law Centre’s view that we must make the law as simple and understandable as possible. In particular, it has been said that the system for out-of-area placing request appeals is complex. We will address that in the code of practice, which will make the process clearer and leave parents and authorities in no doubt about the action that should be taken. In addition, I am reasonably certain that the tribunal’s jurisdiction on placing requests is now the right one, including all parents of children who have CSPs and being extended to include all appeals of decisions to turn down requests for placements at special schools.

Ken Macintosh and Elizabeth Smith emphasised the importance of getting the definitions right, including the definitions of “significant” and “complex”. Lord Nimmo Smith produced a useful definition in the Court of Session of the areas that we need to focus on. I intend to introduce our proposals on that issue at stage 2, but it is important to remember that education authorities are required to have regard to the code of practice and that both the tribunals and the Court of Session refer to the code. I therefore propose to the Education, Lifelong Learning and Culture Committee that we put the definitions into the code rather than the primary legislation, but we can discuss that further at stage 2.

Margaret Smith: The tribunal president said that it would be useful for tribunals to be able to monitor and consider enforcing decisions that they have taken. I am sure that we all know parents who have had their cases decided by tribunals, and the situation can be stressful and very involved, especially if they get a decision in their favour but the council does not act on it. Does the minister believe that there is scope for what the tribunal president proposed?

Adam Ingram: No. Going back to the tribunal would introduce an unnecessary layer of bureaucracy. I am talking to the tribunal president about how, when she issues decision letters, she can make it clear to parents that they have direct recourse to the Scottish ministers in the form of a section 70 complaint and how they can take up that option.

A number of members made plain their views on the role of local authorities as gatekeepers to the budgets. I make it absolutely clear that cost is not an excuse: the needs of the child are the primary consideration and local authorities have received a record level of funding under the Scottish Government.

Helen Eadie and George Foulkes referred to COSLA. As I understand it, and to be fair to that body, it was referring in its e-mail to the provision of a universal advocacy service for all parents of children who have additional support needs, which is currently unaffordable—as I said to the committee. We are committed to representative advocacy at tribunals.

Ken Macintosh: I have not had a chance to see the whole of COSLA’s submission, but from my brief glance at it I gathered that it suggests that amendments be directed at the code of practice, which says everything that needs to be said about the importance of the code compared with that of the legislation.

Adam Ingram: A number of issues remain to be debated at stage 2. I will be happy to consider all amendments that are lodged and all arguments that are made.

During his speech, Ken Macintosh said that the proportion of children who receive support has increased from 5.1 to 5.6 per cent. That is a considerable underestimate: more children receive additional support than those statistics indicate. The figures relate only to children who have individualised education programmes or CSPs, but many more children receive assistance below that level.

There is an issue about the gathering of accurate statistics. The Scottish Government is in discussion with education authorities on the development of proposals for the collation of more robust statistics at national level through ScotXed—I could go on about that, but I will not.

Liz Smith asked about access to advocacy. We will aim to ensure that parents have access to advocacy at tribunals and that parental awareness is increased. We charged Govan Law Centre with coming up with proposals on building capacity for advocacy throughout the country. The centre reported recently, but I have not had time to study its proposals, which will be brought to the committee for its consideration. We have also
provided extra funding to ISEA Scotland to take it up to the end of the financial year.

The Presiding Officer (Alex Fergusson): I must ask you to close, minister.

Adam Ingram: Oh, right. I hoped to cover many more points, but we will return to the issues at stages 2 and 3.

The Scottish Government is committed to improving the lives of children who have additional support needs. I ask members to support the motion.
Business Motion: Bruce Crawford, on behalf of the Parliamentary Bureau, moved S3M-3668—That the Parliament agrees that consideration of the Education (Additional Support for Learning) (Scotland) Bill at Stage 2 be completed by 3 April 2009.

The motion was agreed to.
Education, Lifelong Learning and Culture Committee
Scottish Parliament
Edinburgh EH99 1SP

17 March 2009

Education (Additional Support for Learning) (Scotland) Bill

As you may recall, during the Stage 1 debate on the Education (Additional Support for Learning) (Scotland) Bill on 4 March 2009, I gave a commitment to write to the Education, Lifelong Learning and Culture Committee to provide an update on the work of the Co-ordinated Support Plan Short Term Working Group (the Group).

The Group was formed to advise the Scottish Government on co-ordinated support plan (CSP) matters and help facilitate the development of any further CSP guidance or training. I have attached a list of the Group’s members at Annex A for your information. The remit of the Group includes:

- applying the legal criteria to determine whether co-ordinated support plans (CSPs) are required including, in particular, improving the advice provided in the Code of Practice on the meaning of ‘Significant additional support’;
- linking with Getting it Right for Every Child including the Integrated Assessment Framework and any other relevant planning documents/approaches; and
- dealing with any other matters relating to guidance on co-ordinated support plans identified by the group especially those covered by Chapter 4 of the supporting children’s learning code of practice (code of practice).

To date, the Group has met on three occasions (19 January 2009; 19 February 2009; and 5 March 2009) and the definition of ‘significant’ has been explored during every meeting. In order to assist the Group, Jessica Burns, President of the Additional Support Needs Tribunals for Scotland, and David Watt from HMIE kindly attended the third meeting to share their experiences in relation to CSPs. It is expected that the Group will meet approximately 4 times in total.
The Group’s last meeting is scheduled for 26 March 2009. The aim of the fourth meeting is to discuss CSP training and indentify any further training needs. It is proposed that Learning and Teaching Scotland will take forward the findings of this meeting as part of its work plan for 2009-2010.

All of the members of the Group are in agreement that the revised code of practice is the most appropriate place to provide further guidance on the definition of ‘significant’ and the Group is in the process of producing draft guidance on which we will consult before including it in the revised code of practice. I appreciate that the Committee has reserved its position on whether the most appropriate place to clarify the definition of ‘significant’ is in the code of practice or on the face of the Bill. However, I trust that the draft guidance attached at Annex B demonstrates clearly that the best place to clarify the definition of the term ‘significant’ is in the revised code.

It is the intention to include an Annex in the code practice that provides exemplars on the test for ‘significant’ additional support. The test relates to the frequency, nature, intensity and duration of support from external agencies, such as health or social work, and whether that support is necessary to enable educational objectives to be met. It is anticipated that the exemplars will help authorities in deciding on whether the additional support provided by an external agency is ‘significant’. Annex C illustrates what that guidance may look like although I should stress here that this is very much work in progress and it is likely that in the revised code we shall provide more detail on the illustrative cases studies.

I think it might be useful if I say a few words about the status of the code of practice. Education authorities and appropriate agencies, such as NHS Boards and social work services, are under a duty to have regard to the code of practice when carrying out their functions under the 2004 Act. The code of practice is designed to help them make effective decisions but it is not prescriptive about what is required in individual circumstances. However, education authorities and appropriate agencies must ensure that their policies, practices and information and advice services take full account of the legal requirements of the 2004 Act. Under the Act, an Additional Support Needs Tribunal is required to consider an authority’s actions in line with the guidance in the code of practice published by Scottish Ministers.

Similarly, in relevant circumstances courts will have regard to the code. While the original code of practice did not offer definitive interpretations of the legislation, since this is ultimately a matter for the courts, the revised code of practice will reflect the courts' interpretation of the 2004 Act and provide further guidance where necessary.

I trust that you find the revised guidance at Annexes B and C helpful in further clarifying the term ‘significant’ and agree that the revised code practice is the most appropriate place to include this guidance.

ADAM INGRAM
Membership of the CSP Short Term Working Group

Scottish Government:

Seth Chanas, Support for Learning, Scottish Government

Donald Ewing, Allied Health Professions and Education Working in Partnership Project

Mike Gibson, Head of Support for Learning, Scottish Government

Susan Gilroy, Support for Learning, Scottish Government

Robin McKendrick, Support for Learning, Scottish Government

Nicola Robinson, Allied Health Professions and Education Working in Partnership Project

Working Group Members:

Alan Cowieson, Quality Improvement Officer, North Ayrshire Council

Susan Gow, Head of Education Services, East Renfrewshire Council

Liz Herd, Inclusion & Equality Officer, Education & Children's Services, East Lothian Council

Helen Hunter, Integration and Inclusion Manager (Acting), Glasgow City Council

Jane Mallinson, Service Manager, Allied Health Professionals

Janice Masterton, Quality Improvement Officer (ASN), Clackmannanshire Council

Michael McKean, Additional Support For Learning Manager (Stewartry), Dumfries & Galloway Council
Ann Marie Shields, Service Manager, Community Health and Care Partnership, East Renfrewshire Council

Maggie Smith, Inclusive Education Development Officer, Learning Teaching Scotland
ANNEX B: DRAFT ADVICE ON THE INTERPRETATION OF THE TERM 'SIGNIFICANT' AS IT APPLIES IN THE TERM 'SIGNIFICANT ADDITIONAL SUPPORT'

The code of practice

1. The code of practice outlines what is meant by the term 'significant additional support', one of the criteria for fulfilling the requirements for a co-ordinated support plan. The code currently states: 'The use of the term "significant" signals that the scale of the support, whether it is in terms of approaches to learning and teaching (e.g. adaptation or elaboration of the curriculum) or personnel or resources, or a combination of these, stands out from the continuum of possible additional support. Judgements about significance have to be made taking account of the frequency, nature and intensity of the support, and the extent to which that support is necessary for the achievement of the educational objectives which will be included in the plan. Full-time placement in a special school or unit would count as significant additional support, as would provision of personnel full-time to support a child or young person in a mainstream school, and provision of specialist aids to communication.' Code of Practice, Chapter 4, para 16

The interpretation of 'significant'

2. Under the terms of the 2004 Act to require a co-ordinated support plan, a child must have additional support needs that meet the requirements listed in Section 2 (1) of the Act, one of which must be that he/she requires significant additional support to be provided by the education authority and at least one appropriate agency from out with education.

3. As the Inner House of the Court of Session demonstrated in July 2007 in the case of JT, the definition of the term "significant" is intended to be found in the extent of the provision provided by the education authority. In that context the Inner House stated that the word significant has shades of meaning from "not insignificant" at one end of the spectrum to "important" or "notable" at the other, but that the use of word was intended to add emphasis to the provision which it would lack if the word was omitted. In the JT case the court construed significant as importing more than "not insignificant".

4. It, therefore, follows that when deciding whether the additional support being provided is "significant", the education authority will need as a first step to determine whether any support provided can be regarded as 'additional support'. Now 'additional support' is defined as provision which is additional to, or different from, that normally provided by the education authority. For example, speech and language therapy (SLT) is not generally available, so any provision of SLT is likely to be defined as "additional support" if a child needs it to benefit from education. When deciding whether SLT support is significant it will be necessary to compare the level of SLT provision with SLT provision made generally for children with additional support needs in schools.

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1 That is, from an appropriate agency, such as NHS Board or from the education authority exercising functions outwith education (eg social work)
5. In line with the Inner House decision, the key to deciding whether that additional support is significant and the requirements for having a co-ordinated support plan are fulfilled, would then involve the education authority considering what the external agency is providing in terms of the **scale of support: its frequency, nature, intensity and duration** along with the extent to which that provision is necessary for the child to achieve his/her educational objectives and, of course, whether the other criteria for requiring a co-ordinated support plan are fulfilled.

6. In the above mentioned Inner House case the duration of the support was particularly relevant. Although the level of SLT was high, it was required for a short period. The court reasoned that there was no point preparing a plan for the co-ordination of services which were unlikely to require co-ordination by the time the plan was prepared.

7. It is important to recognise that the final decision as to whether the additional support is significant, in terms of meeting one of the tests for a co-ordinated support plan, is one for the education authority to take. Also, there will be circumstances where there are several service providers from outwith the education authority and where, individually, each may not meet the test for being 'significant' but where taken together they trigger the test for 'significant additional support' and, therefore, require to be co-ordinated.

Scottish Government
March 2009
ANNEX C Test for ‘significant’ - assume other tests for co-ordinated support plan are satisfied
Table focuses on input from other appropriate agencies and/or support from the home LA outwith education.

<table>
<thead>
<tr>
<th>External Agency</th>
<th>Frequency (How often)</th>
<th>Nature (Type of personnel Learning and Teaching L&amp;T approaches)</th>
<th>Intensity (Degree of individualisation/differentiation resources)</th>
<th>Duration (how long for)</th>
<th>Test (If the support is necessary to enable educational objectives to be achieved co-ordination and CSP is required - in the comments here)</th>
<th>CSP?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Speech and language therapy</td>
<td>Direct therapy 1 a week in a 6 week block-spaced 6 weeks and then repeated. Cycle occurs 4x/year</td>
<td>L&amp;T approaches informed by speech and language therapy Joint planning and monitoring</td>
<td>High 1-1</td>
<td>Extends a year or more but not necessarily continuously</td>
<td>In this case support needed to secure educational objectives.</td>
<td>Yes</td>
</tr>
<tr>
<td>Speech and language therapy</td>
<td>Direct speech and language therapy weekly in mainstream school Plus support weekly from</td>
<td>L&amp;T approaches informed by speech and language therapy Joint planning and monitoring</td>
<td>1:1 weekly Class and group weekly</td>
<td>Extends a year or more but not necessarily continuously</td>
<td>Support from speech and language therapy needed by the pupil and classroom staff to enable educational objectives to be achieved</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>Speech and language therapy</strong></td>
<td><strong>Direct speech and language therapy monthly in mainstream school plus monthly visits from speech and language therapy assistant</strong></td>
<td><strong>L&amp;T approaches informed by speech and language therapy</strong></td>
<td><strong>1:1 monthly</strong></td>
<td><strong>Extends a year or more but not necessarily continuously</strong></td>
<td><strong>Support from speech and language therapy needed by the pupil and classroom staff to enable educational objectives to be achieved</strong></td>
<td>Yes</td>
</tr>
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</tr>
<tr>
<td><strong>Speech and language therapy</strong></td>
<td><strong>Assessment plus advice to parents and teacher with review a year later</strong></td>
<td><strong>Speech and language therapy advice to school and parent</strong></td>
<td><strong>No further involvement prior to review</strong></td>
<td><strong>Brief</strong></td>
<td><strong>Support not needed to secure educational objectives</strong></td>
<td>No</td>
</tr>
<tr>
<td><strong>Social work in special school</strong></td>
<td><strong>Direct counselling 1 a month. Anger management course for 10 weeks</strong></td>
<td><strong>Counselling and anger management. Contribution to Health and Wellbeing objectives</strong></td>
<td><strong>High 1-1 counselling Anger management in small group</strong></td>
<td><strong>Extends more than a year</strong></td>
<td><strong>In this case support needed to secure educational objectives</strong></td>
<td>Yes</td>
</tr>
<tr>
<td>CAMHS&lt;sup&gt;1&lt;/sup&gt; Social work</td>
<td>Quarterly meetings with psychiatrist</td>
<td>Support re self esteem issues and monitoring for possible ASD</td>
<td>Medium - advice provided to parent which is shared with school</td>
<td>Decision for continuation made at each meeting</td>
<td>Support not needed to secure educational objectives</td>
<td>No</td>
</tr>
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</tr>
<tr>
<td>Speech and language therapy</td>
<td>Provision of befriender Weekly 2 hour meeting</td>
<td>Advice to school following assessment Advice provided</td>
<td>Low</td>
<td>No further input Brief but will be reviewed at annual review</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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<sup>1</sup> Child and Adolescent Mental Health Services
The Bill will be considered in the following order—

Sections 1 to 10  Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

**Section 1**

**Ken Macintosh**

17  In section 1, page 1, line 21, after *practicable* insert *(and in no case later than 90 days)*

**Ken Macintosh**

18  In section 1, page 1, line 23, at end insert—

<(  ) In section 12 (duties to seek and take account of views, advice and information), after subsection (3) insert—

“(3A) Where any such co-ordinated support plan as is mentioned in section 10(1) is transferred to the education authority by virtue of regulations made in pursuance of section 11(8), the authority’s duty under subsection (2)(a) includes a duty to seek and take account of information and advice (within such period as will enable the authority to comply with their duty under section 10(5A)) from the education authority from which the plan was transferred and any agencies or persons involved in providing support under the plan prior to its transfer.”>.

**Mr Adam Ingram**

1*  In section 1, page 1, line 24, at end insert—

<(  ) after paragraph (d) of subsection (3) insert—

“(da) a decision of an education authority refusing a placing request made in respect of a child or young person (including such a decision in respect of a child or young person for whose school education the authority refusing the request are not responsible)—

(i) made under sub-paragraph (1) of paragraph 2 of schedule 2 in relation to a special school, or

(ii) made under sub-paragraph (2) of paragraph 2 of schedule 2 in relation to a school mentioned in paragraph (a) or (b) of that sub-paragraph,”>.
Mr Adam Ingram
2 In section 1, page 1, line 26, at end insert—

<(  ) after “request” insert “, other than a placing request mentioned in paragraph (da),”>

Mr Adam Ingram
3 In section 1, page 2, line 17, at end insert—

<(  ) in subsection (7), for “(3)(e)” substitute “(3)(da) or (e)”>

Mr Adam Ingram
4 In section 1, page 2, line 18, at end insert—

<(  ) after subsection (4) insert—

“(4A) Where the reference relates to a decision referred to in subsection (3)(da) of that section the Tribunal may—

(a) confirm the decision if satisfied that—

(i) one or more grounds of refusal specified in paragraph 3(1) or (3) of schedule 2 exists or exist, and

(ii) in all the circumstances it is appropriate to do so,

(b) overturn the decision and require the education authority to—

(i) place the child or young person in the school specified in the placing request to which the decision related by such time as the Tribunal may require, and

(ii) make such amendments to any co-ordinated support plan prepared for the child or young person as the Tribunal considers appropriate by such time as the Tribunal may require.”,

Mr Adam Ingram
5 In section 1, page 2, line 19, at end insert—

<(  ) in paragraph (b), at the end of sub-paragraph (i) insert “by such time as the Tribunal may require”>

Mr Adam Ingram
6 In section 1, page 4, line 15, at end insert—

<(  ) after sub-paragraph (11), add—

“(12) Any references to an appeal under this paragraph (however expressed), except such references in sub-paragraphs (3)(a) and (b) and (5), include references to an appeal relating to a decision which has been referred back under section 19(5)(f) or (g).”>
After section 5

Mr Adam Ingram

7 After section 5, insert—

<Additional support needs

Additional support

In section 1(3)(a) of the 2004 Act (additional support needs), after “provision”, where it occurs for the first time, insert “(whether or not educational provision)”>.

Margaret Smith

7A As an amendment to amendment 7, line 4, leave out <1(3)(a) of the 2004 Act (additional support needs)> and insert <(1(3) of the 2004 Act (additional support needs)—

( ) in paragraph (a),>.

Margaret Smith

7B As an amendment to amendment 7, line 5, at end insert—

<( ) in paragraph (b), for “educational provision” substitute “provision (whether or not educational provision)”>.

Mr Adam Ingram

8 After section 5, insert—

<Assessments and examination

After section 8 of the 2004 Act insert—

“8A Assessments and examinations: further provision

(1) A person specified in subsection (3) may request that the education authority arrange for a child or young person to whom section 4(1)(a) applies to undergo, for the purpose of considering the additional support needs of the child or young person, a process of assessment or examination.

(2) The education authority must comply with the request unless it is unreasonable.

(3) The persons referred to in subsection (1) are—

(a) where the request relates to a child, the child’s parent,

(b) where the request relates to a young person, the young person or, where the authority are satisfied the young person lacks capacity to make the request, the young person’s parent.

(4) The education authority must, in accordance with the arrangements made by them under section 4(1)(b), take into account the results of any assessment or examination undertaken by virtue of this section.

(5) A process of assessment or examination undertaken by virtue of this section is to be carried out by such person as the education authority consider appropriate.

3
(6) In this section the reference to assessment or examination includes educational, psychological or medical assessment or examination.”.

Ken Macintosh
23 After section 5, insert—

<Assessment requests

In section 8 of the 2004 Act (assessments and examinations), for subsections (1) and (2) substitute—

“(1) A person specified in subsection (2) may request that the education authority arrange for a child or young person specified in subsection (2A) to undergo, for a purpose mentioned in subsection (2B), a process of assessment or examination (such a request being referred to in this section as an “assessment request”).

(1A) The education authority must comply with the request unless it is unreasonable.

(2) The persons referred to in subsection (1) are—

(a) where the request relates to a child, the child’s parent,
(b) where the request relates to a young person, the young person or, where the authority are satisfied that the young person lacks capacity to make the request, the young person’s parent.

(2A) The children or young persons referred to in subsection (1) are children or young persons—

(a) for whose school education the authority are responsible, or
(b) belonging to the area of the authority but for whose school education an authority is not responsible.

(2B) The purposes referred to in subsection (1) are—

(a) identifying whether the child or young person has additional support needs,
(b) identifying whether a child or young person with additional support needs requires a co-ordinated support plan,
(c) considering the additional support needs of a child or young person,
(d) reviewing a co-ordinated support plan under section 10.

(2C) Where both subsections (2A)(a) and (2B)(c) apply, the education authority must, in accordance with the arrangements made by them under section 4(1)(b), take into account the results of any assessment or examination undertaken by virtue of this section.”.

Margaret Smith
Supported by: Ken Macintosh

14 After section 5, insert—

<Additional support needs etc.: specified children and young people

(1) In section 1 (additional support needs) of the 2004 Act, after subsection (1) insert—
“(1A) Without prejudice to the generality of subsection (1), a child or young person has additional support needs if the child or young person is looked after and accommodated by a local authority under section 26 of the Children (Scotland) Act 1995 (c.36).”.

(2) In section 6 (children and young persons for whom education authority are responsible) after subsection (1) insert—

“(1A) Without prejudice to the generality of subsection (1) every education authority must in particular consider whether each child or young person falling within section 1(1A) for whose school education they are responsible requires a co-ordinated support plan.”.

Ken Macintosh

14A As an amendment to amendment 14, line 7, at end insert—

<( ) is a carer (within the meaning of section 12AA of the Social Work (Scotland) Act 1968 (c.49) or section 24 of the Children (Scotland) Act 1995 (c.36))>

Ken Macintosh

14B As an amendment to amendment 14, line 7, at end insert—

<( ) has a mental disorder (within the meaning of section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13))>

Ken Macintosh

14C As an amendment to amendment 14, line 7, at end insert—

<( ) is deaf or partially deaf>

Ken Macintosh

14D As an amendment to amendment 14, line 7, at end insert—

<( ) is blind or partially sighted>

Ken Macintosh

14E As an amendment to amendment 14, line 7, at end insert—

<( ) is (any or all) deaf, partially deaf, blind or partially sighted>

Ken Macintosh

14F As an amendment to amendment 14, line 7, at end insert—

<( ) has a disability within the meaning of the Disability Discrimination Act 1995 (c.50)>

Ken Macintosh

13 After section 5, insert—
<Co-ordinated support plans>

**Co-ordinated support plans**

In section 2(1)(d) (persons by whom additional support provided) of the 2004 Act, the word “significant” is repealed.

Ken Macintosh

26* After section 5, insert—

<Pre-school children>

**Functions of education authority in relation to certain pre-school children with additional support needs**

In section 5 of the 2004 Act (general functions of education authority in relation to additional support needs)—

(a) in subsection (2), the words “, subject to subsection (3),” are repealed, and
(b) subsection (3) is repealed.

Claire Baker

15 After section 5, insert—

<Supporters and advocacy>

**Supporters and advocacy**

In section 14 (supporters and advocacy) of the 2004 Act—

(a) in subsection (1)—

(i) the word “or” immediately following paragraph (a) is repealed,
(ii) after paragraph (b) insert—

“(c) the authority to secure the provision of a supporter or an advocate on the relevant person’s behalf,”,

(b) subsection (3) is repealed.

Kenneth Gibson

21 After section 5, insert—

<Mediation services>

**Mediation services**

In section 15(2) (independence of mediation services) of the 2004 Act, for the words “under this Act (apart from this section)” substitute “relating to education or any of their other functions”.

Kenneth Gibson

22 After section 5, insert—
Dispute resolution

In section 16(2) (dispute resolution) of the 2004 Act, before paragraph (a), insert—

“(za) requiring any application by a person mentioned in subsection (1)(a) to (c) for referral to dispute resolution to be made, in the first instance, to the Scottish Ministers,”.

Elizabeth Smith

10 After section 5, insert—

Publication of information by education authority

Provision of published information to certain persons

In section 26 of the 2004 Act—

(a) in subsection (1)—

(i) the word “and” immediately following paragraph (b) is omitted, and

(ii) after paragraph (c), insert “and,

(d) provide the persons mentioned in subsection (2A) with any information published under paragraph (a) or (c).”,

(b) after subsection (2), insert—

“(2A) The persons referred to in subsection (1)(d) are—

(a) in the case of a child with additional support needs, the child’s parent,

(b) in the case of a young person with additional support needs—

(i) the young person, or

(ii) if the authority are satisfied that the young person lacks capacity to understand the information or advice, the young person’s parent.”.

Margaret Smith

19 After section 5, insert—

Publication of information by education authority

Availability of published information

In section 26(1) of the 2004 Act (publication of information by education authority), after paragraph (a) insert—

“(aa) ensure that the published information is available—

(i) on request, from each place in the authority’s area where school education is provided,

(ii) in any handbook or other publications provided by any school in the authority’s area or by the authority for the purposes of providing general information about the school or, as the case may be, the services provided by the authority, and
(ii) on any website maintained by any such school or the authority for that purpose (whether or not the website is also maintained for any other reason).”.

Elizabeth Smith

11* After section 5, insert—

Publication of information on dispute resolution

In section 26(2) of the 2004 Act (publication of information by education authority), after paragraph (e) insert—

“(ea) any dispute resolution procedures established by the authority in pursuance of section 16,”.

Margaret Smith

20 After section 5, insert—

Publication of information on other sources of advice

In section 26 of the 2004 Act (publication of information by education authority)—

(a) in subsection (2)—

(i) the word “and” immediately following paragraph (e) is repealed, and

(ii) after paragraph (f) insert “and

(g) other specified persons or bodies from whom—

(i) parents of children having additional support needs, and

(ii) young persons having such needs,

can obtain advice and further information about provision for such needs.”, and

(b) after subsection (3) insert—

“(4) In subsection (2)(g), “specified” means specified for the purposes of that subsection in an order made by the Scottish Ministers.”.

Margaret Smith

24 After section 5, insert—

Annual statistical report

In section 26 of the 2004 Act (publication of information by education authority) after subsection (3) insert—

“(4) Every education authority must publish annually a report setting out (by school and year group)—

(a) the number of children and young persons for whose school education the authority are responsible having additional support needs, and
the principal grounds on which such children and young persons have been identified as having additional support needs.

(5) Subsection (3)(b) applies to a report published under subsection (4) as it applies to information published under subsection (1).”.

Margaret Smith

25 After section 5, insert—

Publication of information by education authority: consultation etc.

(1) After section 26 of the 2004 Act (publication of information by education authority), insert—

“26A Consultation on policy in relation to provision for additional support needs etc.

(1) Before publishing information under section 26(1), every education authority must comply with the duties described in subsections (2) and (3).

(2) The first duty is a duty to consult at least once every three years (beginning with the commencement of this section) the persons specified in subsection (4) about the matters specified in section 26(2).

(3) The second duty is a duty to have regard to any guidance issued by the Scottish Ministers about—

(a) the content of information published under section 26(1),
(b) the way in which such information is to be published, and
(c) the persons to be consulted by virtue of subsection (2).

(4) Those persons are—

(a) (in so far as the education authority considers them to be of a suitable age and maturity), such children and young persons for whose school education the authority is responsible,
(b) such parents of such children and young persons, and
(c) such other persons,
as the authority considers appropriate.

(5) Consultation on the matter specified in section 26(2)(a) must in particular seek the views of the persons specified in subsection (4) about any general policies or practices applied (or proposed to be applied) by the authority in complying with their duty under section 4(1)(a) (for example, policies as to what constitutes adequate and efficient provision for children or young persons with a particular type of additional support need).

(6) A consultation under subsection (2) is to be carried out on the authority’s behalf by a person who is not employed by the authority (whether in the exercise of their functions relating to education or any of their other functions).

(7) A report of the consultation carried out under subsection (2) is to be published in such manner as the authority considers appropriate and a copy sent to Her Majesty’s Inspectors.”.
(2) In section 29(2) of the 2004 Act (interpretation) after ““Health Boards”,” insert—
““Her Majesty’s Inspectors”,”.

Margaret Smith
Supported by: Ken Macintosh

16 After section 5, insert—

<Definition of “young person”

In section 29 (interpretation)—

(a) in subsection (1), after the definition of “Tribunal” insert—

““young person” means a person over school age who is still in school education.”,

(b) in subsection (2), the words “young person” are repealed.>

Before section 6

Elizabeth Smith

12* Before section 6, insert—

<References to Tribunal in relation to duties under section 12(6) and 13

(1) In section 18 of the 2004 Act—

(a) in the title, omit “in relation to co-ordinated support plan”, and

(b) in subsection (3), after paragraph (f) (as inserted by section 1(6)(b) of this Act), insert—

“(g) failure by the education authority to comply with their duties under section 12(6) and 13 in respect of the child or young person (except where consent for information to be provided under section 13(2)(a) or (4) has not been given under section 13(5)) .”.

(2) In section 19(3) of the 2004 Act, for “or (d)(ii) or (iii)”, substitute “, (d)(ii) or (iii) or (g)”.>

After section 7

Ken Macintosh

27 After section 7, insert—

<Power to monitor implementation of Tribunal decisions

In schedule 1 of the 2004 Act (Additional Support Needs Tribunals for Scotland) after paragraph 11, insert—

“Power to monitor implementation of Tribunal decisions

11A The President may, in any case where a decision of a Tribunal required an education authority to do anything, keep under review the authority’s compliance with the decision and, in particular, may—
(a) require the authority to provide information about the authority’s implementation of the Tribunal decision,
(b) where the President is not satisfied that the authority is complying with the decision, refer the matter to the Scottish Ministers.”.

**After section 7**

Ken Macintosh

28 After section 7, insert—

<Recovery of costs>

Provision by education authority for education of pupils belonging to areas of other authorities: recovery of costs where pupil has additional support needs

After section 27 of the 2004 Act insert—

“Recovery of costs

“27A Provision by education authority for education of pupils belonging to areas of other authorities: recovery of costs where pupil has additional support needs

Where the responsible education authority make a claim to recover reasonable costs for the education of pupils belonging to areas of other authorities, where the child or young person has additional support needs and in respect of those additional needs, that other education authority must make payment.”.

**Long Title**

Mr Adam Ingram

9 In the long title, page 1, line 3, after <education;> insert <to make minor provision in relation to additional support needs;>
1st Groupings of Amendments for Stage 2

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. In this case, the information provided consists solely of the list of groupings (that is, the order in which amendments will be debated). The text of amendments set out in the order in which they will be debated is not attached on this occasion as (with the exception of amendment 9 which is the last amendment on the Marshalled List) the debating order is the same as the order in which the amendments appear in the Marshalled List.

Groupings of amendments

**Coordinated support plans: transfer and review**
17, 18

**Placing requests**
1, 2, 3, 4

**Power of Tribunal to specify commencement of placing requests**
5

**Transferring references between the Tribunal and Sheriff**
6

**Additional support needs: whether or not educational provision**
7, 7A, 7B, 9

**Assessment and examination: further provision**
8, 23

**Additional support needs: specified children and young people**
14, 14A, 14B, 14C, 14D, 14E, 14F

**Coordinated support plans: issue of “significant”**
13

**Pre-school children: role of health boards**
26

**Supporters and advocacy: local authority provision**
15

**Mediation services: independence from local authorities**
21

**Dispute resolution: referral to Scottish Ministers**
22
Publication of information: availability
10, 19

Publication of information: content
11, 20, 24

Local authorities consultation on policy for additional support needs provision
25

Definition of ‘young person’
16

Reference to Tribunal: post-school transition
12

Implementation of Tribunal decisions: power to monitor
27

Recovery of costs: host authority obligation to pay
28
EDUCATION, LIFELONG LEARNING AND CULTURE COMMITTEE

EXTRACT FROM THE MINUTES

10th Meeting, 2009 (Session 3)

Wednesday 25 March 2009

Present:

Claire Baker      Aileen Campbell
Kenneth Gibson (Deputy Convener)  Ken Macintosh
Christina McKelvie     Elizabeth Smith
Margaret Smith     Karen Whitefield (Convener)

Also present: Adam Ingram (Minister for Children and Early Years).

Education (Additional Support for Learning) (Scotland) Bill: The Committee considered the Bill at Stage 2 (Day 1).

The following amendments were agreed to (without division): 1, 2, 3, 4, 5, 6 and 7.

Amendment 18 was agreed to (by division: For 5, Against 3, Abstentions 0).

Amendments 17 and 7A were moved and, with the agreement of the Committee, withdrawn.

Amendment 7B was not moved.

Sections 2, 3, 4 and 5 were agreed to without amendment.

Section 1 was agreed to as amended.

The Committee ended consideration of the Bill for the day amendment 7 having been disposed of.
Scottish Parliament

Education, Lifelong Learning and Culture Committee

Wednesday 25 March 2009

[THE CONVENER opened the meeting at 10:02]

Education (Additional Support for Learning) (Scotland) Bill: Stage 2

The Convener (Karen Whitefield): I open the 10th meeting of the Education, Lifelong Learning and Culture Committee and remind everyone present that BlackBerrys and mobile phones should be switched off for the duration of the meeting.

The first and only item on the agenda is the committee’s consideration of the Education (Additional Support for Learning) (Scotland) Bill at stage 2. Members should have in front of them a copy of the bill, the marshalled list and the groupings. I welcome to the meeting Adam Ingram, the Minister for Children and Early Years.

Section 1—Placing requests

The Convener: Amendment 17, in the name of Ken Macintosh, is grouped with amendment 18. I invite Mr Macintosh to move amendment 17 and speak to amendment 18.

Ken Macintosh (Eastwood) (Lab): These amendments are designed to ensure that, when a child with a co-ordinated support plan transfers to another authority, the new host authority reviews that CSP in a timely and appropriate manner. It is already the case under the bill that a plan should be reviewed as soon as practicable, but amendment 17 would set an absolute time limit of 90 days. Amendment 18 would place a duty on the host authority to consult those in the home authority who were involved in drawing up the initial CSP.

The amendments have been suggested by Independent Special Education Advice (Scotland) and, as with other suggestions from that organisation, are informed by its experience.

The bill currently addresses the problem of delays in reviewing CSPs when children transfer from one authority to another by stating that a CSP should be assessed “as soon as practicable after the date of transfer.”

In ISEA’s experience, that has proved problematic. It states:

“For example, in one case we have a family that has moved from one of the islands to a mainland town. The co-ordinated support plan was completed to the parent’s satisfaction. The receiving authority is presently reviewing it, but in the interim the authority is not providing the child with the support currently provided therein. The authority has refused our suggestion to contact the professionals who have worked with the child to expedite matters. The time delay is resulting in the child not receiving the support required.”

ISEA therefore suggests that the phrase, “as soon as practicable” remain unchanged but that an extra timescale, or backstop, be added.

In addition, for the reasons described in the example that I gave, a further amendment should be included placing a duty on the receiving authority to consult, as far as practicable, the transferring authority and the professionals previously involved with the preparation of the co-ordinated support plan to ensure that the review is completed within the legislative timescale.

I move amendment 17.

The Convener: I invite other members to indicate whether they wish to say anything.

As no other member wishes to speak, I invite the minister to respond.

The Minister for Children and Early Years (Adam Ingram): The bill provides that, following a successful out-of-area placing request, the new host authority is required to carry out a review of any co-ordinated support plan as soon as practicable after the date of transfer of the CSP from the home authority to the host authority. As Mr Macintosh said, amendment 17 seeks to set a long-stop date for reviewing any CSP at no later than 90 days after the date of transfer.

Although I completely agree with Ken Macintosh that a timescale is required for such a review, I consider that the most appropriate place for such a timescale is the co-ordinated support plans regulations rather than the bill. Those regulations currently prescribe all the time limits and exceptions to such limits for the preparation and review of a CSP, arrangements for keeping the plan, arrangements regarding the transfer of a plan to another authority following a change of residential address, and arrangements for the discontinuance, retention and destruction of a CSP.

As a result, and with a view to keeping all the relevant time limits in the one place, I am sure that the committee will agree that the CSP regulations are the most appropriate place to set a long-stop date by which the review of a CSP must be completed. I take the opportunity to assure Ken Macintosh that the CSP regulations will be amended in due course.
It is proposed that, following a successful out-of-area placing request, when a child or young person has a CSP, the CSP should be transferred to the new host authority. The timescale for the transfer of the CSP from the home authority to the host authority will be four weeks from the date when the child starts at the new school or, if the child has already started school in the new host authority, four weeks from the date on which the home authority becomes aware of the change. On receipt of the CSP, the new authority must treat the plan as if it had been prepared by the new authority.

It is proposed that the CSP regulations will provide that, when a child or young person moves from a school in one authority area to a school in another authority area as a result of a successful out-of-area placing request, the CSP must be transferred. It is also proposed that, on receipt of the transferred CSP, the new host authority must complete the required review of the CSP within 12 weeks, with a possible extension up to 20 weeks. Those are the time limits currently set for the reviews of plans, and there is merit in having a consistent approach.

I hope that the committee will be assured that any amendment such as those to the CSP regulations will be consulted on fully and that the views of stakeholders will be considered carefully before we lay any Scottish statutory instrument in Parliament. I therefore ask Ken Macintosh to seek to withdraw amendment 17.

The Convener: Mr Macintosh, you now have the opportunity to wind up the debate on this group of amendments. In so doing, will you also indicate whether you wish to press amendment 17?

Ken Macintosh: I am not sure whether it is possible to hear the views of committee members at this stage. I understand what the minister is suggesting—in fact, the explanatory notes to the bill make it clear that a timescale would be brought forward in regulations—but what will that timescale be? It has been clarified that a review would require to be completed within 12 weeks, with a possible extension up to 20 weeks.

There is another question. Should the timeframe be in the bill or the regulations? The minister suggests that all the timescales are in the regulations, but it is clear that there are quite a lot of regulations—

The Convener: I will remind members of parliamentary procedure. It is perhaps some time since some of us considered technical amendments at stage 2 of a bill, and I recognise that there are new MSPs who have not had the privilege or opportunity of engaging in stage 2 proceedings.

The procedures are clear. The member who is moving an amendment should remember that they have the opportunity to question the minister when they are doing so, not in winding up. The minister will not have another opportunity to respond. Once a member has spoken to the amendment that they are moving, other committee members should take part in the debate if they think that doing so is appropriate so that the committee will have a sense of whether they support the amendments in the group.

I remind members of the procedure, as it is some time since we considered a bill at stage 2.

Ken Macintosh: I appreciate that, convener, which is why I started my comments by suggesting that members had possibly missed the opportunity to contribute to the debate and that you could perhaps show discretion if members felt motivated to speak now.

My questions to the minister were actually rhetorical rather than real. I think that I answered them, but I was looking for a nod of the head.

The deadline for a review of a CSP would be 12 weeks, with a possible maximum of 20 weeks. As I have said, the committee must consider whether the timescale should be in the bill and whether the 90 days for a review that I have suggested or the 12 to 20 weeks that the minister has suggested is an appropriate timeframe.

As the minister suggested, many of the timescales are laid out in the regulations, but timescales have also been established in statute—I refer in particular to the Education (Additional Support for Learning) (Scotland) Act 2004, which includes the provision that a CSP must be reviewed after 12 months. That is one reason why it is worth considering whether a timescale should be included in the bill.

There is a slight problem with my amendment 17. Although I have suggested a timescale of 90 days, most CSPs are, as the minister suggested, transferred within four weeks. I think that we would want to encourage most local authorities to carry out a review as speedily as that. My worry is that a timescale of 90 days might create the opportunity for authorities to take longer to review CSPs, so I am minded to seek to withdraw amendment 17.

I am quite keen on amendment 18. I am not sure whether it would work without amendment 17 being agreed to, but I think that it would. I will refresh members’ memories. Amendment 18 does not refer to the timeframe; rather, it would ensure that the new host authority contacted the home authority and those initially involved with the CSP to get their views so as not to—

The Convener: For your information, Mr Macintosh, amendment 18 could stand alone.
Ken Macintosh: That is good. I am therefore minded to seek to withdraw amendment 17 with a view to possibly revisiting the matter at stage 3 on the basis that my suggestion of a 90-day timeframe and the minister’s suggestion of a 12-week timeframe are on the long side. Twenty weeks is a totally unacceptable timeframe in a child’s life—half of the school term would be gone. Something closer to four weeks would be more appropriate.

Amendment 17, by agreement, withdrawn.

Amendment 18 moved—[Ken Macintosh].

10:15

Adam Ingram: Convener, may I clarify that I did not speak to amendment 18—

The Convener: Minister, I know that it is some time since we considered a bill at stage 2, but I made clear that the procedure was for Mr Macintosh to move amendment 17 and speak to all the amendments in the group. In responding to him, you should have spoken not only to amendment 17 but to amendment 18. It is incumbent on your officials, who have experience of the process, to be aware of parliamentary procedure—

Adam Ingram: To be fair to my officials, the fault was mine—

The Convener: Minister, I remind you that it is not particularly wise to cut across the convener of a parliamentary committee and speak when you have not been asked to speak. On this occasion, I am willing to allow you to comment on amendment 18, but I ask everyone to listen more carefully in future.

Adam Ingram: Thank you, convener. I just wanted to point out that the fault was mine and not that of my officials.

The 2004 act places duties on education authorities to seek and take account of advice, information and views from other sources, including other agencies and the child or young person and their parents, when they consider key questions in relation to a pupil’s additional support needs or CSP. The 2004 act makes it clear that that should happen when the education authority is reviewing the CSP.

It is important to remember that the people whom the education authority considers it appropriate to consult will depend on the individual child or young person’s needs and circumstances. The authority might well consult the home authority, and the supporting children’s learning code of practice recognises that it might be necessary to seek advice and information from elsewhere in the public sector, for example from health professionals or a voluntary organisation that has supported the child.

Amendment 18 would be overly bureaucratic and might cause the new education authority to look back on what has happened in the past rather than focus on a positive future for the child. Let us not forget that a child will be being educated in the new authority because there has been a successful out-of-authority placing request. The new authority represents a choice of destination, which is why the child or young person is there. On that basis, I ask Ken Macintosh to withdraw amendment 18.

The Convener: This is quite irregular but, given that the minister has had an opportunity to speak to amendment 18, I think that Mr Macintosh should have the opportunity to respond.

Ken Macintosh: I thank the convener for allowing the minister to comment on amendment 18, and I thank the minister for his comments. I appreciate that local authorities have the power to take account of all views, but amendment 18 would place a duty on host authorities to take account of the home authority’s views. It is difficult to imagine a situation in which the host authority would not want to consult people who were involved in the case, but it is clear that that has happened in practice.

I will be honest and admit that amendment 18 is probably not the most important amendment to the bill that we will consider—although it might be the most important amendment that we consider today. I trust ISEA to have formed its view in the light of experience. Many of the amendments that we will consider today are aimed at ensuring the successful implementation of legislation whose principles we all agree on. The duty that amendment 18 would place on authorities is not onerous and overly bureaucratic, and it is difficult to imagine a situation in which it would not be in a host authority’s interests to hear from professionals in the home authority. I press amendment 18.

The Convener: The question is, that amendment 18 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Baker, Claire (Mid Scotland and Fife) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Smith, Margaret (Edinburgh West) (LD)
Whitefield, Karen (Airdrie and Shotts) (Lab)

Against
Campbell, Aileen (South of Scotland) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 18 agreed to.

The Convener: We move on to group 2. Amendment 1, in the name of the minister, is grouped with amendments 2 to 4.

Adam Ingram: I carefully considered all the amendments that were suggested in evidence to the committee, and I acknowledge that some suggestions will help to improve and strengthen the legislation.

One suggestion was that the Additional Support Needs Tribunals for Scotland should be able to consider all placing request appeals in respect of a place at a special school. The collective purpose of amendments 1 to 4 is therefore to allow all placing request appeals in respect of a place in a special school to be heard by the tribunal. That will include placing request appeals that concern places in public, independent and grant-aided special schools in Scotland, as well as places in special schools in England, Wales or Northern Ireland. An appeal regarding the refusal of such a placing request can be made only once in a 12-month period. The tribunal will have the power to confirm or overturn the authority’s decision and specify when, as a result of a successful placing request, the child should commence at the specified school.

Amendments 1 to 4 will enable parties to have their special school placing request appeals determined by a specialist decision-making body that has expertise in additional support needs rather than by the education appeal committee or a sheriff. To date, all placing request appeals with which the tribunal has dealt have related to special schools. I share the opinion of the president of the tribunal that the complex routes of appeal for parents could be clarified by the establishment of a single, clear appeal route, whereby if a placing request to a special school is refused the decision is referred to the tribunal, which is composed of members who have expertise in dealing with such issues.

I move amendment 1.

Ken Macintosh: As the minister said, the issue emerged during the committee’s consideration. We kept our options open in our stage 1 report, but I think that the solution that the minister has suggested, which is that appeals on applications to special schools should go to the tribunal, is the right one.

I am sure that the minister is aware that the approach is a compromise and that to some extent we are making more complex a process that is already complex. The avenues that are open to the parent of a child with additional support needs are now many, and there are many ways to appeal a decision: an appeals committee, a tribunal or a sheriff court. We should bear in mind the fact that it is a complex matter and, although we have reached the best compromise, we may need to put more effort into the successful implementation of the 2004 act and the reforms to it. Even then, we may still need to review the bill again in a couple of years.

The Convener: No other members wish to speak, so I invite the minister to wind up the debate.

Adam Ingram: I am happy to leave the amendment to the discretion of committee members.

Amendment 1 agreed to.

Amendments 2 to 4 moved—[Adam Ingram]—and agreed to.

The Convener: Amendment 5, in the name of the minister, is in a group on its own.

Adam Ingram: Amendment 5 will extend the tribunal’s power when considering a placing request appeal to enable it to specify a timescale for placing the child in the school that is specified in the request. The change is necessary to ensure the avoidance of unacceptable and damaging delays in school education that can occur if there is a delay between the tribunal issuing its decision on the placing request and the education authority placing the child in the specified school. The amendment will deliver the certainty that parents seek once such a decision is made.

It is anticipated that the commencement date of the placement would, as in any tribunal decision, be subject to parties being heard on the issue at the hearing. If the authority failed to keep to the specified timescale, the parent could refer a section 70 complaint to the Scottish ministers. Alternatively, the parent could request that the Scottish ministers issue a direction under section 27 of the 2004 act to direct the authority to comply with its duties under the act.

As the committee is aware, the extension of parental rights is a key motivation behind the bill. The amendment will provide certainty to parents as to when the placement at the specified school will start and will help to lessen any feelings of anxiety and powerlessness that they have when in dispute with an education authority.

I move amendment 5.

Ken Macintosh: The amendment addresses an issue that emerged for the committee. For the reasons that the minister stated, the timeframe for implementing tribunal decisions is of great anxiety to parents. As it happens, the amendment that the minister has produced is identical to the proposal
that the Govan Law Centre drew up, so I am happy to support it.

Amendment 5 agreed to.

10:30
The Convener: Amendment 6, in the name of the minister, is in a group on its own.

Adam Ingram: The bill as introduced amends the 2004 act to enable a tribunal to consider any placing request decision when a co-ordinated support plan has been prepared or is being considered at any time before final determination by an education appeal committee or sheriff.

That could clearly result in cases in which a placing request appeal is transferred from the sheriff to the tribunal because a CSP is being considered. If the tribunal then decides that the child or young person does not require a CSP after all, the tribunal has the discretion to transfer the placing request appeal back to the sheriff for consideration. However, it is important to note that the tribunal need not exercise its discretion and could make a decision on the placing request appeal regardless of the fact that the child or young person does not require a CSP.

Although it is intended that the tribunal should consider all placing request appeals transferred to it from the sheriff, that could be seen as a perverse incentive for parents to request a CSP in order for the tribunal to consider any placing request appeal. Therefore, the tribunal should have the discretion to transfer the case back to the sheriff. Although it is highly unlikely that a placing request appeal would transfer backward and forward between the tribunal and an education appeal committee or sheriff, amendment 6 is necessary to ensure that all eventualities can be dealt with appropriately.

I move amendment 6.

The Convener: No other member has indicated that they want to speak. It appears that the committee is content with your description of the purpose of and reason for amendment 6.

Amendment 6 agreed to.

Section 1, as amended, agreed to.

Sections 2 to 5 agreed to.

After section 5

The Convener: Amendment 7, in the name of the minister, is grouped with amendments 7A, 7B and 9.

Adam Ingram: Amendment 7 relates to the definition of additional support. Our policy intention is very clear and reflects what is set out in “Supporting Children’s Learning: Code of Practice”. The purpose of additional support is to allow children and young people to benefit from school education. The nature of that support should not be limited to support that is offered in a classroom or school environment, and it can involve not only educational but multi-agency services such as health, social work, voluntary agency services and so on.

However, as the committee noted in its stage 1 report, the decision in the recent case of SC v City of Edinburgh Council cast doubt on that interpretation of the meaning of “additional support” in the 2004 act by suggesting that additional support is limited to educational support that is offered in a teaching environment.

I am keen to allay any concerns surrounding this issue. Therefore, the purpose of amendment 7 is to make it clear that additional support may take the form of non-educational activity and need not take place in a classroom or teaching environment. That is reflected in the code of practice, which states that additional support can be any form of support that enables the child to benefit from school education, regardless of whether it is provided by other agencies and of where such support physically takes place.

On amendments 7A and 7B, it might be useful if I explain that the 2004 act requires an education authority to provide additional support to certain disabled children in its area who are under three years old. The duty applies where such children have been brought to the attention of the education authority by a national health service board as having, or as appearing to have, additional support needs arising from a disability within the meaning of the Disability Discrimination Act 1995 and the education authority has established that they have such needs, for example following referral from the newborn hearing screening programme.

Once the health board has brought the child to the education authority’s attention, the authority may establish whether the child has additional support needs arising from a disability under its arrangements for identifying and providing for children with additional support needs. If the authority then determines that the child has additional support needs arising from a disability, it must provide such educational support as is appropriate for the child.

Where a child is identified as requiring additional support, an education authority is required, prior to the child beginning pre-school education, to seek and take account of relevant advice and information from other agencies no less than six months prior to the child beginning pre-school.

I do not believe that it is appropriate to place education authorities under a statutory duty to
make provision for disabled children under three in the same way as they would under the Scottish Government amendment of the definition of additional support for children over that age. Given that health and social services, rather than education authorities, will be responsible for those children, it simply does not make sense for a similar definition of additional support to apply to this group of children as that which is generally applied for children in pre-school onwards. After all, the education authority’s duty to such children is different. For children under three, the education authority’s responsibility is to put in place arrangements that pave the way for a disabled child’s educational experience. For children who are over three, the education authority is responsible for delivering an educational experience that helps the child to fulfil his or her educational potential.

Amendment 9 alters the bill’s long title to reflect the fact that, if agreed by Parliament, the bill will cover two new topics: the definition of additional support and the ability of a parent or young person to request a specific assessment at any time.

Accordingly, I move amendment 7 and ask Margaret Smith not to move amendments 7A and 7B.

Margaret Smith (Edinburgh West) (LD): This legislation has been deemed necessary partly to restate some of the key messages of the Education (Additional Support for Learning) (Scotland) Act 2004 in the wake of various court judgments, one of which, as the minister has pointed out, was Lord Wheatley’s decision. The committee was right to be concerned about that judgment, as it struck at one of the central features of the 2004 act—the definition of additional support needs.

Lord Wheatley’s judgment restricted additional support to educational support offered in a teaching environment. However, as we know, a range of support is necessary to assist some children in accessing education. The code of practice, for example, lists a number of interventions that children might need, ranging from social work support to remain drug free to psychiatric support.

I very much welcome amendment 7 and the minister’s willingness to address the issue. My amendments 7A and 7B are based on the suggestion that was made in the joint submission from Govan Law Centre, Scotland’s Commissioner for Children and Young People, Capability Scotland and others that the bill’s provisions should cover not only section 1(3)(a) of the 2004 act, as the minister’s amendments do, but section 1(3)(b), which relates to early years provision, to ensure that they apply to children who are not based in school or who have a prescribed pre-school place. Those children were included in the original definition of additional support needs for a purpose.

As the 2004 act stands, additional support is restricted to educational provision—or, as the act states, “such educational provision as is appropriate in the circumstances”.

I find that particularly worrying, given that, as a result of Lord Wheatley’s decision, that provision might be interpreted as referring only to support in a teaching environment and given that children under three are least likely to receive support in such an environment. It might well mean that very young children will miss out on the support that they need.

I remain concerned that by accepting amendment 7 on its own we could be leaving young children in their crucial early years at a disadvantage. We might, for example, jeopardise early communication interventions by speech and language therapists and diminish the systems of preparation for pre-school and school education for children with special and additional needs.

As a result, I urge the committee to support not only amendment 7, in the name of the minister, but amendments 7A and 7B to ensure that the provisions are as comprehensive as possible.

I move amendment 7A.

Elizabeth Smith (Mid Scotland and Fife) (Con): Convener, can you clarify for me whether amendment 7B can stand alongside amendment 7 if amendment 7A is not agreed to?

The Convener: It looks like it probably can.

Elizabeth Smith: So the answer is yes.

The Convener: Yes.

Elizabeth Smith: In that case, I support amendments 7 and 7B, because a very important distinction has been made between educational provision and provision that extends to other aspects of care, notably health care and social work. If the bill has one message, especially in the light of Lord Wheatley’s ruling, it is the need to provide a holistic and fully co-ordinated care package to ensure that the child’s best interests are served both inside and outside the classroom. That is why the narrow definition of educational provision in the 2004 act is unsatisfactory. I hear what the minister says about amendment 7A, but I would like to have more discussion on the matter.

Ken Macintosh: I am happy to support all the amendments in the group. There is clear agreement about and consensus on the need for the bill to address the ramifications of Lord
Wheatley’s judgment and, to an extent, all the amendments do exactly that.

Although I understand the minister’s reservations about amendment 7A, I prefer its more comprehensive approach to the issue. Moreover, by explicitly extending the definition of additional support needs to children from nought to three, amendment 7B is very important. After all, the issue will come up again in a number of amendments—if we ever get a chance to move them. Indeed, it came up in discussions during the passage of the 2004 act.

The minister said that local authorities have the power to address the additional support needs of anyone of pre-school age. As he made clear, however, in practice they do so only when health boards bring such children to the attention of education authorities. Children tend to be dealt with only after that statutory reference to health boards.

I find that situation unsatisfactory; it was certainly not the intention behind the 2004 act, which sought to enable health boards to use their functions to help children. The reference was not meant to get in the way of addressing the additional support needs of children of that age. Certainly there are children—for example, those with a sensory impairment—whose needs are often recognised during that vital period of learning.

Indeed, as everything that we have been told about a child’s development shows, nought to three is a crucial period in a child’s learning. Given that a range of Government policies and measures has concentrated on earlier and earlier intervention, I find it slightly odd that the minister has not recognised that that shift in public policy would also benefit the provisions of the 2004 act.

For those reasons, I support all the amendments in the group.

10:45

Adam Ingram: I clarify that amendment 7A is a technical amendment to allow amendment 7B to be inserted properly. Amendment 7B represents the guts of the issue.

I ask members whether it is reasonable to expect an education authority to take overarching responsibility for additional support needs provision for children from nought to three when health services have that responsibility—for example, the health service is responsible for providing speech and language therapy support for children in that age range.

Children under three are not in a teaching environment, so asking education authorities to take on the overarching responsibility for their support is unreasonable. It also flies in the face of the work that we are doing under the early years framework to encourage all agencies to work together in teams of professionals to deal with early years issues, which we all know and accept is vital to level the playing field in child development for such children.

As I said, before children are three, the education authorities’ responsibility is to ensure that those children can be properly accommodated in pre-school and school provision and that all the arrangements are in place well in advance of their entering pre-school, so that those children can take full advantage of the educational experience that will be offered to them.

I strongly suggest that members weigh up where the balance of responsibilities should lie, pre-three. It would be unfair and unreasonable to place such a responsibility on education authorities when other agencies must be fully engaged and when some, such as health services, should be taking the lead.

Margaret Smith: There is no difference among any of us on wanting under-threes and particularly disabled children in that age group to be given the support that they need to ensure that they have everything that they can have in their favour by the time that they enter pre-school and school settings.

I remain concerned that organisations that represent the parents of such children want an amendment that is as comprehensive as possible. The minister says that the issue comes down to where the responsibility lies. He says that if amendment 7B were agreed to, the responsibility for all sorts of support would lie with the education authority. That is clearly not the intent behind my amendment, which was to ensure that the appropriate types of educational provision were the education authority’s responsibility. That is what the 2004 act says, but the Wheatley judgment challenged that by saying that education provision means only that which is provided in a teaching environment.

I am minded to withdraw amendment 7A, if committee colleagues are happy to support that, and to seek further discussions with organisations and the minister, to ensure that we do not leave ourselves in a default situation in which nobody takes responsibility.

Amendment 7A, by agreement, withdrawn.

The Convener: Amendment 7B, in the name of Margaret Smith, was debated with amendment 7.

Margaret Smith: I wish to withdraw amendment 7B on the same basis as amendment 7A.

The Convener: You cannot seek leave to withdraw an amendment that you have not moved.
Are you indicating a wish not to move amendment 7B?

**Margaret Smith:** Can I move it, and then withdraw it?

**The Convener:** No. You just do not move it.

**Margaret Smith:** Okay.

*Amendment 7B not moved.*

**The Convener:** I can see that we will all have to have lessons on parliamentary procedure—a refresher course for some of us.

The minister must now indicate whether he wishes to press or withdraw amendment 7.

**Adam Ingram:** I will press amendment 7.

*Amendment 7 agreed to.*

**The Convener:** That brings to a close our stage 2 consideration of amendments for today. The next group of amendments that is due for consideration includes amendment 23, which, if agreed to, would require a financial resolution. Under rule 9.12.6 of standing orders, no proceedings can be taken on such an amendment unless the Parliament has agreed to a motion for such a financial resolution. Does the Scottish Government intend to lodge a financial resolution for the bill, to enable amendments that have been lodged to be debated?

**Adam Ingram:** No; it is not our intention to lodge a financial resolution. As you are aware, the Presiding Officer indicated that no financial resolution was required when the bill was introduced.

Just to clarify matters, the purpose of the bill is to address flaws in the 2004 act that have become apparent with its implementation over the past two or three years. I think that I made it perfectly plain from the outset that I intended neither to tamper with the ethos of the legislation, nor to extend the scope of the bill and the associated financial envelope in any significant way. It was on that basis that the bill’s principles were agreed to at stage 1, so I do not think that it would be in any way appropriate to open up the bill to amendments that would shoehorn millions of extra pounds into the debate or place such obligations on the Scottish Government or the education authorities.

Given that explanation, I feel entirely justified in not acceding to any demands to lodge a financial resolution.

**The Convener:** Thank you for those comments, minister. Do committee members have anything to say on the matter?

**Kenneth Gibson (Cunninghame North) (SNP):** Sorry, it is not on this matter. It is just that I understand that amendment 9 has not been moved yet.

**The Convener:** It does not have to be moved. We will get you on the refresher course, too.

**Ken Macintosh:** I am very disappointed that we have come to such a position in our proceedings. Some issues of timing are perhaps not entirely in the minister’s control, but it is very unsatisfactory that we find ourselves where we are.

Some of the amendments were not printed until a late stage, but the intention behind them was signalled at quite an early stage—it was certainly indicated in the committee report and had been circulated widely in the form of a briefing, if not in the form of written amendments. The minister talked about some of the amendments costing millions—I do not accept that. When the Education (Additional Support for Learning) (Scotland) Act 2004 was introduced, it was a funded provision and local authorities were given substantial sums to implement it. It is debatable whether all those sums have been spent on its implementation.

All the amendments are clearly within the scope of the bill and they are practical amendments. The committee expressed its concern that the bill does not represent a wholesale review. We accepted that the ethos and principles of the 2004 act were to be protected and valued, and that the bill was a way of improving its implementation and addressing some outstanding concerns. For the minister to come to the committee at this stage and suggest, on the ground that there is no financial resolution, that we should not even be allowed to debate some of the amendments, I find not only unsatisfactory but almost anti-democratic. The effect of what the minister is saying is that we cannot have a cross-party parliamentary discussion, when so far we have had an entirely consensual committee debate on the matter.

I cannot imagine any previous Administration not responding to the situation by automatically introducing a financial resolution and debating the provisions as they stand on their merits; I am surprised that this Administration will not do that. There is no suggestion that any member of the committee wishes to act in a financially irresponsible manner. If we look at the work that was done by the Education Committee in the previous session of Parliament, it would have been equally difficult to accuse the Opposition of being entirely financially irresponsible. I do not think that the accusation is remotely justified in this case.

I urge the minister to have a rethink. To not allow debate to take place on all the issues that have been raised in the committee report and by everyone who has given evidence to the committee would be to undermine the bill in its
entirely. It would send out entirely the wrong signal, because it would indicate that we are willing to rectify a couple of minor points but not to address the real concerns and anxieties of parents. It would say to parents, “We’re not on your side. We’re on the side of the local authorities and the purse keepers, who are frightened by some of the demands.” They should not be anxious or frightened—they should be more sympathetic to the needs of parents.

Margaret Smith: I echo Ken Macintosh’s comments. I am disappointed by what the minister said; in effect, it closes down parliamentary discussion and decision making on issues that were raised with us in our evidence sessions.

The minister is well aware of a couple of the issues that I am raising in amendments. I had the courtesy to discuss them with him well in advance, so he had knowledge of the issues that I was concerned about at stage 1 in the committee, during the stage 1 debate in the Parliament and last week, well before the unfortunate set of circumstances that meant that the amendments came out late. There is no question but that the minister was made aware at various points along the way of some of the issues that I have raised in my amendments, which I think might be caught in this way.

My amendments are responses to evidence that we received on issues that relate to information being given to parents. That was a massive issue that was raised with the committee consistently throughout our evidence-taking sessions, which we undertook in a very good and professional cross-party manner. I am not convinced, for example, that money that is spent on giving out information to parents or on consultation with parents is necessarily something that is all one way.

Some of the evidence that we heard suggested that, if parents had had more information and had been involved in a more proactive way at an earlier stage, some cases might never have ended up at tribunals, sheriff courts and so on. Although I accept that costs are associated with some of the proposals that I, as a member of the Parliament, have a right to put forward for discussion by those who heard the evidence, there will also be savings in some cases. None of us would seek to incur extra expenditure without having serious discussion and thought about the impact and purpose of that expenditure.

At the end of the day, it is not a question of shoehorning something into the bill. Committee members have lodged many of their amendments in response to evidence that has been given to the committee. It is 100 per cent anti-democratic if a minority Government has the right, by using a parliamentary device, to stop discussion of issues that have been raised in amendments. That does no service to the committee, to the evidence that we have heard or to the minister and the Government.

11:00

Elizabeth Smith: I associate myself with the comments of Mr Macintosh and Ms Smith.

The Convener: A number of members of the committee have made clear their unhappiness about the situation in which we find ourselves. The committee has received representations from a number of agencies that, throughout the bill process, have welcomed moves that the Government has made but think that the legislation could be improved. It would be nice for us to have a full and frank debate on those issues. However, under rule 9.12.6, if the Government chooses not to lodge a motion for a financial resolution, such a debate cannot take place. I urge the Government to think about whether it is in its best interests to stifle that debate, instead of winning the committee over to its way of thinking. It has until tonight to consider lodging a motion for a financial resolution.

The minister may want to give careful consideration to any precedent that may or may not have been set in previous sessions. In some instances, bills were introduced without financial resolutions, but it became apparent at stage 2 that financial resolutions were required to allow amendments to be debated. Amendment 23 is admissible, so I urge the minister to consider the matter before the end of the night.

At the end of its stage 2 consideration, the committee may want to consider asking the Standards, Procedures and Public Appointments Committee whether the existence of rule 9.12.6 is in the best interests of the Parliament and proper scrutiny of legislation.

Meeting closed at 11:03.
Point of Order

14:35

Mike Rumbles (West Aberdeenshire and Kincardine) (LD): On a point of order, Presiding Officer. I stand having consulted the business managers for the Labour Party and the Conservative party. We are concerned about a letter that you have sent to Ken Macintosh MSP and its implications for the Education (Additional Support for Learning) (Scotland) Bill. In the letter, you refer to Mr Macintosh’s amendment 23. That is the only adjudication that has been made on the amendment. The letter states:

“As you may know, Rule 9.12.6 of the Parliament’s standing orders states that, where the effect of an amendment to a Bill, if agreed to, would be that the Bill would require a financial resolution which it would not otherwise require, no proceedings can be taken on the amendment unless such a resolution has been agreed to.”

It is my understanding that the Government is not willing to produce such a resolution. As I understand it from the clerks to the Education, Lifelong Learning and Culture Committee, if you were willing to call a meeting of the Parliamentary Bureau this afternoon we could extend the timetable for the committee’s stage 2 consideration of the bill to enable the problem—clearly, there is a problem—to be dealt with. The issue cannot be dealt with if the timetable is not extended. I therefore request that you call a meeting of the business bureau this afternoon.

The Presiding Officer (Alex Fergusson): Thank you for the point of order. The matter raises complex issues that are new to us as a Parliament. I therefore think that it would be appropriate for the Parliamentary Bureau to meet this afternoon to discuss those issues, if we can all agree a time. I have no difficulty with that whatever. We will be in touch with the business managers on that.
Business Motion: Bruce Crawford, on behalf of the Parliamentary Bureau, moved S3M-3808—That the Parliament agrees that consideration of the Education (Additional Support for Learning) (Scotland) Bill at Stage 2 be extended to 24 April 2009.

The motion was agreed to.
Business Motion: Bruce Crawford, on behalf of the Parliamentary Bureau, moved S3M-3845—That the Parliament agrees that consideration of the Education (Additional Support for Learning) (Scotland) Bill at Stage 2 be extended to 1 May 2009.

The motion was agreed to.
Education, Lifelong Learning and Culture Committee

11th Meeting, 2009 (Session 3), Wednesday 22 April 2009

Education (Additional Support for Learning) (Scotland) Bill

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. The Committee published its Stage 1 report on the Bill on 10 February 2009. A copy is available at this link—


4. The Bill passed Stage 1 on 4 March 2009, and details of the Stage 1 debate can be viewed at this link—

   [http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-09/sor0304-02.htm#Col15365](http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-09/sor0304-02.htm#Col15365)

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

6. The Committee began its Stage 2 proceedings on 25 March 2009. The Marshalled List of amendments, Groupings of amendments and the Official Report from that meeting can be viewed at this link—


7. At the Stage 2 proceedings on 25 March 2009, the first 11 amendments on the Marshalled list of amendments were disposed of.

8. However, the Convener halted proceedings at that stage, as the Presiding Officer had ruled that one of the amendments in the next Group due for consideration would, if agreed to, require a Financial Resolution.

9. The Bill does not currently have a Financial Resolution, because the Presiding Officer had determined on introduction that the expenditure in the Financial Memorandum that accompanied the Bill was not sufficiently significant to require such a resolution.

10. The Convener therefore stopped Stage 2 proceedings to allow time for the Scottish Government to bring forward a Financial Resolution, if it wished to do so.

11. The Scottish Government confirmed at the meeting of 25 March 2009 that it did not intend to bring forward a Financial Resolution for the Bill.

12. The Parliamentary Bureau subsequently agreed to recommend to the Parliament that the deadline for completion of Stage 2 be extended to allow all members an opportunity to provide information on costings of amendments to the Presiding Officer.

13. The Presiding Officer has then ruled on which of the remaining amendments would, if agreed to, require a Financial Resolution, either on their own, or cumulatively.

**Evidence session on 22 April 2009**

14. The session on 22 April will give the Committee the opportunity to discuss any amendments that the Presiding Officer has ruled would, if agreed to, require a Financial Resolution (either individually or cumulatively).

15. On the basis of the Presiding Officer’s rulings, the amendments fall into the following categories:

- **amendments with no or de minimis\(^2\) cost**: these amendments will be able to be debated as normal on 29 April. These amendments are:
  - amendment 8
  - amendments 14 to 14F
  - amendment 26
  - amendment 21
  - amendment 22
  - amendment 11
  - amendment 20
  - amendment 24
  - amendment 27
  - amendment 28
  - amendment 9

- **significant cost\(^3\)**: these amendments may be discussed on 22 April but no proceedings may be taken on them on 29 April (i.e. the amendment may not be moved, debated or the question on it put –

\(^2\) Less than £10,000.
\(^3\) Each individual amendment costs over £300,000
unless a financial resolution were to be brought forward after all). These amendments are:

- amendment 23
- amendment 13
- amendment 15
- amendment 25
- amendment 16

- **potential cumulative cost**: these amendments can be discussed on 22 April and may be moved, debated and the question on them put on 29 April until such time as an amendment is reached on the Marshalled List which, taking account of amendments already agreed to, would tip the cost over £300,000. The amendment which breaches that tipping point and any subsequent amendments in this category may not be moved, debated or the question on them put on 29 April. Members should note that as matters currently stand, only three amendments fall within this category (with a cumulative cost of £210,000) and so no amendments will currently fail to be moved, debated and the question on them put on 29 April as a result of the cumulative operation of Rule 9.12.6. These amendments (and their costs) are as follows:
  - amendment 10 (£50,000)
  - amendment 19 (£100,000)
  - amendment 12 (£60,000)

16. If, as a result of discussion on 22 April, any member requests any amendment to be redrafted (e.g. in order to remove any unintended consequences with cost implications) prior to the deadline for lodging amendments (12 noon on Friday 24 April), the Presiding Officer will give further consideration to the redrafted amendment. Members will be advised if any amendment changes category (and of the cost of any amendment now falling within the “potential cumulative cost” category).

17. Discussion on amendments on 22 April will be structured around the groupings prepared for the Committee’s meeting on 25 March. That is, amendments in the second two categories above will be discussed in the following order:

- amendment 23
- amendment 13
- amendment 15
- amendments 10 and 19

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4 Each amendment gives rise to a cost of between £10,000 and £300,000.
amendment 25
amendment 16
amendment 12

Nick Hawthorne
Senior Assistant Clerk
Education, Lifelong Learning and Culture Committee
Groupings of amendments

Assessment and examination: further provision
8, 23

Additional support needs: specified children and young people
14, 14A, 14B, 14C, 14D, 14E, 14F

Coordinated support plans: issue of “significant”
13

Pre-school children: role of health boards
26

Supporters and advocacy: local authority provision
15

Mediation services: independence from local authorities
21

Dispute resolution: referral to Scottish Ministers
22

Publication of information: availability
10, 19

Publication of information: content
11, 20, 24

Local authorities consultation on policy for additional support needs provision
25

Definition of ‘young person’
16

Reference to Tribunal: post-school transition
12

Implementation of Tribunal decisions: power to monitor
27

Recovery of costs: host authority obligation to pay
28
Education, Lifelong Learning and Culture Committee

Extract from the Minutes

11th Meeting, 2009 (Session 3)

Wednesday 22 April 2009

Present:

Claire Baker  Aileen Campbell
Kenneth Gibson (Deputy Convener)  Ken Macintosh
Christina McKelvie  Elizabeth Smith
Margaret Smith  Karen Whitefield (Convener)

**Education (Additional Support for Learning) (Scotland) Bill:** The Committee took evidence on the Bill at Stage 2 from—

Adam Ingram MSP, Minister for Children and Early Years, Robin McKendrick, Head of Branch, Support for Learning Division, and Louisa Walls, Principal Legal Officer, Scottish Government.
Education (Additional Support for Learning) (Scotland) Bill: Stage 2

The Convener: The third item on the agenda is stage 2 consideration of the Education (Additional Support for Learning) (Scotland) Bill. I welcome to the meeting the Minister for Children and Early Years, Adam Ingram; Robin McKendrick, head of branch, support for learning division; and Louisa Walls, the principal legal officer.

The purpose of this evidence-taking session is to discuss amendments to the bill that the Presiding Officer has ruled would require a financial resolution if they were agreed to either on their own or cumulatively. However, any amendment that has been determined as having a de minimis cost will not be discussed this morning.

As members are aware, there can be no proceedings at stage 2 on amendments that, if agreed to, would require a financial resolution. As a result, this session will ensure that the committee has the chance to discuss the policy intentions behind the amendments and any disputes over costings before it continues its stage 2 proceedings.

I intend to discuss the amendments in question in the order in which they have been grouped for stage 2. Members who lodged the first amendment in each group will speak first, followed by other members who either have an amendment in the group or wish to contribute to the debate. After the minister responds to the comments made on each group, I will allow some discussion on his response.

Amendment 23, in the name of Ken Macintosh, is the first amendment in the first group in which an amendment appears that the Presiding Officer has ruled will have either a significant cost or a potential cumulative cost. I therefore invite Mr Macintosh to speak first.

Ken Macintosh (Eastwood) (Lab): I hope that I will be able to juggle the many notes that I have made on these amendments.

Other committee members might well share my view that, although I am pleased that we have been able to reach a compromise on the issue and that we are able to have this discussion, I have found the turn of events in recent weeks to be very unsatisfactory. One of the principles behind the Parliament is transparency, but I have to say that the whole process has been very opaque. Although I am pleased that the minister has, this morning, presented us with a paper on the financial costings of his amendments and the Executive’s thinking on the other amendments, it would have been particularly helpful if we had had notice of the paper.

I do not for a second blame the Presiding Officer, who has been trapped in a situation that is not of his making. Indeed, I believe that he has referred the matter to the Standard, Procedures and Public Appointments Committee. I hope that members will support a similar referral from the committee, because the situation is not very helpful for anyone, no matter whether they are in the Executive or a member of this committee, the Standards, Procedures and Public Appointments Committee or the Parliament, and it needs to be resolved before it happens again.

I do not believe that there is a fundamental difference between the minister’s amendment 8A and amendment 23, which is in my name. The purpose of both is to ensure that parents have the right to request an assessment of their child’s needs at any time. That right already exists—in theory, at least—in the Education (Additional Support for Learning) Act 2004; unfortunately, however, because the act linked such assessments to the opening of a co-ordinated support plan, it has in practice not proved as easy as one might have hoped for parents to have their child’s needs assessed.

Before I proceed, I mention in passing a point that I am sure that many of us will want to explore more fully. To implement the 2004 act, local authorities were given substantial sums of money. Those funds remain in the local government settlement, despite the fact that far fewer costs or burdens have been placed on authorities by parents or children exercising their rights than was originally allowed for. Given that many of the amendments that we are dealing with now do not create new rights, but are simply designed to ensure full and fair implementation of the 2004 act, the question must be asked: are any new funds required?

I am sure that we will return to that argument, but I will focus on amendment 23. It suggests a couple of modest extensions—I would call them improvements—to the minister’s amendment 8A. The minister’s amendment restates the right to an assessment, but not in a way that is tied to the opening of a CSP; it is a right or duty that would be restricted, in that it would cover those children for whose school education the local authority is responsible.

Amendment 23, in my name, extends the same right to those for whose school education an authority is not responsible. The intent is to include pre-school children and those who are home educated. That is a group of quite limited
numbers—my understanding is that it is certainly not big enough to trigger any concerns over costs.

Amendment 23 would also extend the right to privately educated children. It is here, I believe, where concerns over costs arise, although I believe such concerns to be misplaced. It is important to remember that some children are placed in private schools—Rudolf Steiner schools, for example—because of their additional support needs. The argument also applies to children who are educated at home, which sometimes happens because the parents and the local authority have fallen out over their respective understanding of the child’s needs. Cases in which a parent simply chooses a fee-paying school for their child but wishes to take advantage of a publicly funded assessment system would not qualify under the provisions of amendment 23, as that would be deemed unreasonable. The number of pupils concerned is therefore fairly modest; I would have thought that it is not that dissimilar to the number who would be covered by the minister’s amendment 8A.

Amendment 23 is not intended to create extensive or expensive new rights for tens of thousands of pupils; it is designed to ensure that a small number of families, whom we know experience difficulty in having their children’s needs assessed, enjoy the same rights as the vast majority of other Scots.

Local authorities would still make all the decisions in such cases, but instead of asking parents to prove that councils were being unreasonable, we should ask councils, when they say no, to demonstrate that the parents were being unreasonable.

I would like to hear from the minister this morning the Scottish Government’s estimate of the cost attached to amendment 8A. We have received a paper now, but I would welcome the minister’s comments on the record, for the benefit of all.

I would also welcome the minister’s comments on how many children amendment 8A would affect and why he believes that amendment 23 would change the calculation so dramatically.

Putting the question of cost to one side for a second, I also wish to establish in principle whether the minister is opposed to extending the right to an assessment to pre-school or home-educated children, or just those who attend private schools.

I wish to highlight another crucial difference between amendment 23 and amendment 8A, on which I would welcome the minister’s and the committee’s views. Under amendment 8A, parents would not be able to refer a refusal of a request for an assessment—or a dispute over who should carry out an assessment—to dispute resolution. I will explain why. The dispute resolution regulations, which are contained in a Scottish statutory instrument, refer specifically to section 8 of the 2004 act, and I believe that those regulations would not apply to proposed new section 8A. My amendment 23 would amend section 8 of the act, so the dispute resolution regulations would therefore apply to requests for assessments.

I do not believe that the issue raises any substantial cost implications, although the principle involved is quite important. Do we want differences between local authorities and parents to be resolved at an early stage? I think that the committee has reached a conclusion on that principle. I ask the minister whether he agrees that accompanying the right to request an assessment should be the right to refer any refusal of a parental request to dispute resolution.

So, just to recap, convener—

10:00

The Convener: Before you recap, I should point out that the minister’s amendment is actually amendment 8, which inserts a new section 8A. I make that clarification so that others who are following these proceedings are not as confused as I initially was. I just want to ensure that you get your amendment numbers correct.

Ken Macintosh: Apologies, convener. I am bound to confuse you again. When I refer to 8A, I am referring to new section 8A, which is proposed by amendment 8.

To recap, the issues are: the cost of the minister’s proposal; the numbers who are affected by the proposal in his amendment in comparison with the numbers who are affected by the alternative proposal in amendment 23; the principle of extending rights to an assessment to pre-schoolers, the home educated and the privately educated; and the right to refer the refusal of an assessment request to dispute resolution.

Kenneth Gibson (Cunninghame North) (SNP): First, I should say that I do not know what Ken Macintosh is getting at when he talks about compromise. I do not remember even being consulted, as deputy convener of this committee, on the timing, content or structure of this meeting. Given the talk about democracy at the previous meeting, I think that that is quite appalling.

Amendment 23—which I do not think that we should even be debating today, given that it is out with the financial memorandum—would extend the process of assessment to children and young people for whom the education authority is not
responsible. Obviously, that could be costly and burdensome and, frankly, it would be unworkable. Education authorities cannot prepare a CSP for anyone for whom they are not responsible and, therefore, no action would follow the assessment of children in independent schools. Quite clearly, if the proposal were agreed to, it would be a waste of resources.

Mr Macintosh said that he thought that there was money in the pot from 2004. I have to say that no one in the Convention of Scottish Local Authorities would agree that that money is just sitting there waiting to be spent on this unnecessary proposal.

The Convener: Before I allow any other member to come in, I should say that I do not think that it is particularly helpful if we talk about the committee’s processes when we are supposed to be considering the amendments. I have no desire to limit discussion of how the committee considers the bill, but we can talk about that at the end of this morning’s business. I point out that the structure of today’s meeting was not something that was agreed by the clerks to the committee or the convener; the Parliamentary Bureau decided that today’s meeting should take place in response to the legitimate concerns of a number of MSPs that it was undemocratic that the Parliament would be unable to consider amendments that had been lodged because no financial resolution accompanied the bill.

Did Christina McKelvie indicate that she wanted to speak to this group?

Christina McKelvie (Central Scotland) (SNP): Yes. I believe that the proposal in amendment 23 would mean that education authorities would become responsible for assessing pupils in private schools, even though those private schools would not be obliged to carry out recommendations arising from an assessment. That would be of no advantage to the child and would be a straightforward waste of public money.

Currently, 29,800 children attend private schools. If we go by the Warnock report’s finding that around 20 per cent of children will need some sort of additional support during their school career, around 6,000 assessments would have to be carried out in relation to privately educated children. Depending on whether we base the calculations on the Scottish Parliament information centre’s figure of £800 an assessment, the costs involved could come to a lower figure of about £1.3 million or a higher figure of £4.8 million, which is a substantial sum to spend on a proposal that would be of no benefit to the pupils, the parents or the local authority.

Finally, my opinion is that amendment 23 is outwith the scope of the bill. I would like to see a scoping exercise that would prove to me that it is within the scope of the bill.

Aileen Campbell (South of Scotland) (SNP): Convener, you said that you do not want to talk about process, but the process is clearly different from what has happened in the past, and I cannot help but think that stumbling along, going with the flow and discussing it at the end of this morning’s business might be a topsy-turvy way of approaching things.

The Convener: Miss Campbell, I have already made it clear that we will return to the process at the end. I have given members leeway to make comments, but I remind you of what I asked members to do and that I made it clear that we would have a full discussion on the process at the end of our consideration of all the amendments. I ask you to speak to amendment 23.

Kenneth Gibson: Excuse me, convener. It would have been helpful if you had said that before Mr Macintosh spoke to amendment 23. Everybody would then have operated on a level playing field. Mr Macintosh was allowed to make his remarks, but there has been an attempt to stop us talking in a similar vein. Surely it would have been more consistent to have explained to him that we would discuss the amendments first and then everybody would discuss the process at the end, rather than have one rule for him and apparently another for the rest of us.

The Convener: I certainly did not cut you off, Mr Gibson; I allowed you to have your say for exactly that reason. Your comments are unhelpful. I have asked all committee members to draw a line under our discussion of the procedures that are being followed, which we will return to at the end of our consideration of agenda item 3. I ask Miss Campbell to speak to amendment 23 if she has any comments to make on it.

Aileen Campbell: I have nothing to say about amendment 23, but I am concerned about why the Presiding Officer deemed that some of the costings are underneath the £300,000 trigger point. I do not know where the Presiding Officer got those figures from or whether we should have had that information in the first place so that we knew what we were comparing things with. We have figures from the Government but no understanding as to why the Presiding Officer ruled the amendments as being adequate for us to discuss today.

The Convener: The Presiding Officer has taken a decision. He has considered all the information that the Government and individual members provided to him, information that was prepared by SPICe and the advice that officials gave him; he has made a ruling; and he has made it clear that he will not enter into a debate about how he
reached his decisions. That is in keeping with the practice of all Presiding Officers in the Parliament when they take positions and make rulings on whether amendments are within the scope of legislation or rulings on costings.

Elizabeth Smith (Mid Scotland and Fife) (Con): I would like some clarification. Did the Presiding Officer consider the paper that was presented to us at half past 9 this morning in any of his deliberations?

The Convener: The Presiding Officer has not had sight of the paper that has been given to the committee. I understand that it was provided to officials and that officials used the information in it in preparing their advice to the Presiding Officer. However, he has not seen the paper.

Elizabeth Smith: Thank you.

Aileen Campbell: So what did he base his decisions on? I understand what you have said, convener, but if the figures differ widely, it might have been helpful to have had an indication of why the amendments are within the scope of today’s discussions.

The Convener: I am not here to justify the Presiding Officer’s decisions. He has taken a decision and made a ruling, which stands.

Aileen Campbell: Convener, I am not necessarily content with that. It is clear that the Presiding Officer has made a decision, but the figures that we have today represent huge sums of money. I do not understand why they have been disregarded or deemed not to be—

The Convener: Miss Campbell, if you are unhappy with that, you should not raise the matter here; it would be for you and your party to take it up with the Presiding Officer at the Parliamentary Bureau. I remind you that the Presiding Officer is under no obligation to advise the Parliament of how he reached his decision or of the information that he used. I have made it clear this morning that a ruling has been made, and the Parliamentary Bureau has been advised of that. Following that decision, we are taking evidence based on it. It is time for us to move on.

Elizabeth Smith: I accept what you say, convener, but the fundamental point is that the bill is about the best interests of the children involved with additional support for learning and their parents, families and carers, and that should be paramount in anything that we decide.

If we are to be true to our principles as parliamentarians, our judgments need to reflect that best interest, based on as much information as is available at the time. I question, on the public record, whether that is happening, because I would have preferred to see a range of figures—quite frankly, some of us have been working in the dark to produce our own figures—and because this debate has affected, although not necessarily in a detrimental way, the process by which we make judgments in the best interests of those children.

The Convener: I remind members that I clearly asked them to save their comments about the process until the end of our deliberations on specific amendments. I understand and accept that the matter is key to the overall consideration of amendment 23, and I have personal views about the imperfections of the process, but this is not the appropriate point to discuss it on the record. We should have a discussion about it at the end of the meeting; members will have to use their judgment, make their points about their feelings about the financial costings that have been provided—imperfect or otherwise—and point out why they believe that those are flawed in relation to specific amendments as we consider them.

I will allow Margaret Smith to come in, but I ask her to be mindful of the advice that I have given the committee.

Margaret Smith (Edinburgh West) (LD): My point is one of clarification. I do not disagree with what you say—we need to get on with our consideration of the amendments—but it is important that committee members’ concerns are on the record. I would like clarification that the discussion that you say that we will have on how the situation has come about will be on the record, rather than being an informal discussion among committee members.

Aileen Campbell and Elizabeth Smith are right: the process is flawed, and I do not think that any of us feel that we have had access to the information that we need to make the best possible judgment. We are, therefore, not doing our jobs properly, and we are all concerned about that.

The Convener: I think that we unanimously agree on that. I intend that that discussion will take place on the record—I have no desire for us not to be transparent and open in all our dealings in relation to our consideration of this piece of legislation.

I see that no one else wishes to make any further comments on amendment 23, so I invite the minister to respond.

The Minister for Children and Early Years (Adam Ingram): Thank you, convener, and good morning, colleagues—I hope that we are all refreshed after our Easter break. I will preface my remarks in a similar vein to Ken Macintosh. I made it perfectly clear when the bill was introduced that I intended neither to tamper with the ethos of the
2004 act, nor to extend its scope or the associated financial envelope in any significant way.

I must point out that the general principles of the bill were agreed to at stage 1 on the basis that the bill did not require a financial resolution, and I was therefore surprised when I was accused of being anti-democratic and trying to stifle debate by not accepting the need for a financial resolution.

If truth be told, I suspect that most members of the committee did not realise that the amendments that they had lodged had significant financial implications and could not be moved in the absence of a financial resolution.

10:15

With regard to the Presiding Officer's ruling on which amendments required a financial resolution, I will start by saying that I am really surprised that he had not seen a copy of the paper that we presented to the clerks on 15 April. I am concerned about that. I will also say that I do not recognise the costings that the Presiding Officer has associated with amendments 10 and 19. In my opinion, my officials provided robust estimates that were based on the cost of publishing and disseminating information. I have made available to members my officials’ estimates and the basis of their calculations. It appears to me that the Presiding Officer’s ruling may not include all the necessary elements that are associated with amendments 10 and 19. However, the methodology used to calculate the costs has not been made available to me or my officials.

That said, I welcome the opportunity to enter into the cut and thrust of debate with members on the policy behind the amendments. My hope is that, at the end of the day, the consensus that marked the stage 1 process might reassert itself. Like Liz Smith, I refuse to believe that we cannot agree on a bill that is designed to meet the educational needs of children who require additional support in order to fulfil their potential.

I turn to amendment 23. Ken Macintosh referred to the Government’s amendment 8, because the two are linked, and said that the purpose of amendment 8 is to insert new section 8A into the Education (Additional Support for Learning) (Scotland) Act 2004, to extend the rights of parents and young people to request a specific assessment, such as an educational, psychological or medical assessment, at any time. That would clarify the current legislation in this area.

Ken Macintosh asks specifically what we would do in relation to the regulations on dispute resolution. We shall amend the regulations to provide that, if a local authority refuses to comply with a request for an assessment under proposed new section 8A, its decisions will be a specified matter that can be referred to dispute resolution. I hope that that answers Ken Macintosh’s point.

We believe that amendment 23 is totally unworkable—basically, because it places a duty on education authorities to respond to requests from parents or young people to assess or examine children or young people for whom the education authorities are not responsible, unless the authorities can prove that the particular requests are unreasonable. However, as Christina McKelvie said, around 29,000 pupils attend independent primary and secondary schools. Do we really expect education authorities to arrange for psychological, medical or educational assessments to be carried out on pupils in those schools, when the authorities are not responsible for the pupils’ education? The pupils have been sent to those schools by their parents precisely because the parents do not want their children to be educated by the education authority. Furthermore, and again as Christine McKelvie said, even if an education authority arranged for an assessment to be carried out in such circumstances, there would be absolutely no requirement on whoever was providing the child’s education to take any account of the result of the assessment. The whole procedure could therefore be a costly waste of time. The arrangements proposed in amendment 23 would be extremely burdensome and costly for education authorities.

Ken Macintosh raised other points in relation to pre-school education. At next week’s meeting, we will discuss an amendment that relates to the under-threes, so we can return to the discussion then.

Convener, I think that I have covered all the points that were raised.

The Convener: Thank you, minister. Does Ken Macintosh, or any other member of the committee, need any further clarification from the minister?

Ken Macintosh: I welcome the minister’s comments about the regulations on dispute resolution, but I ask for further clarification. If an authority refused to accept a request for an assessment, the matter would go to dispute resolution. I understand that, currently, if a parent disagrees with the choice of person to carry out the assessment, which can be contentious, the issue is covered by the regulations. Will that also be a matter for amendment?

Adam Ingram: Yes.

Ken Macintosh: I welcome the minister’s assent.

As the minister said, we will return to the issue of under-threes when we consider another amendment. At our previous meeting,
amendments 7A and 7B, which touched on the issue of pre-school children, were not moved. If we agree next week to the amendment to which the minister was referring, will the parents of pre-school children have the right to request an assessment? I am not sure that the amendment will have that effect, which I have tried to capture by lodging amendment 23.

I know that it is difficult to balance the many aspects of the issue, but the minister did not mention home-educated children. There is a small number of such children, but in my experience children are often home educated specifically because of difficulties or differences of opinion about how to deal with additional needs. Given how amendment 23 is framed, it would not necessarily enable parents who had chosen permanently to opt out of the state system to opt back in at will, because that would be unreasonable. However, at the point of dispute, it is important that parents should have the right to request of the state system an agreed assessment of their child’s needs, so that there can be common ground on which to base a decision whether to keep the child in the state system.

I apply the same argument to private schools, although amendment 23 would not automatically bring in every child who attends a fee-paying school. Perhaps, rather than discuss what amendment 23 would or would not do, we should consider the intention behind it, because if we can agree on that I can redraft the amendment to ensure that it more accurately captures the intent.

Parents often opt out of the state system and into the fee-paying, independent system because of disagreements and worries over additional support needs. I know of children who attend Rudolf Steiner schools because their parents think that they did not get the support that they needed from the state system and that the Steiner schools more appropriately address their needs. There was no other reason for opting out of the state system; the parents are not anti state schools. I do not think that a child who is permanently in the independent sector should be able to opt back in at will and ask for an assessment whenever they want one—that would be unreasonable—but when parents are thinking about where to send their child they should have the right to request an assessment. I do not accept that we are talking about large numbers of children.

Amendment 23 captures the ethos of the minister’s proposed amendment, which is to ensure that families can exercise the right to an assessment and that there are no obstacles that enable authorities to refuse such requests with the result that parents have to justify their case and batter down the doors to get one. As I said, large numbers of people will not be affected: amendment 23 simply effects a slight shift in the balance of power towards parents and away from local authorities. If the minister agrees in principle, the amendment could be redrafted to capture those points.

**Adam Ingram:** I would like time to consider some of Mr Macintosh’s points, but I must say that the 2004 act allows parents many options. For example, they can make a placing request to an independent school. That covers much of Mr Macintosh’s point on parental choice in terms of determining in which authority or school they would like their child to be educated. He also made a point on requests for assessment. That is part of the whole process of establishing additional support needs for a child. When the child has been educated in an authority, that assessment is a right.

I do not quite understand what Mr Macintosh is driving at in seeking to allow parents to remove themselves from a local authority and avail themselves of their rights, which seem to impose burdens on the authority. He seems to be setting up something of a conflict, and I cannot agree with his interpretation of the situation.

**Ken Macintosh:** That is on the private schools. Can I have clarification on the pre-school and home-educated situation?

**Adam Ingram:** Again, home education is a choice that parents make. I imagine that, before they make that decision, most parents seek the best possible outcome for their child and go through a process with their authority in terms of assessment and all the rest of it. Mr Macintosh is using a sledgehammer to crack a nut.

**Ken Macintosh:** And on pre-school?

**Adam Ingram:** Again, home education is a choice that parents make. I imagine that, before they make that decision, most parents seek the best possible outcome for their child and go through a process with their authority in terms of assessment and all the rest of it. Mr Macintosh is using a sledgehammer to crack a nut.

**Ken Macintosh:** And on pre-school?

**Adam Ingram:** Pre-school is a similar situation. Section 5 of the 2004 act covers the scenario that you raised, Mr Macintosh.

**Ken Macintosh:** You said that you will address the issue in an amendment that we will consider next week. I seek clarification on whether the amendment will give parents of pre-schoolers—children below the age of compulsory schooling—the right to request an assessment.

**Adam Ingram:** I will bring in my officials. I ask Robin McKendrick to explain the point.

**Robin McKendrick (Scottish Government Schools Directorate):** In terms of the home-educated and children in independent schools, the 2004 act provides that a parent or school manager can request an assessment of additional support needs, for example if those additional support needs would lead to a co-ordinated support plan. Under section 7 of the act, an authority has the power—not a duty, but the power—to make such an assessment. If they believe that a child for
whom they are responsible requires a co-ordinated support plan, they must inform the parent and school manager of the provisions that would be in such a plan.

Parents and school managers in the independent sector can make requests of their education authority, which has the power to comply with the request if it believes it to be reasonable. Likewise, parents in the independent sector have an existing right to request an assessment and, if it believes that the request is reasonable, the education authority has the power, but not the duty, to make an assessment.

Ken Macintosh: I am fully aware of that; I would not have lodged the amendment otherwise. We debated the issue in 2003 and 2004, and the point of the amendment is to change the power to a duty. You have made your view clear on public schools, private schools and on home education. What is happening with pre-school children? Will you grant pre-school children the right to an assessment and place a duty on local authorities to respond to that?

10:30

Adam Ingram: With respect, Mr Macintosh, that is the subject of amendment 26. Amendment 23 focuses on a different area. We could extend to a general discussion on the bill, or we could focus on amendment 23. As I say, I intend to come forward next week with a comprehensive response on the issue of pre-school children.

The Convener: I appreciate that there are other amendments that will relate to pre-school children, but Mr Macintosh's amendment, which is being considered today, specifically relates to pre-school children. It would help the committee if you could respond to the specifics of pre-school children in relation to amendment 23, which is being considered today, irrespective of whether there is a further amendment that will be considered at a later date.

Adam Ingram: I do not really have anything to add to what I have already said with regard to pre-school children and amendment 23.

Ken Macintosh: There is not much point in continuing the line of questioning. I am slightly disappointed, because my question was not a difficult one. Amendment 26 will address some of my concerns, and I think that the committee and the minister were close to agreement on the issue, but as far as I am aware amendment 26 does not extend the right to request an assessment to pre-school children. If the minister thinks differently, he has the opportunity to tell us.

Is the minister in favour of extending that right? I would like to know so that I have an opportunity to redraft amendment 23 before Friday. I do not believe that extending the right to an assessment to pre-school children will have significant cost implications. It is an important issue and, if the minister thinks that there are significant cost implications, perhaps he should say so now and save us all from discussing the issue again.

Adam Ingram: As I said, I need time to reflect and consider that. I am afraid that I cannot make an instant decision on Mr Macintosh’s suggestion.

The Convener: Christina McKelvie seeks further clarification.

Christina McKelvie: I thought that we were summing up, and I wanted to reiterate—

The Convener: This is not a stage 2 debate, so unless you are seeking further clarification—

Christina McKelvie: I did have a point of clarification. I asked earlier about whether amendment 23 was outside the scope of the bill. Have the clerks done a scoping exercise? If so, can the committee have sight of that? It would allow me to determine whether I can take forward my opinions on amendment 23.

The Convener: I have ruled on the scope of the bill, based on the legal advice that was provided to me. That decision has been taken, and the amendment is within the scope of the bill.

Christina McKelvie: Can we have sight of that legal advice?

The Convener: No. That is a decision for the convener of the committee, in accordance with the standing orders of the Parliament.

We move to the next group and amendment 13, which the Presiding Officer has ruled would involve significant and/or potentially cumulative cost. Ken Macintosh lodged amendment 13.

Ken Macintosh: The purpose of amendment 13 is to repeal the word “significant”. As members will know, this important issue was raised by several if not all witnesses during our discussions on the bill. The word has been a barrier, and it is clear that its use has produced a distorted interpretation of the new rights enshrined in the 2004 act.

At worst, the word has become a barrier that prevents some children from accessing the appropriate level of support. The minister clearly recognises the problems and has gone to significant lengths to address the issue, in particular by establishing a working group to consider the definition. Leaving aside the lack of parental representation on that group, I welcome its efforts, although they have served only to highlight the difficulties that are inherent in relying on an interpretation of the term.
The minister’s answer—to rely on the code of practice—sounds less like a solution and more like a way of avoiding the problem. To my mind, it would be far better, simpler and fairer to remove the term altogether. Even without it, a child would need to fulfil several criteria. A CSP will be given if the child “needs additional support from more than one agency, that child requires the support in order to benefit from school education, and that support is additional to or different from the support offered to children of the same age in mainstream schools.”

There is already a test of some magnitude. Not only is the additional requirement of significance unnecessary but, in practice, it invites regional discrepancies as each agency—each health board and social work department—effectively sets its own standards for what is regarded as significant.

I would welcome the minister’s comments on how much it would cost to remove the term “significant”, why he thinks that doing so would cost a significant amount—I am sorry to use the term again—and require a financial resolution, and whether we need to amend the bill rather than use a code of practice to address this thorny issue.

Kenneth Gibson: Although I understand the point that Mr Macintosh is trying to make, I have concerns that extending eligibility for a CSP to every child or young person with enduring complex or multiple additional support needs would put an additional burden on education authorities without providing any real gain to the children themselves. It would be disproportionate for many children and young people who, at the moment, receive support only infrequently—for example, once or twice a year. The draft guidance that has been prepared would cover the issue.

It is also important to think about the benefits to the children relative to the overweening costs that the proposal would impose. I understand that the costs that the Government has worked out were prepared by an economic advisor in the education analytical services division—the Government’s analytical services unit—and a team leader in the finance directorate. They say that the proposal would cost somewhere in the region of £3.4 million to £11.3 million a year. Westminster is about to impose savage cuts on the Scottish Government from next year, and I do not see where that money will come from.

Notwithstanding the point about costs, the proposal is unnecessary and would impose a bureaucratic nightmare. Without a financial resolution, it should not proceed, even in this surreal debate.

Margaret Smith: We could approach the matter in different ways. First, we could go down the route that Ken Macintosh suggests and take away the word “significant”. Many organisations regard that route positively because of complete and utter frustration at the actions of certain local authorities in their role as gatekeepers to services. If any member doubts that local authorities are not, in certain cases, doing what they are meant to do, they need only look at the financial memorandum, which reflects on the number of CSPs that have been granted compared with those that were estimated in the financial memorandum for the 2004 act.

Paragraph 41 of the memorandum states: “Education authorities have therefore already received excess funding for their work in this area.”

In fact, local authorities would have to go to considerable lengths to bring the number of CSPs up to the level for which they have been funded since 2004. That is what the financial memorandum says; in addition, that is the information that I received from SPICe and, I think, is what Joe FitzPatrick was told in response to a parliamentary question.

We know that there is a long way to go before we reach the number of CSPs that was expected. The financial memorandum to the 2004 act estimated that there would be between 11,200 and 13,700 CSPs at any one time. Currently, the number of CSPs has risen to 2,694, which means that there is a gap of up to 11,000. That covers the financial side of the issue: there is some slack in the system that could be taken up, as the Government has acknowledged in its financial memorandum.

Notwithstanding that point, it is much more important that we as a committee decide what is most likely to address the concerns that parents and others have brought to us. Removing the word “significant” from the 2004 act might well address those concerns, but they could also be addressed through the guidance that is produced as a result of the work of the working group. I have discussed the matter with people in the field and their response has been that the information that will come out of that group is the kind of information that they would have found helpful over the past few years.

On balance, my preference would be to go down the route of the working group and its guidance, which it is intended will give examples so that practitioners in the field have a much better understanding. That will mean that we do not get into a situation in which, as Kenny Gibson said, even if a child is seen only once every year they automatically need a CSP. My understanding is that the guidance will make the position clear.

If amendment 13 were agreed to, there would be cost implications, but what is most important is that we improve the service that is available to
people. The evidence that we have heard is that the present service is not what we would have hoped it to be; it is certainly not what people in 2004 hoped or intended it to be. There is an important financial issue—local authorities have received considerable funding to undertake work that the Government says that they have not undertaken—but with amendment 13, as with all the amendments, the much more important issue is about the service. On this occasion, it might well be possible to improve the service without removing the word “significant”, through the work that the working group is doing to put flesh on the bones of what the provision of significant additional support means in practice.

My only concern is that over the past few years local authorities have, on occasion, proved that they will use any loophole that exists and will work to the letter of the law rather than to its spirit. I can understand why some people might look favourably at Ken Macintosh’s amendment, given that, in some cases, local authorities have failed to do what they have been given the opportunity to do, and should have been doing, over the past few years. That partly explains the attractiveness of amendment 13. I seek as much information as possible from the minister about the guidance that will be prepared for practitioners, which has the potential to improve the service that is available to parents and to children and young people who have special needs.

The Convener: I invite the minister to comment.

10:45

Adam Ingram: I agree very much with a lot of what Margaret Smith said. Removing the word “significant” from the eligibility criteria effectively removes the discretionary element of deciding whether a co-ordinated support plan should be prepared. That would have a major impact on the ethos of the bill and in financial terms, as Kenny Gibson pointed out.

Amendment 13 would require a CSP to be provided for every child or young person who had complex or multiple additional support needs likely to continue for more than a year for which additional support is provided from two or more sources. It might sound like every such child or young person should automatically have a CSP, but amendment 13 would enable a situation in which a child with dyslexia or English as a second language who receives support from an allied health professional once or twice a year can have a CSP. Clearly, that would be disproportionate and not something that we would want to happen as a matter of course.

Amendment 13 could have substantial implications for local authorities by requiring them to assess a large number of children and young people for co-ordinated support plans even though the level of support that they receive from outwith education services requires little or no co-ordination. Authorities would also have to prepare an annual review of the CSPs for all children and young people who, as a result of the amendment, required one. That would be very bureaucratic and not cost efficient.

The word “significant” works as a qualifier to enable a commonsense decision to be taken on a case-by-case basis. We appreciate that there are concerns about the definition of “significant” and, as members know, a co-ordinated support plan short-term working group was formed to advise the Government on CSP matters and to help facilitate the development of any further CSP guidance or training. One of the group’s tasks was to draft further guidance on the definition of “significant” for inclusion in the revised supporting children’s learning code of practice. In taking forward that task, the group had to consider carefully recent Court of Session inner house opinions, which provide clarity on the legal interpretation of the term “significant”.

As members know, I wrote to the committee on 17 March to provide a copy of the draft guidance on the definition of “significant” produced by the working group and to seek its agreement that the best place to clarify the definition of “significant” is in the revised code. It is anticipated that the definition in the revised code will include exemplars of the kind sought by Margaret Smith and, more important, practitioners in the field. It will help them to make up their minds as to what comes under the term “significant”.

Before we remove one of the CSP criteria, we need to be clear about what the outcome of a change to the primary legislation would be. I doubt whether there is any silver bullet that will resolve all the issues around the CSP. If the term “significant” were dropped, might we not start having arguments about what are complex or multiple factors and so on?

I have offered what I consider to be a sound definition of the term “significant” for the code to which authorities, the tribunals and the Court of Session must have due regard before making a decision. It is my view that that is the best way forward, and I hope that that satisfies committee members.

Ken Macintosh: I want to clarify two separate issues, the first of which is about cost. I was intrigued by the minister’s paper on costings, which suggests that removing the word “significant” would automatically mean that around 8,500 pupils would qualify for a CSP. I will not go into the argument about whether that is the case, although I do not mind exploring the issue further.
I have a different view about the number who would qualify. I am intrigued to know how many pupils the minister thinks would qualify if the code of practice were used to amend the definition of “significant”. Currently, 2,694 pupils have a CSP. The minister suggests that if the primary legislation were amended to remove the word “significant”, 8,500 pupils would automatically benefit. If we took the alternative approach of using the code of practice, how many would benefit?

Adam Ingram: I reiterate that my view—and the Government’s view—is that not enough CSPs are being produced up and down the country. The purpose of establishing the CSP working group, of defining the term “significant” appropriately and of reworking the code of practice—the committee should remember that the code will be presented to it and the rest of the country for consultation in due course—is to ensure that all children with additional support needs are appropriately supported. When a CSP is appropriate, we want it to be put in place. As I have suggested, the best way to proceed is through the code of practice, which we hope will change what is happening in practice.

You ask how many pupils I estimate would have CSPs. I would like the level of CSPs to approach that which was expected when the original legislation was passed. In the past year or so, the number of CSPs has increased significantly and I want that increase to continue. The proposal in amendment 13 would not help that process; it would muddy the waters, to say the least. The amendment would be overburdensome and counterproductive.

Ken Macintosh: I welcome the minister’s comments. The clear difficulty is that the code of practice is not amendable by us, whereas the bill is.

Adam Ingram: We will issue a draft of the code of practice and we will take on board people’s views and amend the draft accordingly before the code of practice is presented to Parliament.

Ken Macintosh: It is worth noting in passing that we cannot discuss an amendment that might or might not cost the sums of money that have been mentioned, but the minister can produce regulations that will cost that money and which are not subject to amendment. That is interesting. The regulations do not require a financial resolution, although it seems that they will cost more than the bill. If the minister expects the code of practice to extend the use of CSPs to exactly the same number of pupils as it is suggested my amendment would cover, introducing the code will cost more than passing the bill. However, I will put that to one side.

I draw to the minister’s attention a couple of issues with the code of practice route. The minister knows that although many organisations that represent parents were pleased that the working group was established, they were concerned that it was dominated by local authorities and that it had no parental representation. Even now—before the code of practice has been produced for consultation—can voluntary sector parental groups be represented on the working group, which could have their input?

Sense Scotland produced a paper on the term “significant” that I think that the working group would find useful. Will the minister ask Sense Scotland for its thinking on the matter and have that discussed by the working group, whoever its members are?

Adam Ingram: I understand that the working group’s short term is over and that the group has reported. The consequence is the revision of the code, which I hope that you will see and comment on in due course.

Of course I want to involve parents, particularly parents from the coalition for Scotland’s disabled children, which I have met on occasions. I very much want to involve parents in the development of the code, the regulations and other secondary legislation further down the line. I want to ensure that all stakeholders are engaged in the process. The working group largely considered technical matters, so the scope for input from parent groups was not great. However, I have undertaken to consider such issues in the future, to ensure that parents are appropriately represented when we set up working groups.

The Convener: The next amendment that the Presiding Officer has ruled has a significant or potentially cumulative cost is amendment 15, which was lodged by Claire Baker.

Claire Baker (Mid Scotland and Fife) (Lab): Amendment 15 would ensure that parents were provided with a supporter or advocate when necessary and would bring the bill in line with the Adults with Incapacity (Scotland) Act 2000. The amendment arose from concerns that were expressed during stage 1 by witnesses and by committee members from different political parties. It attempts to address the gap between the right to advocacy and the delivery of that right, by placing a duty on local authorities to provide or fund the right to support and independent advocacy.

At stage 1, the committee heard evidence of the increasingly adversarial nature of some tribunals. I think that we all want measures to be put in place to address the issue. We all agree that successful mediation is the preferred route, but there will be cases that need to be heard by the tribunal, and
parents must be properly supported before and during the process.

In evidence at stage 1, the minister said that he values advocacy and support services. He said:

"I want to ensure that parents have access to advocacy."—[Official Report, Education, Lifelong Learning and Culture Committee, 21 January 2009; c 1905.]

Amendment 15 would enable that to happen. The minister also told the committee that he hoped to be in a position at stage 2 to provide more detailed information on how the Government would address the need for representative advocacy. I hope that the debate on amendment 15 will give him an opportunity to do that.

The committee heard at stage 1 that several authorities have provided advocacy services through Parent to Parent and other organisations. Amendment 15 would give all parents such a service.

The bill team told the committee:

"We will consider each proposed amendment individually and judge it on its merits."—[Official Report, Education, Lifelong Learning and Culture Committee, 3 December 2008; c 1746.]

It is unfortunate that, so far, amendment 15 has been judged solely on cost and not on merit. I welcome the minister’s comment that no member intended to be in such a position. That is particularly true in my case, given that this is the first stage 2 that I have experienced.

I accept that advocacy and support services come at a cost and that it has been difficult to determine the cost. However, the minister has acknowledged the importance of advocacy and support and amendment 15 would achieve the provision of such services.

**Aileen Campbell:** This is my first stage 2, too. I am a wee bit concerned about amendment 15, although I take on board what Claire Baker said and understand that she is well intentioned. It is unclear from the amendment whether the intention is to provide for either advocacy or support, or both, which has cost implications. I understand that we must base the discussion on the Presiding Officer’s determination on costings, but according to the Scottish Government paper similar approaches have cost more than £2 million, which is far more than the £300,000 trigger for a financial resolution. Therefore, amendment 15 should not be part of our consideration of the bill, especially as there appears to be nothing in the 2004 act that would prevent an authority from providing an advocate or supporter.

11:00

**Margaret Smith:** Amendment 15 is really important. It is also quite difficult to cost. We have heard from organisations that provide support and advocacy that the cost would be considerably less than the Government has suggested, but the Government’s suggestion is based on costs for advocacy under the Mental Health (Care and Treatment) (Scotland) Act 2003, and there are definitely similarities.

I will not make a judgment on the financial arguments because we have had a relatively short time to consider them, but I will return to what has led to Claire Baker’s lodging of amendment 15. The 2004 act created a right to support and advocacy but did not create an accompanying duty on councils to provide independent support and advocacy. That was different from how it treated mediation.

One thing that was highlighted to us in evidence was parents’ experience of tribunals. We wrestled with the reality of what happens at tribunals where parents find themselves up against legal teams that sometimes include Queen’s counsels. All members of the committee feel that there is a basic unfairness and fundamental inequality of arms in the system. However, we decided as a committee—as, in fact, our predecessor committee decided in 2004—not to balance up arms by saying that parents should have access to legal aid, which would have brought with it its own financial constraints. We decided that to do so would not only simply benefit lawyers but compound a situation about which were all concerned and that we did not want to be maintained: the increasingly litigious and legal character of a system that was set up to try to work matters through much more informally and in a much more parent-friendly, child-friendly and, as one of our witnesses said, council-friendly way.

That takes us back to how we should redress the balance. If we do not take the legal route to equalise it, we need to find other ways in which parents can get the support that they require. There has to be some middle way between that as the justification for Claire Baker’s amendment 15 and the position at which we have arrived, which is to throw out the amendment on the ground of finance.

That is not to say that the finance is not significant, but amendment 15 is designed to address one of the fundamental problems with the working of the current system. Many members think that we will not consider the legislation on additional support needs again for some years and, when they see something in the current legislation that is patently not working and is being unfair, they do not want to let the opportunity to address it go by. The minister might disagree with that and say that it is not in the ethos of the bill but, having heard the evidence that the committee has taken and knowing the evidence of our
constituencies, we know that it is part of the system that is failing not only parents and children, but everybody at the moment.

I seek some sort of Government response to Claire Baker's amendment 15 that provides a way to address the issue and to give parents greater support than they already have. The Government has put funding into Independent Special Education Advice (Scotland), for example, but that came at the 11th hour. ISEA and other organisations like it live hand to mouth. It is good that the Government funds and continues to fund them, and next week we will consider an amendment in my name to ensure that information about such organisations is made available to parents nationally. However, we must try to find some way in which to square the circle, support parents and make the system fairer without having to spend multiple millions of pounds to do so.

We need to find a way of working together to address the issue, because it is a central problem with the system and it would be deeply unfortunate if we let the opportunity go by us without having tried to address it.

Ken Macintosh: I endorse the comments that Claire Baker and Margaret Smith have made—and indeed the consensual position in the committee's report following our consideration of the matter. Even if the minister is not able to follow the line that amendment 15 suggests, does he agree in principle that there should be a funded advocacy service? If so, what are his thoughts on the form that such a service should take?

Adam Ingram: It might be helpful to split the issue into two parts. There is the question of advocacy services for parents who are speaking to the local authority about their children's needs and are seeking representation at that level; there is also the question of the advocacy services that are required for representation at tribunals. I will deal with those two matters separately.

Although I am fully supportive of parents having the ability to access advocacy at local authority level when they are dealing with council officials, the reality is that we are unable to provide for that service in terms of cost. We would obviously like parents to have supporters or advocates when they need them. The point was recognised, as Mr Macintosh will remember, under the 2004 act. Basically, we did not decide to make access to advocacy unlimited.

Margaret Smith highlighted the use of advocacy under the Mental Health (Care and Treatment) (Scotland) Act 2003. I think that her purpose in using that example in her workings was to show that such advocacy is demand led, and that the demand tends to grow rather rapidly over time, as people get to know about the service. There was a huge growth in the advocacy that was provided under the 2003 act during years 1 and 2, and that was the basis of some of the calculations that have been made for the bill before us.

Committee members should be aware that, after the 2004 act was implemented, an additional support needs advocacy services scheme for eight education authorities was funded by the Scottish Government in 2005-06, at a cost of nearly £250,000. Even allowing for no growth at all, the cost of rolling that out to all education authorities would amount to £1 million per annum. If we add on growth from a demand-led service, a lot of money is involved. Amendment 15 puts the burden to pay for the service on to the education authority.

On the other side of the equation, and as I said during the stage 1 debate, I am committed to establishing a representative advocacy service at tribunals for all parents and young people throughout Scotland. I propose the allocation of £100,000 per annum for a service to represent and/or support parents and young people effectively at tribunals.

Such a service, which would offer additional provision to that of the existing advocacy and representative organisations for parents and young people in Scotland, would support parents and young people from such time as they had grounds to make a referral to the tribunal. I would also expect the service to help parents and young people with independent adjudication and with other remedies that are open to them to resolve disputes with education authorities.

My officials are considering the exact terms and conditions of that representative and support service. Once those have been finalised, a fair and open competitive grants scheme will be advertised to relevant organisations and further details will follow in due course. I hope that the situation that Margaret Smith described, in which organisations currently work from hand to mouth, can be put behind us.

The Convener: We will come to Margaret Smith's amendment in a minute, but I will first allow Claire Baker to respond to the minister's remarks.

Claire Baker: Briefly, the minister's response is helpful. All committee members have recognised that the way in which the current legislation operates gives parents a right to advocacy without placing a duty on anyone to deliver that service. That has been a problem—we heard that during stage 1—as has the adversarial nature of the tribunal, which is an issue of concern. I welcome the minister's commitment to fund representative advocacy support services.
I understand that the minister’s officials are still working on the details of the proposal, but do we have an idea of when the scheme will come into operation? Does the minister feel that such a service will meet the need for advocacy at that level? Will there be enough capacity to deliver advocacy for all parents?

Adam Ingram: Yes. The bidding process should kick off in the autumn, so I hope that we can move seamlessly from the current situation to the new one in the new year.

Claire Baker: In addition, the minister mentioned the eight pilot authorities. In evidence at stage 1, I think that Highland Council was mentioned as one of the authorities that uses Parent to Parent. What is being done to encourage other authorities to go down the path of providing that type of service? The purpose of amendment 15 is to impose a duty on education authorities to provide such services. If we are not to go down the road of imposing a duty, how can we encourage authorities to provide such services?

Adam Ingram: Clearly, a number of local authorities already fund local advocacy services within their areas, but it is really a matter for them to respond to the wide variety of demands for advocacy that exist. Such demands are not just focused on additional support needs. I would certainly like to see advocacy services expand, as I think that there is a need for them. I have asked officials in my department to carry out a mapping exercise of advocacy services in Scotland, so I will want to look at that before I consider any proposals to beef up provision. However, I am broadly supportive of encouraging local authorities to develop advocacy services, as I think that they are important.

The Convener: On that point, does the minister have any concerns that anecdotal evidence—particularly from Who Cares? Scotland, which provides advocacy services to 31 local authorities—suggests that several authorities have substantially reduced the advocacy services that they offer? One or two local authorities are even considering ending the provision of independent advocacy.

Adam Ingram: It would be a retrograde step if authorities were to go down that line without considering any alternative.

11:15

Ken Macintosh: At stage 1, the minister said that he had commissioned a study into the issue from the Govan Law Centre. I cannot remember exactly, but I thought that he said he would have that paper before or during stage 2—or, certainly, before stage 3—and would share it with us. Is that the case?

Adam Ingram: Yes; I mentioned that I had commissioned the paper and that I hoped to update the committee on what we intended to do on advocacy services by the time that stage 2 arrived. If I recall, that was what I said. I will need to look it up again, but I assume that I am fulfilling my obligation to come back to the committee at stage 2 with the announcement that I made.

The Convener: The next group of amendments that the Presiding Officer has ruled have a significant or potentially cumulative cost contains amendments 10 and 19. Elizabeth Smith, who lodged amendment 10, will speak first. Margaret Smith, who lodged amendment 19, will then make her remarks.

Elizabeth Smith: What struck me most frequently when we took evidence—particularly from the National Autistic Society, the Scottish Government schools directorate and the Additional Support Needs Tribunals for Scotland—and when I consulted two experts in ASN support, was the contrast between Scotland and other countries when it came to the provision of adequate and accurate information on the rights of parents and their children in assessing good-quality care and support. I was particularly struck by examples from countries where, from the day that a specific additional support need is identified, a clear parent-partnership officer structure was put in place with a mandatory obligation on local authorities to provide a clear set of policies, support and a code of practice, plus a full list of the rights of parents associated with those two provisions.

Although some local authorities in Scotland are exceptionally good at that, sadly some are not, with the result that their children’s support services either fall woefully short of the expected standard or, in some cases, are non-existent. There is a clear need to provide a level playing field in that respect and ensure that we do anything possible to identify all the cases in which there are additional support needs. My belief is that, if people are much better informed, it will save costs in the long run because, the sooner we identify some of the issues, the sooner we are able to pick them up and ensure that they do not protract into longer difficulties for the parents, with the trauma and stress that goes with that.

That is the intention of amendment 10, which I will move next week.

Margaret Smith: Amendment 19 says that information about a council’s ASL policy should be available on request from each school or education authority establishment, and suggests that the information should be in any school
handbook or other publication about the services that the authority provides that is given to parents. It also suggests that the information should be on any website that a school or the local authority maintains. We know from statistics that 24 per cent of adults access information about their local authorities from websites, so at least that percentage is likely to do so in this respect, as well.

As I see it, the normal course of events would be that a parent would be given the information in the school handbook when the child joined the school but could also, at any time, access it on the council or school website and should be able to ask for it from the school. In that case, the information might be in the form of a separate leaflet, but it could be a copy of the relevant part of the school handbook.

The 2004 act already requires education authorities to publish information on ASL policy, to keep it under review and to publish revised information. Some councils already do some of that, although some do not. I would echo the points that Liz Smith made about that.

The crucial point is that amendment 19 would not introduce any new requirement in respect of the production of information about ASL policy, but simply makes suggestions about where and how the existing information might be accessed. Indeed, paragraph 87 of the financial memorandum to the bill that became the 2004 act stated that, although it contained duties to publish information,

“The Bill formalises this good practice that is already occurring in local authorities and it is therefore expected that these duties will be absorbed within existing resources.”

I note that the Government’s view is that the information that would be provided would be additional, but I dispute that. I do not intend to introduce anything additional because the duty on education authorities to provide information already exists and, if there are reviews, they have to review that provision.

The Government also says that education authorities would be

“under a duty to send out all of this information again with any general information publications”.

I point to the use of the word “request” in amendment 19. It is about people being able to get further information on request. The information would already be in key documents, such as the school handbook, and on websites. The amendment is designed to ensure that people are able to turn up at the school office and ask for something that will give them information on ASL policy, as well as the information that they would get as a matter of course.

I expect that the parents of children with additional support needs would be most likely to want to access the information. That gives us a range of between 5 per cent, that are already identified as having ASN, and Baroness Warnock’s figure of about 20 per cent. We can take a stab at how many people will request the information. However, Liz Smith’s amendment 10, which is about giving out information to parents of children who are identified as having ASN, would do some of what I propose and, indeed, some of it is already meant to be done under the 2004 act. Therefore, we would not be talking about the full 20 per cent.

Scottish Parliament information centre figures estimate that the cost of printing and circulating information would be £1.25 per pupil, and I have said that we could assume that something in the region of 7 per cent of parents would request information. Therefore, the cost to each council would be relatively small—about £4,500—partly because some of the costs can be spread and some are already covered in implementation of the 2004 act.

It is also worth noting that the financial memorandum for the bill does not include costs for dissemination of information about the changes that will be brought in by the bill as introduced by the Government. Therefore, it is clear that the Scottish Government shares my view on the matter. If it does not, why does its financial memorandum not include the cost of publishing information about the changes that the bill will introduce, such as access to out-of-area placements?

I have not included any one-off costs because it is clear from the 2004 and current financial memoranda that the Scottish Executive and the Scottish Government felt that such costs could be absorbed. Therefore, it seems bizarre that cost could be used as a reason to stop debate on any amendment about where and how information should be accessed. The Govan Law Centre believes that the costs that would be incurred through agreement to amendment 19 would be negligible—I agree. I expect that the costs would be associated mainly with printing of leaflets that people could request at schools and local authority offices on an on-going basis.

In evidence, we heard a great deal about parents not being aware of their rights under ASL legislation. Amendment 19, in my name, and amendment 10, in the name of Liz Smith, would go some way towards addressing that important issue. We know that some councils follow good practice, but others do not. The good practice should be identified and copied throughout Scotland. Amendments 19 and 10 would go some way towards making more parents aware of their
rights and therefore more likely to engage earlier in the process, before people’s positions become entrenched and lead to disputes.

I strongly challenge the costings on amendment 19. The absence from the financial memorandum of figures on distribution of information suggests that the Government thinks that such costs could be absorbed—as was the case for the previous Government in relation to the 2004 act. It is bizarre that amendment 19, which would require information to be made available on a website or in a school handbook, is suddenly thought to require large amounts of money.

Aileen Campbell: We all want to find ways to inform and empower parents. That has been a theme in many of our discussions on the bill. However, amendment 10 would require education authorities to provide parents of children who have additional support needs with all the information that they published under section 26 of the 2004 act, whether or not parents wanted that information. The Scottish Government’s figures indicate that the information might have to go to between 38,000 and 136,000 parents and young people. If we take the higher figure and assume that it costs £2 to send information out to a person, we are getting near to the £300,000 trigger for a financial resolution. Moreover, amendment 10 does not set out how information should be distributed. The Scottish Government has suggested that costs could be high and might range from £250,000 to £870,000 or so. There would be postage costs, too.

I would be interested to know what matters the Presiding Officer considered during his deliberations on amendments 10 and 19, given that Adam Ingram said that there is concern that perhaps not all aspects of the costings have been considered. If amendment 10 were agreed to, the effect would be that every time there was a review of figures on distribution of information suggests that the Government thinks that such costs could be absorbed—as was the case for the previous Government in relation to the 2004 act. It is bizarre that amendment 19, which would require information to be made available on a website or in a school handbook, is suddenly thought to require large amounts of money.

Amendment 19 would place authorities under a duty to ensure that the information that they must publish under the 2004 act was available

*(i) on request, from each place in the authority’s area

where school education is provided,

(ii) in any handbook or other publications provided by any school in the authority’s area or by the authority for the purposes of providing general information about the school or, as the case may be, the services provided by the authority, and

(iii) on any website maintained by any such school or the authority for that purpose*.

Therefore, every publication that included general information about the school—whatever the topic—might contain a disproportionate amount of information on additional support for learning. We are keen to empower and inform parents, but we do not want parents to drown in information, which could be an unintended consequence of amendments 10 and 19.

Ken Macintosh: As was the case for my colleagues, the inclusion of amendments 10 and 19 in the Presiding Officer’s list caused me the most surprise. I do not understand why it is thought that they would attract significant costs.

It is clear that throughout Scotland there is a problem to do with getting proper information to parents. Does the minister agree in principle that a duty to supply information should be included in the bill, to address the problem?

The Convener: I point out that amendments 10 and 19 are deemed to incur not “significant” but “cumulative” costs. The committee will be able to consider the amendments next week and, indeed, agree to them, if we think that they are appropriate.

11:30

Adam Ingram: I have no argument with the policy intention of amendments 10 and 19. As Aileen Campbell intimated, my concern relates to the unintended consequences of how the amendments have been drafted, which means that they will place a particular kind of burden on local authorities. I have produced alternative amendments that I would like to share with the members who lodged amendments 10 and 19, so I would like to discuss the amendments with them prior to 12 noon on Friday, which is the deadline for lodging stage 2 amendments.

I accept that some authorities are failing in their statutory duty to provide parents with, or to signpost them to, information about their rights. I intend to exercise my direction-making power under section 27(9) of the 2004 act to ensure that the requirements of that duty are met: I will write shortly to all chief executives of local authorities to that effect. Furthermore, I will ask my officials to collate the information that is published by each authority to ensure that the statutory requirement has been met.

I do not want to explain again the burdens that amendments 10 and 19 would place, as entirely unintended consequences, on local authorities—Aileen Campbell has already gone over that ground. We do not want to turn school handbooks into additional support needs manuals, which would, according to my legal advisers, be the consequence of the amendments. Similarly, the amendments would lead to the distribution to parents of all the information that is listed in section 26 of the 2004 act. It would be useless to have such voluminous material go through
people’s doors, as no one would ever read it. I would be grateful if members would consider with me how we can adjust the amendments to focus on the policy intention.

Margaret Smith: I am happy to have such discussions with the minister. The important point is to ensure that information is made available at locations and in ways that enable parents and local people to access it as easily as possible. It is clearly not our intention that school handbooks should be full of ASL information. However, it is perfectly reasonable to require that every school handbook in the country should include some ASL information, to act as a signpost for parents. I am happy to have a conversation with the minister about that prior to Friday’s deadline.

Elizabeth Smith: I, too, will discuss the matter with the minister. My amendments have been costed on the basis that information will be provided not to all parents but to parents who have children with ASL needs, which may alter the conversation slightly. I am willing to share with the minister the costs of doing that, which I do not see as being significant. We can discuss the matter.

The Convener: That concludes our consideration of amendments 10 and 19. I suspend the meeting for a short comfort break.

11:33
Meeting suspended.

11:43
On resuming—

The Convener: I reconvene this meeting of the Education, Lifelong Learning and Culture Committee. We return to item 3 on our agenda.

The next group contains amendment 25, which was lodged by Margaret Smith, and which the Presiding Officer has ruled potentially has significant or cumulative costs.

Margaret Smith: Time and again we have heard that the 2004 legislation is good in principle, but that the practice does not always match the spirit of the legislation or the intent of Parliament in passing it.

It is clear to me, and probably to other committee members, that parents of children and young people with additional support needs are often among those who are best placed to comment on what is happening on the ground and on the steps that might be taken to improve the services that they use. In its report on the 2004 act, Her Majesty’s Inspectorate of Education highlighted the lack of consultation with parents and young people about services.

My amendment 25 states that education authorities will have to consult on their ASN policy and the information given out about it every three years—crucially, once every council term. No council would ever be able to say, “This isn’t something that’s important to us”; it would have to address the matter regularly. We heard from a large number of parents and groups that some local authorities do not listen to their concerns, therefore I suggest that consultation be undertaken by an independent figure so that parties can have faith in the results, and that the report be sent to HMIE, which has flagged up its concerns.

Amendment 25 states that the council would have to consult children and young people, their parents and other persons “as the authority considers appropriate.”

That means that a local authority would not have to consult every pupil or parent, or indeed every pupil with ASN or their parents. It could consult parents and groups that it considered appropriate to get the required information on how its services were doing. However, there would be guidance from ministers about the content and publication of the information and the persons consulted. There is an element of discretion in my suggested approach, which has been supported by several children’s organisations, including Children in Scotland, the National Deaf Children’s Society and the for Scotland’s disabled children campaign.

Given that the Presiding Officer has deemed that significant costs are attached to amendment 25, it is unlikely that it will go any further, so I seek assurances from the minister that the Government might audit councils’ consultation of affected families, at least as regards additional support for learning. It would be useful if the Government considered how to develop that in a way that did not require legislation.

The Presiding Officer’s office has taken the view that amendment 25 carries significant costs, but the responses that I have received from a range of sources, including SPICe, Govan Law Centre, Children in Scotland and the City of Edinburgh Council testify to the fact that amendment 25 is very difficult to cost. The costings range from £96,000 every three years, which I got from Govan Law Centre, to £9.6 million, which is from SPICe, although SPICe has since written to me accepting that the figure could be considerably reduced, given that not all parents and young people would be consulted. SPICe’s original figures were based on having to consult everybody, which was not the intention of amendment 25.

Children in Scotland has told me—and it might have told the Government the same thing, because the Government uses the same
example—about a consultation that it undertook in North Ayrshire that cost £30,000. However, so many factors are involved that it is difficult to determine costs. The City of Edinburgh Council told me that it had undertaken a number of consultations but refused—or was unable—to come up with a figure for consultations under amendment 25, because it said doing so would require the detail of who was to be spoken to and what was to be asked. Councils would have discretion in determining who to consult. Consultation could involve a small number of people or a much larger group. If the local authority decided that the consultation was to be much more targeted, possibly involving consultation of representative groups only, for example, the cost would clearly be much lower.

Govan Law Centre costed amendment 25 at £96,000 every three years, which most people would agree is a fairly minimal amount of money, given that it would cover the whole country. Govan Law Centre cited the explanatory memorandum to the Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005—I will give all members a copy at the end of the meeting—and the consultation undertaken by the Greater London Authority when it developed its disability equality scheme. The overall cost of the consultation for the GLA, said Govan Law Centre, was £3,000. If you multiply that by 32 councils you get £96,000 every three years. Obviously, London has a much larger population than any Scottish authority area, but each council would have to tailor its consultation to suit its needs. I am sure that it could be argued that that is but one example, and that other examples would show something else. Bearing all that in mind, and bearing in mind the fact that local authorities would seek to minimise costs, I believe that a figure of about £152,000 over three years is reasonable.

In advance of the meeting, we were in the dark as to what cost the Presiding Officer’s office would attach to amendment 25. However, a ruling has now been made. I accept that, in the present climate and given the restrictions on council budgets, consultation might not be seen as a priority, whether the cost is £152,000 or significantly more. However, I return to the principle of amendment 25, which is about ensuring that councils consult properly the people who are affected by their services. I ask the minister to take that on board and to consider whether, when he writes to council chief officers to ask what they are doing on access to information, he might also ask what they are doing on consultation. Some councils have consulted from time to time. Some have had in-house consultations and others have set up independent consultations. It would be good if the councils that have not so far consulted were reminded that doing so is good practice and that other councils are undertaking it.

I am concerned that, if we do not agree to amendment 25 or a similar provision, some people might see the Parliament as a further barrier to concerns about the ASL system being heard. I seek assurances from the minister that something will be done to ensure that that does not happen.

Kenneth Gibson: The spirit of amendment 25 is good, but it is lacking somewhat on the details. The provision to which Margaret Smith referred, about local authorities consulting people whom they consider to be appropriate, drives a bit of a coach and horses through the amendment. I am also alarmed by the possibility that the cost could range from £96,000 to £9.6 million. An amendment with a possible financial impact of such a wide range cannot possibly be accepted. The proposal will have to be considered again, if that is possible. The phrase that adheres to the proposed consultations under the amendment is, “How long is a piece of string?” A further issue is that, even if there was a duty to consult, there would be no corresponding duty on the Scottish ministers to publish guidance.

Amendment 25 is well-meaning and members would like something in the bill along the lines that it sets out. However, the costings are open-ended and, even if the amendment was within the financial envelope, the fact that some local authorities might carry out a minimalist consultation whereas others might carry out a significant one would render it completely ineffective. I have concerns about the practicalities.

The Convener: I call Liz Smith.

Elizabeth Smith: —

Kenneth Gibson: —

The Convener: Sorry, convener. I wanted to add another point, but I forgot about it.

The Convener: I remind you that I chair the meeting and I decide who is going to speak. I will let you in on this occasion.

Kenneth Gibson: Yes—sorry, convener.

Margaret Smith said that the cost would be about £152,000 over three years. That is a fairly precise figure, but she did not explain how she arrived at it. When she sums up, will she say how she arrived at that figure? It might help.

Margaret Smith: I have workings, but I decided not to go into them.

Elizabeth Smith: I lend my support to the principle behind amendment 25, as it is yet another amendment that could improve the process by which we help parents through the difficulties of having children with additional support needs. The key priority is to place a duty
on local authorities to assess whether they are delivering good-quality services. That ought to happen as part of local authority processes in any case, but a duty is important.

I appreciate that we have been given a wide range of costings. I did a little research of my own and I was persuaded that the costs would be minimal rather than of great substance. My support for amendment 25 is perhaps slightly conditional, but amendment 25 would be a way of improving our appraisal of service delivery. There are no two ways about it—the importance that local authority policy attaches to support for parents and children is fundamental. I am minded to support the amendment, on condition that it does not result in too many costs.

The Convener: I ask the minister to respond to members’ points.

Adam Ingram: Members have covered the ground. We see amendment 25 placing an onerous cost burden on local authorities—members have the methodology that brought us to that conclusion—although I agree with the policy intention. We need to establish best practice for consulting parents on the information that they require with regard to their children’s needs, and we must ensure that that best practice is adopted throughout the country. When I write to chief officers, I shall refer to that point. I hope that that satisfies Margaret Smith’s aims.

I should point out that we have a continuing inspection process. Given that HMIE has already flagged an issue of concern, I will ensure that it is followed up on throughout the country.

The Convener: Margaret Smith, do you have any further points of clarification that you would like to pursue with the minister?

Margaret Smith: I shall address some of the points that have been raised on my amendment 25. I share a certain amount of common ground with Kenny Gibson—that may not happen on many occasions today. My amendment 25 seeks to pick up on HMIE’s concerns about consultation, and concerns that were raised with the committee. When one drafts and lodges an amendment, it is concerning that the costings are so varied. SPICe effectively rowed back on the most excessive costing when I clarified that the duty placed on councils was discretionary—they would not have a duty to consult every single person.

There remains a certain amount of latitude in the costings, due, to a large extent, to the discretion afforded to local authorities. However, local authorities will not have discretion not to consult, which is the important part of amendment 25. I would like to pursue that with the minister. It is important that a duty is placed upon councils to consult on their services within a reasonable timeframe. We cannot get away from the fact that costs would be attached to that. I, for one, would not want millions of pounds to be spent on consultations instead of on additional support for learning services—none of us would think otherwise. Being given such a range of costings is perplexing.

Ken Gibson said that my proposed process would leave no place for ministers, but amendment 25 states:

“The second duty is a duty to have regard to any guidance issued by the Scottish Ministers”.

so ministers would have a role.

12:00

As regards my costings, I used as a starting point the figure for the Greater London Authority that was given to me by Govan Law Centre. Given that that authority has to come up with only one set of proposals, which it can implement across the board—albeit that the area in question is extremely large—I moved upwards from the figure of £3,000 and came up with one of just under £5,000: £4,750. I thought that that was a perfectly reasonable amount, given what consultation might consist of.

I felt that if we left the matter in the hand of councils, their instinct, at this point, would be to adopt a minimal approach. A council might take such an approach to the duty to consult regularly on one or two occasions, but it might spend more money on the process every decade or so when it considered changing services. I would have thought that the instinct of councils would be to meet the duty but perhaps to do so by approaching representative bodies and asking them to consult parents and so on, and that there would be a way of conducting such consultations across the country for about £150,000, which I consider to be a reasonable cost.

I am pleased that the minister has said that he will write to the chief officers on the matter. There is a certain veracity in his comment that because the issue has been flagged up by HMIE, councils will have to take cognisance of it. I do not doubt that some councils will do that, but councils’ record on the 2004 act does not fill me with a great deal of confidence that they will all do so.

That takes me back to the fact that, even though I heard what Mr Gibson, the minister and Elizabeth Smith have said, the policy intention behind my proposal—that parents and children and young people should be consulted on such important services—has a certain amount of support around the table. My intention was to find a way to ensure that consultation occurs. Clearly, neither I nor any other member of the committee wants the cost of such consultation to be prohibitive. I would like to
discuss the matter further with the minister to establish whether my amendment 25 can be tightened up in such a way that the duty to consult remains but we know for a fact that it will not cost a prohibitive amount of money.

Kenneth Gibson: I have a point of clarification on proposed new section 26A(3) of the 2004 act. Although it states that there would be a duty on authorities

to have regard to any guidance issued by the Scottish Ministers about … the persons to be consulted,

there is no corresponding duty on the Scottish ministers to publish guidance. That is the point that I was trying to make.

Margaret Smith: Technically, that issue could probably be swept up at stage 3, if I was allowed to do so, but I will not be.

The Convener: Minister, do you have anything to add?

Adam Ingram: I look forward to exchanging views with Margaret Smith and seeing what we can come up with.

The Convener: We now move on to amendment 16, which the Presiding Officer has also ruled would have a “significant” or “potentially cumulative” cost. I invite Margaret Smith, who lodged the amendment, to speak first.

Margaret Smith: I will give the committee my rationale for lodging amendment 16 and address others’ interpretation of it, which are not the same thing. My motivation when I spoke almost in the spirit of regarding it as a minimal, almost technical, amendment, and I still believe that its costs, which have been underspent. I refer to my earlier point on the amounts of money that have been given out for CSPs. Exactly the same argument can be made for the number of tribunals, whereby funding was made on the basis of having 300, although there have been only 75. I am sorry that my earlier figure was wrong. I recalled it from memory, which is always a bad move at my age. Tribunals and local authorities have therefore been overfunded for the past few years, so any amendments that increase the number of tribunals by no more than 225 should incur no extra cost.

A costing of £16,000 means less than £500 per local authority area, so I am puzzled by the decision to deem that as a significant cost. SPICe, ISEA, Govan Law Centre, the for Scotland’s disabled children campaign and others believe that the costs associated with amendment 16 would be minimal. In fact, I lodged amendment 16 in the spirit of regarding it as a minimal, almost technical, amendment, and I still believe that its financial consequences would be small. Amendment 16 would give a small number of pupils access to tribunals and deal with the current anomaly of reduced protection for young people aged over 18.

The number of extra references to tribunals for children in their eighteenth year would be low. In fact, it would be of the order of one reference every few years, given that we have had, I think, only 30 tribunals in total. Such costs are absorbable by the on-going budgets for tribunal costs, which have been underspent. I refer to my earlier point on the amounts of money that have been given out for CSPs. Exactly the same argument can be made for the number of tribunals, whereby funding was made on the basis of having 300, although there have been only 75. I am sorry that my earlier figure was wrong. I recalled it from memory, which is always a bad move at my age. Tribunals and local authorities have therefore been overfunded for the past few years, so any amendments that increase the number of tribunals by no more than 225 should incur no extra cost.

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She went on to say that an amendment such as amendment 16 would

undoubtedly ease the transition process.”

I have also heard from elements of the voluntary sector that parents are put off going to tribunals towards the end of their child’s school career partly because of information that they receive about the age bar. Viewing it in that way, I would have thought that the Government would be content to address the anomaly, because it impacts on only a small number of individuals.

Amendment 16 seeks to redefine “young person” to mean a person over school age who is still in school education, as opposed to the current definition from section 135(1) of the Education (Scotland) Act 1980, which says that a young person is someone over school age who is not yet 18. Currently, if someone is still at school but over 18, they are not covered. Amendment 16 would extend coverage to those pupils.

According to the pupil census, 1,457 pupils in secondary school and 215 at special school are 18 or over. Assuming that 4.7 per cent of the secondary school pupils have additional support needs, that adds a further 68 pupils, which means that 283 ASN pupils are over 18. Of those pupils, 7 per cent will have CSPs, so SPICe believes that the cost involved in an annual review would be around £16,000.

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The Government’s reading of amendment 16 is obviously very different from mine. It has somehow added a further 40 people over 17 to the schools cohort, suggesting that they would seek to stay at school because of what amendment 16 would do, and added two extra years at school for
some. The Government quotes unpublished Scottish Government figures that show that 554 young people with ASN will reach 18 this year. The Government’s take on the effect of amendment 16 is to include the costs for all those 554 young people, but I suggest that some of the costs are already being met. Not taking that into account is why the Government gets a cost rise of £14 million, which is clearly not the intent of amendment 16 or, indeed, of the evidence that we took about the anomaly that it seeks to amend. If amendment 16 would give rise to any untold consequences—financial or otherwise—I am keen to hear them, so that I can investigate with the minister whether the amendment can be redrafted to realise my original limited intent.

I return to my earlier point about the process. As the clerks will be aware, when the financial concern about amendment 16 was flagged up to me two or three weeks ago, I immediately asked why, because I could not understand why that should be the case. Had someone been able to tell me the reason, I would have addressed the matter in good time. It was certainly not my intent to create unforeseen consequences. On hearing the ruling that amendment 16 was still causing concern, I again sought clarification with a view to saying that I would be only too happy to make any changes necessary to ensure that the consequences did not arise. However, I was told that, in the normal course of events, information about a Presiding Officer’s decision would not be made available to me or to any of us. I must say that this does not seem a very normal course of events.

If something at the heart of amendment 16 means that my intention is being pursued in the wrong way, but the Government is content for the intended technical point to be pursued, I will be only too happy to try to find ways to work with the minister on the issue. If, on the other hand, the minister has a principled position that suggests that I am completely on the wrong track, I look forward to hearing his comments. However, from my perspective, amendment 16 typifies the ridiculousness of the system that we have had to work with over the past two or three weeks. All of us around the table are just seeking to do the best that we can in trying to produce workable amendments that do not cost the earth but improve services for children with additional support needs.

Aileen Campbell: Of course I hear what Margaret Smith says, and I understand where she is coming from, but my reading of the information that we have received today is that there are concerns that amendment 16 would run contrary to all other education legislation by removing the cap at the age of 18. As Margaret Smith said, we would all want to guard against a huge cost of £14 million.

No matter how well intentioned it might be, amendment 16 could also be viewed as discriminatory against school pupils who do not have additional support needs. The result could be perpetual schooling, with adults in their 60s being viewed as young people. Of course, that would bring with it disclosure considerations. If more young people were kept within the system, there could also be a knock-on effect on school places, especially at special schools. Therefore, I do not think that amendment 16 works. It certainly does not work financially, given what we have heard.

I share Margaret Smith’s concerns about the process, but I do not think that we should proceed with amendment 16 as drafted, because of the issues concerning perpetual schooling, cost and discrimination.

Ken Macintosh: I, too, was surprised that very modest amendment 16 was included in the category of amendments involving a significant cost.

Let me first highlight the reasons for the amendment. As many of us will know from our casework if not from the stage 1 evidence, one of the most difficult moments in the life of any family that has a child with additional support needs is the point of transition to adulthood, when services drop off abruptly. As Margaret Smith pointed out, that transition can happen when the young person is still at school. Let me remind the minister and others of the recent report “Sweet 16? The Age of Leaving Care in Scotland”, which was published by Scotland’s Commissioner for Children and Young People. It is worth drawing a parallel with that report, which highlighted a similar problem in a different context when it flagged up the difference that statutory rights can make to young people at the ages of 17 and 18.

We currently rely on good practice, but that can easily be jettisoned. It is important to put something in statute to protect the rights of young people at school. The Government appears to believe that amendment 16 might encourage young people to stay on at school or that it would capture a group that I do not think exists—Aileen Campbell referred to older people with special needs who might be at school. I do not know who those people are, but that is absolutely not the intention. I ask the minister to confirm whether he would support amendment 16 if it was redrafted so that it was clearer that it would affect young people with additional support needs who turn 18 while they are at school.
Adam Ingram: The major problem is that 18 is the cut-off point between childhood and adulthood—that runs throughout our education legislation. My understanding of amendment 16 is that it aims to ensure that children or parents of young people have access to a tribunal if they have problems with the transition planning that relates to the move from children's services to adult services. I certainly want to address such issues, but we have a problem with legal definitions and issues such as who is entitled to school education. The proposals would upset the whole system, so we must consider that.

I do not know whether Margaret Smith has spoken to Jessica Burns about the issue, but I want to get a little more information about what the particular problem is. It seems to me that any problems with the transition process should be flagged up well before the young person reaches 18, because the arrangements for that are supposed to be established a year in advance of a young person leaving school. Why would access to a tribunal be desirable post-18? Should it not happen a long time before that? I ask the proposer of the amendment to give me convincing answers to those questions. I have not had a great deal of feedback that access to a tribunal for over-18s is a significant problem.

There is a problem with the transition to adult services and we have concerns about that. We have a policy on that, which is our 16+ learning choices policy. Under that initiative, we want young people to move into positive and sustained post-school destinations to help develop their learning and their skills for life and work in whatever type of provision best suits their needs and aspirations. The 16+ learning choices initiative is the new model for ensuring that all young people have a suitable offer to enable them to stay in learning and make the right decisions for their future. We aim to provide that for all young people, including those with additional support needs.

I am happy to discuss the details with Margaret Smith and other committee members. I am a bit doubtful about whether we can come up with something to tweak the legislation, but I have an open mind on that.

Margaret Smith: I am happy to undertake discussions with the minister on amendment 16 and the other two amendments that we discussed earlier. If there is a way in which we can address the matter that does not involve hitting the definition of a young person, that would be the best way forward, but I have been in the hands of draftsmen who have suggested that that cannot be done and have said how the matter had to be addressed.

The minister may be correct when he says that he is not aware that 18-year-olds having access to and going to a tribunal is a significant problem. It may not be a significant problem. That takes us back to the costings that I had attached to the matter. I did not think that there was a significant problem because I thought that a very small number would be involved—one person every few years—but I thought that we should consider the fact that the president of the Additional Support Needs Tribunal for Scotland flagged the matter up to us. That was backed up by more anecdotal concerns that were raised informally with me by certain children’s organisations.

There are concerns that a message is, in effect, given to parents as children come towards the end of their schooling that once their kid gets to 18, whether or not they are at school, nothing can be done and they cannot go to a tribunal. Concern exists that another barrier is being put in place for certain people. That is largely the sort of anecdotal evidence that exists, but it is indicative of the concerns that have been raised with us about the issue. Parents think that all sorts of barriers to getting problems addressed or to getting some sort of redress are put in their way. I appreciate that the problem will not affect many people—hence my reading of what the consequences of amendment 16 would be. I am happy to consider the matter further with the minister to see whether any problems that a relatively small number of people might have with the current system can be addressed. We may be unable to do that because the consequences would have too many ramifications, but I am happy to enter into conversations with the minister to see what we can do.

Adam Ingram: There is only one other thing that I want to mention, which follows on from what I have said. We recognise that problems exist. HMIE pointed out that there were problems with post-school transitions. We have appointed a national transitions development officer, who will lead, manage and co-ordinate local and national partnership approaches to the effective implementation of the act. It is not as if we are not aware of the issue or that we are not taking steps to address it. Members of the committee should bear that in mind. Not all solutions are necessarily legislatively or policy driven. The example in question is an example of that.

The Convener: That concludes our consideration of amendment 16.

The final group with an amendment that the Presiding Officer has ruled as having significant or potentially cumulative costs contains amendment 12, lodged by Liz Smith.

Elizabeth Smith: Amendment 12 was lodged to address further the issue that was raised in
amendment 16 and to ensure that, through the tribunal process, measures will be put in place if a local authority fails to fulfil properly the duty to ensure that transitions are in place for young people who are beyond the school leaving age and have been identified as having additional support needs. I stress that we are talking about situations in which a local authority fails to fulfil its duty.

I note that the Presiding Officer has ruled that amendment 12 would cost in the region of £60,000; SPICe commented to me that it is likely that minimal costs would attach to the amendment; and that the Govan Law Centre, which based its figures on Government statistics, said that the cost would be up to £125,000. I do not want to comment further on that at this stage. Amendment 12 would be important where there was a failure to deliver on the statutory duty; it is a principled amendment in that respect.

Aileen Campbell: There are already dispute mechanisms in the 2004 act that relate to post-school transitions, but I agree that we must do all that we can to ensure that they work. Under the act, if a parent of a child with additional support needs feels that transition arrangements are necessary and the authority disagrees, the parent can refer the case to dispute resolution, and if the child has a CSP the case can go to a tribunal. We have heard about the problems in relation to that, so we must ensure that the process is clear and works as well as it can.

Going by what the minister said about amendment 16—that the transition process begins one year before the young person leaves school—I guess that the process could begin as early as 15. Currently, authorities must approach other agencies concerned with the child or young person when they leave school, but I agree that we must do all that we can to ensure that the transition works in the best interests of the child or young person. As mechanisms currently exist in the 2004 act, I remain doubtful about the need for further amendment, but we have some sympathy with the policy intent of amendment 12.

Adam Ingram: I refer to my response on amendment 16, when I spoke about the appointment of a national transitions development officer, which would also help to reduce the incidence of authorities’ failure to comply with their duties on post-school transitions. The whole point of appointing such an officer is to address those issues. The post will be, if you like, a preventive mechanism, to prevent such failure from happening.

Elizabeth Smith: Will you clarify the cost of that appointment?

Adam Ingram: It is not associated with the bill; it is—

Elizabeth Smith: I would still like to know what the cost will be.

Adam Ingram: I do not have the information to hand, but I can certainly furnish you with the detail later.

Elizabeth Smith: That would be helpful; thank you.

The Convener: That concludes our consideration of amendment 12. I will now suspend the meeting to allow the minister and his officials to leave. Thank you, minister, for your attendance today.

12:28
Meeting suspended.

12:31
On resuming—

The Convener: I said earlier that I would give members an opportunity to express any concerns that they might have about the process, before we conclude our consideration of agenda item 3. I intend to allow every member to speak once—and once only—if they so wish, to conclude our consideration of the matter. I remind everyone that we are still in public session and that the official report is present.

Elizabeth Smith: We all said at the start of the process of looking at the Education (Additional Support for Learning) (Scotland) Bill that it was potentially one of the most important bills to go through Parliament because it is extremely important that we deliver adequate and better services for those affected. It is important that this Parliament lives up to its promise of being open and transparent and that it is able to deliver good-quality legislation. I firmly believe that, to do that, we have a right to access to all relevant information, both of an objective nature, which has been the case, and of a subjective nature—in other words, when objective information has been used subjectively by any party, the Government or officials to put forward a point of view.

If good government is about anything, it allows us to marshal our facts, look at opposing opinions and present our case on the public record. As a member of this committee and, more important, as an elected member of the Scottish Parliament, I do not feel that I have been able to do that with the rigour that I would have liked during the process of scrutinising legislation. We have been compromised by not having the necessary information available to us and, therefore, we have all had to come at it from a slightly haphazard
angle, which has made the scrutiny process extremely difficult.

I have grave reservations about what has happened over the past four weeks and about the fact that we have been compromised in our consideration of what I and, I think, colleagues around the table consider to be extremely important legislation that we are obliged to get right for the parents and children concerned. The natural conclusion to draw from the experience is that we might not be able to pass as good legislation as we might have done. That is an unacceptable circumstance.

Politics currently suffers enough from a lack of integrity and other difficulties and this experience has not helped. I thoroughly recommend that the Standards, Procedures and Public Appointments Committee look at the process. Lots of questions have been raised about the democratic process and the scrutiny that we are expected to undertake as elected members. People expect elected members to exercise democratic scrutiny, but in this instance we have not been entirely able to discharge our duties.

Margaret Smith: I agree absolutely that the Standards, Procedures and Public Appointments Committee must consider the issue. We are in a unique set of circumstances. Obviously, issues to do with financial resolutions have cropped up in previous sessions of Parliament but, on those occasions, the Government produced new financial resolutions. I accept that the present circumstances are different, because we have a minority Government rather than a majority one, but the standing orders say that it is up to the Government to produce a financial resolution.

Many committee members lodged amendments to the bill in good faith. In some cases the intention is to seek to change the bill; in others the amendments are probing ones, with the aim of getting on the record comments from the minister about issues of concern that are raised during the committee process. That happens in many stage 2 proceedings—it is how we do legislation and members who have been here for a decade have done it that way in the past.

It is not members’ intention to push every amendment they lodge at stage 2 to a vote—often, that is not the intent; the process is an opportunity for committee members and the Government to put comments on the record and to give a sense that concerns are being noted and, to an extent, addressed. In many cases, addressing the concerns falls short of legislative change. This morning, we have done something very similar. In the dialogue at stage 2, a minister often suggests to a member that they might redraft an amendment or have discussions with the minister. That often happens in a good spirit and a collegiate manner.

The way in which the present process has transpired meant that, on the eve of the stage 2 consideration, when members had lodged amendments in good faith and had no knowledge that the financial resolution would be an issue, Ken Macintosh was informed that he had lodged an amendment that would trigger a problem. Other members were told informally on the morning of the committee’s stage 2 consideration that we had also lodged amendments that would trigger a problem, although we were not given details of what the problems were. The clerks gave us an informal indication of the amendments that were involved. For example, I was particularly surprised to be told informally that there was a problem with amendment 16. When I sought to do something about that as early as possible, I was in effect stonewalled by process. That is in no way a criticism of any of the individuals who were involved, but the process did not allow any of us to try to remedy the situation in which we found ourselves, even if we genuinely wanted to do so.

The bill is important. We all understand the frustrations that many people have with the practice that has grown up around the 2004 act, to which we all signed up and with which we all agreed in principle. It is important that we do not come out of the present legislative process having failed parents and children again. It was incredibly difficult for us to produce our own costings in the middle of recess. We had the best help possible from SPICe and we tried to pull together information from a range of options, but none of us had previously attempted to undergo that process or been aware that it existed. That left some members with a wide range of costing possibilities. That happened to me in relation to amendment 25, which is on consultation. I am not left with any great sense that I am best placed to make a decision on the issues, and I know that other members feel exactly the same way.

Timetabling has been an issue. The situation was flagged up at tea time on the night before the first day of stage 2 consideration. We submitted our costings last Wednesday, but we were told the decision only at 7 o’clock on the following Monday evening, so we had only one full working day before today’s committee meeting. That left committee members in a difficult position, although we are trying to do our jobs as best we can.

There are several questions about how the decisions on costings were taken. I understand that the common practice is that the Presiding Officer does not provide further information about how decisions were taken, but a decision was made somewhere that amendments 10, 19 and 12 would incur cumulative costs. It is arguable that it
is for the committee to decide which amendments it wants to take up the slack on the £300,000 limit that is available to us, but that option is not available.

I am not arguing against amendment 19, which I lodged, going forward to next week because at least it is being treated more reasonably than the amendments that will not proceed, but we have stumbled through a process that has at points been disrespectful to members and on several occasions been particularly disrespectful to the parents and children whom we are trying to help. The Standards, Procedures and Public Appointments Committee is required to consider the position and to ensure that standing orders are fit for every possible purpose.

Ultimately, the Parliament’s purpose is to hold the Government to account and to scrutinise and pass the best possible legislation to address the country’s problems. If we are denied the opportunity to put the amendments that we lodge to a committee decision of our peers and to the Parliament of our peers, we cannot guarantee to people that we have done our jobs properly and that we have produced the best possible legislation.

I will make a practical point. In the circumstances, we have had a fruitful discussion today. It would help if we asked the official report to provide a copy of those discussions as soon as possible, and certainly as a matter of urgency, so that we can look at the debate and so that some of us can decide what we must do before the deadline for lodging amendments, which is on Friday.

The Convener: Does any other member wish to speak?

Kenneth Gibson: Everyone wants to be the last person to speak because of your ruling that we can speak only once, convener. Perhaps members should be allowed to speak more than once.

Several issues have been raised. I understood that when the bill’s principles and ethos were agreed at stage 1, that was how we would proceed. I was astonished by what happened four weeks ago, when the minister was in effect hijacked by several supposed concerns about amendments that should not have been considered.

The figures that I have found from adding the minimum and maximum costs of seven of the amendments that we have discussed today—amendments 10, 13, 15, 16, 19, 23 and 25; I did not include amendment 12 because it is a bit more open ended—range from £10.4 million to £41.3 million. It is inappropriate to expect ministers of whichever party to accept amendments of such cost when Parliament has not agreed to a financial resolution.

The Presiding Officer has not helped the matter by not giving us some breakdown of how his office calculated the figures or his rationale. I understand that he had the figures on 15 April and that our clerks requested and received the figures on the same day, so I do not understand why that information was not passed to committee members sooner than this morning. Although the Presiding Officer has the right not to tell us how the figures were arrived at, it would have been better for the meeting if we had been told.

12:45

A few weeks ago, we discussed our workload. Given the workload that we have, it was wrong to abandon a committee meeting. I am sure that other work could have been found.

Further, I am not aware of any consultation with members about the status, format and timing of this meeting. The informal/formal/whatever status of the meeting would not have been particularly clear to anyone looking at our discussion. We have spent three hours on amendments that cannot be brought forward without a financial resolution. Our time could have been spent much more appropriately.

I do not understand why the marshalled list that we were sent on Monday night was not updated to include amendments withdrawn or agreed to previously. I do not know how unique these arrangements are. As far as I understood it, the procedures were the same as for every bill. However, unique circumstances seem to have developed.

Finally, at the previous meeting, the convener showed a lack of respect for the minister. Regardless of what someone thinks of an individual minister or their party, ministers should be shown the due respect of their office.

Ken Macintosh: All members have been frustrated today because we have been faced by two problems. The first is the process and the second is a far more political issue, which is the deliberate decision by the Scottish Government not to publish a financial resolution. That is a rare event that has provoked all the problems today.

I found the meeting quite constructive and was pleased that we had it because we were able to restore some of the harmony that had existed previously. We are now going to undo all of that.

The minister has responded constructively and positively to the amendments that were not allowed to be lodged and has made his own proposals in place of those amendments. That is exactly what should happen. It would not have
happened if we had not had the meeting today, and if we had not suspended stage 2 before the recess, which—as I understand it—was ordered by the Parliamentary Bureau and was not decided on by us or consulted on with us.

The process is frustrating and I am not talking only about the frustration of members. I mentioned earlier that we pride ourselves on our transparency: we are always trying to engage the public in the parliamentary process and in forming legislation, but anyone who has been trying to follow the bill will have been unable to understand anything that has been going on. That is unsatisfactory.

Like all members, I was concerned about the Presiding Officer’s decisions about our amendments, so I wrote to him asking for further information. As I do not think the reply is confidential, I will share a little bit of it. He said:

“Dear Ken … As you will be aware, I am not in the habit of giving reasons for specific decisions (on, for example, the admissibility or selection of amendments). Such decisions usually involve an exercise of judgement in relation to matters about which members, understandably, often have strongly held views and entering into a detailed debate with members about such matters does not necessarily assist in reaching an impartial view, as I am obliged to do.”

He went on to say that

“Without wishing to be unhelpful”

he has given me as much information as he can.

That is a position with which I think we are all familiar. When we are in the chamber, we are not allowed to challenge the Presiding Officer’s decisions, which is why he is not allowed to share the reasons for his decisions. I do not believe that that is the end of the matter—it is a very unsatisfactory affair altogether. I am pleased that the PO has referred it to the Standards, Procedures and Public Appointments Committee. The PO has been entirely caught up in this. I have every sympathy with him; I am sure that he has no wish to be caught in the middle of cross-party or any other kind of political dispute about such matters. I hope that we are able to learn from this situation which parliamentary procedures would be better placed to serve members, committee scrutiny and the public, should such a situation arise again.

I return to the question why we are here today. We are here because Scottish ministers deliberately chose not to publish a financial resolution. I find that extraordinary—it is certainly a very disappointing decision. Until a few weeks ago, I had thought that the committee and the minister had worked together admirably. We had listened to the evidence and parents’ views, had engaged constructively and had come together well to shape the bill more effectively. It would appear, however, that all along the minister had a hidden agenda, which was to ensure that the implementation of parental rights should come at no cost—not even potential cost—to the Administration or to local authorities.

The committee was prepared to accept its disappointment at the limited scope of the bill; no outlandish or hugely expensive amendments were lodged, even today, by committee members, who have shown every willingness to be reasonable and accommodating in seeking to achieve what I thought were shared objectives. In response, the Scottish Government has been intransigent and has shown a lack of trust in the committee and the parliamentary process, and a lack of confidence in its own arguments.

Local authorities are not allowed to take decisions on additional support for learning on the ground of cost—they may take such decisions only to address children’s needs. However, too many parents tell us—as they did in evidence—that they fear that, in practice, the issue of costs is implicit in, and underpins, too many decisions. How can we expect that to change if the Scottish Government sends out exactly the same message in the bill? I worry that, instead of reinforcing parental rights with the bill, we are pulling the rug from under parents’ feet.

Christina McKelvie: I agree with some of the comments that have been made around the table about our frustration with the process. This is the first time I have taken part in stage 2, and I have found it to be extremely frustrating and, in some cases, quite opaque. I did not lodge amendments because of a lack of information and support. From other members’ comments and from my experience of trying to gather the evidence that would allow me to decide whether I could or could not support an amendment, it is clear that information and support were lacking. On numerous occasions, I sought clarification from the clerks and SPICe, but did not receive it in time or in a form that I found supportive. It makes me extremely disappointed that, by design, default or even by the rule of unintended consequences—which we have discussed today—some of the amendments have resulted in wrecking the bill, which has a direct impact on parents and children who need its support.

This morning we have talked a great deal about transparency, which is a big issue for me. If legal and other opinions and other evidence were gathered to allow committee members to lodge amendments, we should have had all that information, for the sake of transparency and of the dignity and integrity of the Parliament. That would have allowed me to form a much better opinion on the stance that I should adopt in relation to amendments.
Ken Macintosh spoke about the purpose of the bill, which was to amend the 2004 act, not to introduce new legislation. If a new bill were needed, we should have considered that earlier. At stage 1, when we agreed to the general principles of the bill, we agreed that the purpose of the bill was to amend the 2004 act to address some issues that had arisen under it. All the bluster from Ken Macintosh does not serve the committee and the Parliament well.

I cannot say that this has been a good learning opportunity for me, as a committee member. It has certainly been a learning opportunity, but it has taught me many negative lessons that I will follow up. I am extremely concerned and disappointed by the fact that the committee and other parts of the Parliament have not served well the bill or the people whom it is intended to help.

Aileen Campbell: We were told about the scope of the bill at the outset and we were told that there would be no financial resolution. Ken Macintosh seems to be suggesting that there has been a sudden change of mind on the part of the Government, but that is not the case: the position was clear from the outset.

It is sad that we are in this position, given that members of the committee worked well together when we gathered information about the bill. We agreed to do all that we could do to help the children and young people who will be affected by the bill. Like Kenny Gibson, I am concerned about the sudden turn in the committee. Meetings were cancelled without real consultation and the process, purpose and standing of today’s meeting was unclear, which has affected our ability to scrutinise the bill. Like Christina McKelvie, I would have been happier if we had had legal advice. I think that I heard today that the convener had sought legal advice and had written to the clerks about that. I do not know why we have not been privy to that information; perhaps the convener will explain.

Like Margaret Smith, I am concerned about the huge differences between the costings that the Presiding Officer advised and the costings that the Government presented for consideration today. In essence, we have been blindly discussing the implications of amendments to the bill and we have been comparing apples with pears. Ken Macintosh said that he does not think that the amendments that have been lodged have real cost implications, but costs of £14 million are attached to one amendment, which seems fairly significant when we consider that the trigger for a financial resolution is £300,000.

I hope that we can move forward more constructively than we have been allowed to do and in a way that does not allow any of us to try to score points, so that we can do what is best for the vulnerable people whom the bill is trying to help.

Claire Baker: I agree with what many members have said. This has been a difficult process for someone who has been experiencing stage 2 for the first time. When amendments were lodged there was a lack of information about the process, the status of amendments and how to provide costings.

Margaret Smith’s comments on the situation in which the minority Government finds itself were relevant. Today’s discussion indicated that although costs are attached to amendments that have been lodged, members are keen to talk about the issues that the amendments address and are prepared to compromise as well as to seek concessions from the minister. If we look back at the stage 1 report, I think that we will find that all the amendments that we have considered cover issues that the minister acknowledged there is a need to address—that is particularly true in relation to advocacy. I appreciate the Government’s concern about how committee members might vote but, as Ken Macintosh said, the Government should have put more trust in the committee to approach the bill in the way we approached stage 1, when we worked well with the minister and the Government. That would have been a more satisfactory way to manage stage 2.

The Convener: I will clarify the procedures that have led to our ending up in this situation. On whether stage 2 amendments are ruled admissible or inadmissible, I make it clear that that is a decision for the convener at stage 2. At stage 3, it is the decision of the Presiding Officer.

No convener or Presiding Officer would take such decisions lightly; the matter is given rigorous and careful consideration. We receive procedural advice, which is prepared by the clerks in consultation with others, and in general we follow the advice and precedent that have been set. On this occasion, and during the past 10 years in the Parliament, I have in no way deviated from that approach.

On the decision to cancel a committee meeting and not to fill it with other business, the Parliament’s standing orders and our procedures are quite clear. We had not notified the public and we had no agenda for the meeting, so it would have been impossible for us to have met formally with a new agenda.

13:00

As far as today’s meeting is concerned, I was not consulted on whether or not the decision that was reached was agreeable to me or to the committee—the decision was taken by the Parliamentary Bureau. If people have objections to
the decision, they should be raising them not with me, but with their business managers, who represent their parties at the Parliamentary Bureau. The committee is only fulfilling the obligation that was placed on us by the bureau.

Turning to the wider issues, I think that parents with children with additional support needs, as well as organisations that represent those children, will be looking aghast at how Parliament has conducted itself in relation to our consideration of the matters that are before us. They will be wondering just why we have behaved in this manner and, more important, why the Government has behaved as it has.

All this could easily have been avoided. None of the amendments that have been considered today was unexpected; all the issues were raised with the committee in evidence at stage 1. They were also flagged up during the stage 1 debate. For it to be a surprise that members of the committee would wish to lodge amendments, and for them not to be considered, is just unacceptable.

On the part of the staff of the Parliament, I deeply resent the suggestion that the clerks, SPICe or other staff were unhelpful in assisting any member of the committee to formulate amendments. I deeply resent the suggestion that clerks of the Parliament are in some way not capable of assisting members.

We could have had a proper stage 2 consideration of all the amendments if the Government had chosen to introduce a financial resolution. That would in no way have meant that all the amendments would have been accepted. The Government is trying to suggest that members of the Opposition parties want to steamroller through amendments that are unreasonable and costly. Members should have the confidence to marshal their arguments to convince other committee members that their amendments, although well intentioned, would have unexpected consequences. That is how Parliament has considered proposed legislation for the past 10 years, and I do not think that that system has served us badly.

The arrangements for today have perhaps served us much more adversely than the system and procedures that we have used in the past. I hope that the Standards, Procedures and Public Appointments Committee will consider the matter fully when the Presiding Officer writes to it to ask it to do so.

Meeting closed at 13:03.
Education (Additional Support for Learning) (Scotland) Bill

2nd Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

Sections 1 to 10 Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

After section 5

Mr Adam Ingram

8 After section 5, insert—

<Assessments and examination

After section 8 of the 2004 Act insert—

“8A Assessments and examinations: further provision

(1) A person specified in subsection (3) may request that the education authority arrange for a child or young person to whom section 4(1)(a) applies to undergo, for the purpose of considering the additional support needs of the child or young person, a process of assessment or examination.

(2) The education authority must comply with the request unless it is unreasonable.

(3) The persons referred to in subsection (1) are—

(a) where the request relates to a child, the child’s parent,
(b) where the request relates to a young person, the young person or, where the authority are satisfied the young person lacks capacity to make the request, the young person’s parent.

(4) The education authority must, in accordance with the arrangements made by them under section 4(1)(b), take into account the results of any assessment or examination undertaken by virtue of this section.

(5) A process of assessment or examination undertaken by virtue of this section is to be carried out by such person as the education authority consider appropriate.

(6) In this section the reference to assessment or examination includes educational, psychological or medical assessment or examination.”.

Ken Macintosh

30 After section 5, insert—
Assessment requests

In section 8 of the 2004 Act (assessments and examinations), for subsections (1) and (2) substitute—

“(1) A person specified in subsection (2) may request that an education authority arrange for a child or young person specified in subsection (2A) to undergo, for a purpose mentioned in subsection (2B), a process of assessment or examination (such a request being referred to in this section as an “assessment request”).

(1A) The education authority must comply with the request unless it is unreasonable.

(2) The persons referred to in subsection (1) are—

(a) where the request relates to a child, the child’s parent,

(b) where the request relates to a young person, the young person or, where the authority are satisfied that the young person lacks capacity to make the request, the young person’s parent.

(2A) The children or young persons referred to in subsection (1) are—

(a) children or young persons for whose school education the authority are responsible,

(b) children belonging to the area of the authority who are under school age, and

(c) children or young persons belonging to the area of the authority but—

(i) for whose school education an authority is not responsible, and

(ii) who are not being provided with school education at an independent school or a grant-aided school.

(2B) The purposes referred to in subsection (1) are—

(a) identifying whether the child or young person has additional support needs,

(b) identifying whether a child or young person with additional support needs requires, or would require, a co-ordinated support plan,

(c) considering the additional support needs of a child or young person,

(d) reviewing a co-ordinated support plan under section 10.

(2C) Where both subsections (2A)(a) and (2B)(c) apply, the education authority must, in accordance with the arrangements made by them under section 4(1)(b), take into account the results of any assessment or examination undertaken by virtue of this section.

(2D) Where—

(a) the education authority is complying with a request made by virtue of section 7(2)(b), and

(b) a person mentioned in subsection (2) requests that the education authority arrange for the child or young person to whom the request under that section relates to undergo, for the purpose mentioned in subsection (2B)(b), a process of assessment or examination,

the education authority must comply with that request unless it is unreasonable.”
Margaret Smith
Supported by: Ken Macintosh

14 After section 5, insert—

<Additional support needs etc.: specified children and young people>

(1) In section 1 (additional support needs) of the 2004 Act, after subsection (1) insert—

“(1A) Without prejudice to the generality of subsection (1), a child or young person has additional support needs if the child or young person is looked after and accommodated by a local authority under section 26 of the Children (Scotland) Act 1995 (c.36).”.

(2) In section 6 (children and young persons for whom education authority are responsible) after subsection (1) insert—

“(1A) Without prejudice to the generality of subsection (1), every education authority must in particular consider whether each child or young person falling within section 1(1A) for whose school education they are responsible requires a co-ordinated support plan.”.>

Ken Macintosh

14A As an amendment to amendment 14, line 7, at end insert—

<( ) is a carer (within the meaning of section 12AA of the Social Work (Scotland) Act 1968 (c.49) or section 24 of the Children (Scotland) Act 1995 (c.36))>

Ken Macintosh

14B As an amendment to amendment 14, line 7, at end insert—

<( ) has a mental disorder (within the meaning of section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13))>

Ken Macintosh

14C As an amendment to amendment 14, line 7, at end insert—

<( ) is deaf or partially deaf>

Ken Macintosh

14D As an amendment to amendment 14, line 7, at end insert—

<( ) is blind or partially sighted>

Ken Macintosh

14E As an amendment to amendment 14, line 7, at end insert—

<( ) is (any or all) deaf, partially deaf, blind or partially sighted>

Ken Macintosh

14F As an amendment to amendment 14, line 7, at end insert—
<Co-ordinated support plans>

In section 2(1)(d) (persons by whom additional support provided) of the 2004 Act, the word “significant” is repealed.

<Pre-school children>

Functions of education authority in relation to certain pre-school children with additional support needs

In section 5 of the 2004 Act (general functions of education authority in relation to additional support needs), for subsections (2) and (3) substitute—

“(2) Where a child falling within subsection (3) has been brought to the education authority’s attention as appearing to have needs of the type mentioned in subsection (3)(c), the authority must (unless the child’s parent does not consent)—

(a) in accordance with the arrangements made by them under section 6(1), establish whether the child does have such needs, and

(b) provide such additional support as is appropriate for the child.

(3) A child falls within this subsection if the child—

(a) is under school age (unless the child is a prescribed pre-school child),

(b) belongs to the authority’s area, and

(c) appears to have additional support needs arising from a disability (within the meaning of the Disability Discrimination Act 1995 (c.50)) which the child has.”.

<Provision of supporters and advocacy>

After section 14 of the 2004 Act (supporters and advocacy), insert—

“14A Provision of supporters and advocacy

The Scottish Ministers must secure the provision of a national supporters and advocacy service for the purpose of enabling relevant persons (within the meaning of section 14(2)) to have access, on request and free of charge, to a supporter or an advocate (within the meaning of section 14(1)(a) or, as the case may be, (b)).”.
Kenneth Gibson
21 After section 5, insert—

<Mediation services

Mediation services

In section 15(2) (independence of mediation services) of the 2004 Act, for the words “under this Act (apart from this section)” substitute “relating to education or any of their other functions”.

Kenneth Gibson
22 After section 5, insert—

<Dispute resolution

Dispute resolution

In section 16(2) (dispute resolution) of the 2004 Act, before paragraph (a), insert—

“(za) requiring any application by a person mentioned in subsection (1)(a) to (c) for referral to dispute resolution to be made, in the first instance, to the Scottish Ministers.”.

Mr Adam Ingram
29 After section 5, insert—

<Access to information published by education authority

Access to information published by education authority

In section 26 of the 2004 Act (publication of information by education authority)—

(a) in subsection (1)—

(i) the word “and” immediately following paragraph (b) is repealed,

(ii) after paragraph (c) insert—

“(d) ensure that the information published by them under this subsection is available, on request, from each school under the management of the authority, and

(e) provide the persons mentioned in subsection (2A) with information on how to access the information so published.”,

(b) after subsection (2), insert—

“(2A) The persons referred to in subsection (1)(e) are—

(a) in the case of a child with additional support needs for whose school education the authority are responsible, the child’s parent,

(b) in the case of a young person with additional support needs for whose school education the authority are responsible—

(i) the young person, or

(ii) if the authority are satisfied that the young person lacks capacity to understand the information published under subsection (1)(a) or (c), the young person’s parent.”.
After section 5, insert—

<Publication of information by education authority>

Provision of published information to certain persons

In section 26 of the 2004 Act—

(a) in subsection (1)—

(i) the word “and” immediately following paragraph (b) is omitted, and

(ii) after paragraph (c), insert “, and

(d) provide the persons mentioned in subsection (2A) with any information published under paragraph (a) or (c).”;

(b) after subsection (2), insert—

“(2A) The persons referred to in subsection (1)(d) are—

(a) in the case of a child with additional support needs, the child’s parent,

(b) in the case of a young person with additional support needs—

(i) the young person, or

(ii) if the authority are satisfied that the young person lacks capacity to understand the information or advice, the young person’s parent.”>

Availability of published information

In section 26(1) of the 2004 Act (publication of information by education authority), after paragraph (a) insert—

“(aa) ensure that the published information is available—

(i) on request, from each place in the authority’s area where school education is provided,

(ii) in any handbook or other publications provided by any school in the authority’s area or by the authority for the purposes of providing general information about the school or, as the case may be, the services provided by the authority, and

(iii) on any website maintained by any such school or the authority for that purpose (whether or not the website is also maintained for any other reason).”>
<Publication of information by education authority

Availability of published information

In section 26(1) of the 2004 Act (publication of information by education authority), after paragraph (a) insert—

“(aa) ensure that a summary of the published information is available—

(i) on request, from each place in the authority’s area where school education is provided,

(ii) in any handbook or other publications provided by any school in the authority’s area or by the authority for the purposes of providing general information about the school or, as the case may be, the services provided by the authority, and

(iii) on any website maintained by any such school or the authority for that purpose (whether or not the website is also maintained for any other reason).”.

Elizabeth Smith

After section 5, insert—

<Publication of information by education authority

Publication of information on dispute resolution

In section 26(2) of the 2004 Act (publication of information by education authority), after paragraph (e) insert—

“(ea) any dispute resolution procedures established by the authority in pursuance of section 16,”.

Margaret Smith

After section 5, insert—

<Publication of information by education authority

Publication of information on other sources of advice

In section 26 of the 2004 Act (publication of information by education authority)—

(a) in subsection (2)—

(i) the word “and” immediately following paragraph (e) is repealed, and

(ii) after paragraph (f) insert “and

(g) other specified persons or bodies from whom—

(i) parents of children having additional support needs, and

(ii) young persons having such needs,

 can obtain advice and further information about provision for such needs.”, and

(b) after subsection (3) insert—

“(4) In subsection (2)(g), “specified” means specified for the purposes of that subsection in an order made by the Scottish Ministers.”,
Margaret Smith

After section 5, insert—

\textit{Publication of information by education authority}

\textbf{Annual statistical report}

In section 26 of the 2004 Act (publication of information by education authority) after subsection (3) insert—

“(4) Every education authority must publish annually a report setting out (by school and year group)—

(a) the number of children and young persons for whose school education the authority are responsible having additional support needs, and

(b) the principal grounds on which such children and young persons have been identified as having additional support needs.

(5) Subsection (3)(b) applies to a report published under subsection (4) as it applies to information published under subsection (1).”.

Margaret Smith

After section 5, insert—

\textit{Publication of information by education authority: consultation etc.}

\textbf{Publication of information by education authority: consultation etc.}

(1) After section 26 of the 2004 Act (publication of information by education authority), insert—

\textit{Consultation on policy in relation to provision for additional support needs etc.}

(1) Before publishing information under section 26(1), every education authority must comply with the duties described in subsections (2) and (3).

(2) The first duty is a duty to consult at least once every three years (beginning with the commencement of this section) the persons specified in subsection (4) about the matters specified in section 26(2).

(3) The second duty is a duty to have regard to any guidance issued by the Scottish Ministers about—

(a) the content of information published under section 26(1),

(b) the way in which such information is to be published, and

(c) the persons to be consulted by virtue of subsection (2).

(4) Those persons are—

(a) (in so far as the education authority considers them to be of a suitable age and maturity), such children and young persons for whose school education the authority is responsible,

(b) such parents of such children and young persons, and

(c) such other persons,

as the authority considers appropriate.
(5) Consultation on the matter specified in section 26(2)(a) must in particular seek the views of the persons specified in subsection (4) about any general policies or practices applied (or proposed to be applied) by the authority in complying with their duty under section 4(1)(a) (for example, policies as to what constitutes adequate and efficient provision for children or young persons with a particular type of additional support need).

(6) A consultation under subsection (2) is to be carried out on the authority’s behalf by a person who is not employed by the authority (whether in the exercise of their functions relating to education or any of their other functions).

(7) A report of the consultation carried out under subsection (2) is to be published in such manner as the authority considers appropriate and a copy sent to Her Majesty’s Inspectors.”.

(2) In section 29(2) of the 2004 Act (interpretation) after ““Health Board”,” insert—

““Her Majesty’s Inspectors”,.”.

Margaret Smith
Supported by: Ken Macintosh

34 After section 5, insert—

After section 6

Elizabeth Smith

12 After section 6, insert—

References to Tribunal in relation to duties under section 12(6) and 13

(1) In section 18 of the 2004 Act—

(a) in the title, omit “in relation to co-ordinated support plan”, and

(b) in subsection (3), after paragraph (f) (as inserted by section 1(6)(b) of this Act), insert—

“(g) failure by the education authority to comply with their duties under section 12(6) and 13 in respect of the child or young person (except where consent for information to be provided under section 13(2)(a) or (4) has not been given under section 13(5)) .”.

(2) In section 19(3) of the 2004 Act, for “or (d)(ii) or (iii)”, substitute “, (d)(ii) or (iii) or (g)”.

After section 6

References to Tribunal in relation to duties under section 12(6) and 13

(1) In section 18 of the 2004 Act—

(a) in the title, omit “in relation to co-ordinated support plan”, and

(b) in subsection (3), after paragraph (f) (as inserted by section 1(6)(b) of this Act), insert—

“(g) failure by the education authority to comply with their duties under section 12(6) and 13 in respect of the child or young person (except where consent for information to be provided under section 13(2)(a) or (4) has not been given under section 13(5)) .”.

(2) In section 19(3) of the 2004 Act, for “or (d)(ii) or (iii)”, substitute “, (d)(ii) or (iii) or (g)”.
After section 7

Ken Macintosh

27 After section 7, insert—

<Power to monitor implementation of Tribunal decisions>

In schedule 1 of the 2004 Act (Additional Support Needs Tribunals for Scotland) after paragraph 11, insert—

“Power to monitor implementation of Tribunal decisions

11A The President may, in any case where a decision of a Tribunal required an education authority to do anything, keep under review the authority’s compliance with the decision and, in particular, may—

(a) require the authority to provide information about the authority’s implementation of the Tribunal decision,

(b) where the President is not satisfied that the authority is complying with the decision, refer the matter to the Scottish Ministers.”.>

Ken Macintosh

28 After section 7, insert—

<Recovery of costs>

Provision by education authority for education of pupils belonging to areas of other authorities: recovery of costs where pupil has additional support needs

After section 27 of the 2004 Act insert—

“Recovery of costs

27A Provision by education authority for education of pupils belonging to areas of other authorities: recovery of costs where pupil has additional support needs

Where the responsible education authority make a claim to recover reasonable costs for the education of pupils belonging to areas of other authorities, where the child or young person has additional support needs and in respect of those additional needs, that other education authority must make payment.”.>

Long Title

Mr Adam Ingram

9 In the long title, page 1, line 3, after <education;> insert <to make minor provision in relation to additional support needs;>
2nd Groupings of Amendments for Stage 2

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted (including, for those amendments ruled by the Presiding Officer to have a potential cumulative cost, the cost determined for each amendment. Where no cost is stated for an amendment, the cost has been ruled to be zero or de minimis); and
- a list of amendments already debated.

The list of groupings excludes those amendments which the Presiding Officer has ruled have a significant cost. Under Rule 9.12.6 of the Parliament’s Standing Orders, no proceedings may be taken on such amendments unless the Parliament has agreed the necessary financial resolution motion. The amendments excluded on this basis are as follows:

- amendment 30
- amendment 13
- amendment 32
- amendment 25
- amendment 34

These amendments will be passed over without being moved, debated or the question on them put when each of them is reached on the 2nd Marshalled List of Amendments for Stage 2.

As the total cost of all of the amendments ruled to have a potential cumulative cost is less than £300,000, proceedings may be taken on all of these amendments.

Groupings of amendments

Assessment and examination: further provision
8

Additional support needs: specified children and young people
14, 14A, 14B, 14C, 14D, 14E, 14F

Pre-school children: role of health boards
31

Mediation services: independence from local authorities
21
Dispute resolution: referral to Scottish Ministers
22

Publication of information: availability
29, 10, 19, 33

Notes on amendments in this group
Amendment 29 has been determined to cost £13,745
Amendment 10 has been determined to cost £50,000
Amendment 19 has been determined to cost £100,000
Amendment 33 has been determined to cost £25,000

Publication of information: content
11, 20, 24

Reference to Tribunal: post-school transition
12

Notes on amendments in this group
Amendment 12 has been determined to cost £60,000

Implementation of Tribunal decisions: power to monitor
27

Recovery of costs: host authority obligation to pay
28

Amendments already debated

Additional support needs: whether or not educational provision
With amendment 7 – 9
EDUCATION, LIFELONG LEARNING AND CULTURE COMMITTEE

EXTRACT FROM THE MINUTES

12th Meeting, 2009 (Session 3)

Wednesday 29 April 2009

Present:
Claire Baker  Aileen Campbell
Kenneth Gibson (Deputy Convener)  Ken Macintosh
Christina McKelvie  Elizabeth Smith
Margaret Smith  Karen Whitefield (Convener)

Also present: Adam Ingram MSP, Minister for Children and Early Years

Education (Additional Support for Learning) (Scotland) Bill: The Committee considered the Bill at Stage 2 (Day 2).

The following amendments were agreed to (without division): 8, 31, 11 and 9.

The following amendments were agreed to (by division)—

14A (For 3, Against 3, Abstentions 2; amendment agreed to on casting vote)
14B (For 3, Against 3, Abstentions 2; amendment agreed to on casting vote)
14C (For 3, Against 3, Abstentions 2; amendment agreed to on casting vote)
14D (For 3, Against 3, Abstentions 2; amendment agreed to on casting vote)
14E (For 3, Against 3, Abstentions 2; amendment agreed to on casting vote)
14 (For 4, Against 3, Abstentions 1)
10 (For 5, Against 3, Abstentions 0)
33 (For 5, Against 3, Abstentions 0)
12 (For 5, Against 3, Abstentions 0)
27 (For 5, Against 3, Abstentions 0)
28 (For 4, Against 4, Abstentions 0; amendment agreed to on casting vote).

Amendment 29 was disagreed to (by division: For 3, Against 5, Abstentions 0).

The following amendments were moved and, with the agreement of the Committee, withdrawn: 21 and 22.

The following amendments were not moved: 14F, 19, 20 and 24.

The following amendments were not taken by virtue of Rule 9.12.6 (Financial Resolution): 30, 13, 32, 25 and 34.

Sections 6, 7, 8, 9 and 10 were agreed to without amendment.

The long title was agreed to as amended.
The Committee completed Stage 2 consideration of the Bill.
Education
(Additional Support for Learning)
(Scotland) Bill: Stage 2

10:02

The Convener: We move to our continued consideration of the Education (Additional Support for Learning) (Scotland) Bill at stage 2. We have been joined by the Minister for Children and Early Years, Adam Ingram, and his officials.

Members should have a copy of the bill, the marshalled list and the groupings. Members should note that the groupings contain the Presiding Officer’s rulings on the cost of amendments. A number of amendments that appear in the marshalled list have been ruled by the Presiding Officer to have significant costs. Under rule 9.12.6 of standing orders, no proceedings can take place on such amendments as the bill does not have a financial resolution. I will not be able to call those amendments, so they will be passed over in the marshalled list.

After section 5

The Convener: Amendment 8, in the name of the minister, is in a group on its own. I invite the minister to move and speak to the amendment.

The Minister for Children and Early Years (Adam Ingram): The purpose of the amendment is to insert section 8A in the Education (Additional Support for Learning) (Scotland) Act 2004 to extend the rights of parents and young people, to enable them to request a specific assessment, such as an education, psychological or medical assessment, at any time. Currently, under the 2004 act, parents of young people can make an assessment request only when an education authority proposes to establish whether a child has additional support needs or requires a coordinated support plan, or when the authority is reviewing a CSP.

It is considered that that is unduly restrictive on parents’ and young people’s rights to request an assessment, especially for those children and young people who do not have a CSP and whose additional support needs may change over time. At present, parents may be able to make an assessment request only once during their child’s school education. A further assessment may be necessary and desirable if the additional support needs change. I think that the right to request an assessment should be available at any time.

As you may be aware, the 2004 act already places a duty on education authorities to make appropriate arrangements for keeping under consideration the additional support needs and the
adequacy of the additional support that is provided to children and young persons with additional support needs. Therefore, an education authority would be failing in its duty if it did not carry out a specific assessment that it thought necessary.

The amendment provides that the education authority must take account of the results of the assessment when considering the additional support needs and the adequacy of the additional support provided for the child. Education authorities will not be required to comply with the assessment request if it is considered to be unreasonable.

I should also take this opportunity to make it absolutely clear that, under the current legislation, parents of prescribed pre-school children—generally between the ages of three and five—have the ability to request an assessment under section 8 of the 2004 act. The amendment will also enable them to request an assessment of their child’s needs at any time.

We shall amend the dispute resolution regulations to provide that if an authority refuses to comply with a request for an assessment under section 8A, its decision will be a specified matter that can be referred to dispute resolution.

I move amendment 8.

Ken Macintosh (Eastwood) (Lab): I reaffirm my support for amendment 8. I was slightly disappointed that amendment 30 could not be heard on this issue.

The committee has heard evidence that there is an issue with children under three not being assessed. Although local authorities have the power to assess children under three, the 2004 act has not been taken advantage of widely and there have been a number of obstacles in the way. It is clear that amendment 8 is of specific help to all those for whom local education authorities have responsibility, but it does not specifically cover those under three. Will the minister address that?

I am grateful that the minister is reforming the dispute resolution regulations to ensure that section 8A will be covered by them. I support the amendment.

Adam Ingram: Our early years framework focuses on birth to three and what we plan there complements the 2004 act. You will also be aware that later this morning we will deal specifically with the arrangements that are in place for those aged between zero and three and I hope that we can come to agreement on that specific issue.

It is important that the amendment is accepted because we all know that a child’s additional support needs might change over time. Parents are best placed to identify those changes and bring them to the attention of authorities and request assessments. This will be a significant improvement to the existing legislation.

Amendment 8 agreed to.

The Convener: I cannot call amendment 30 because it has been ruled by the Presiding Officer to have significant costs and, under rule 9.12.6, no proceedings can be taken on the amendment because the bill does not have a financial resolution.

Amendment 14, in the name of Margaret Smith, is grouped with amendments 14A to 14F.

Margaret Smith (Edinburgh West) (LD): After all our evidence taking and, indeed, in the course of our work as MSPs, we should be aware of the particular challenges that are faced by looked-after children, who are the subject of amendment 14. Time and again, those children are let down by the system and those of us who are meant to be responsible for them.

The needs of looked-after children have been highlighted in a number of submissions, particularly in the one from the Govan Law Centre. Also, in his foreword to “These Are Our Bairns: a guide for community planning partnerships on being a good corporate parent”, the minister makes it clear that the attitude of corporate parents should be that looked-after children are their responsibility and in their care and that they need to do the best for them. I hope that the committee will rise to that challenge today.

Looked-after children are very often let down or abused by their own parents, and they look to local authorities as corporate parents. Although they are often well cared for, we know that they are too often left behind when it comes to educational attainment. They will often encounter council staff who will protect, support and nurture them but, given council staff’s busy workload, their needs and life chances are often overlooked. Some will say that, because of the getting it right for every child programme and the inclusive nature of the 2004 act, it is wrong to pick out and give prominence to any group of children. However, I believe that these children and young people are different. Either they have no parents or their parents are unable or unwilling to care for them. They find themselves with another parent, the local authority, which very often is the gatekeeper to services. I want to ensure that no local authority is tempted to short-change any looked-after children and that no council official is tempted not to ask for an assessment or a co-ordinated support plan for such children because they are overworked, because they know that their education colleagues will not want them to make such a request or because of some other excuse.

Amendment 14 seeks to cover looked-after and accommodated children who live away from their
parents and to allow them by virtue of their status to be treated as children with additional support needs. It will not give them an automatic right to a CSP and discretion will be retained in the matter. In that respect, the briefing from the Convention of Scottish Local Authorities is wrong.

It is also worth noting that amendment 14 and the other amendments in the group seek to address certain failures by local authorities to implement duties under the current legislation. As the amendment proposes that each child be considered for a CSP, the number of assessments—and, I think, CSPs—would undoubtedly rise. At the moment, there are 4,751 children in the category of looked-after children who live away from home but who have not been identified as having additional support needs.

Clearly, not all looked-after children will either be assessed or get a CSP. For example, a council might feel that such actions are unnecessary for children who are being looked after temporarily. Some councils will choose to link this assessment to other care plan assessments that they are already carrying out for a particular child; indeed, I believe that some are already trying to pull the two processes together. However, Her Majesty’s Inspectorate of Education’s view is that the educational element of the care plans that are already in place could be improved. That said, amendment 14 is designed to ensure that councils at least consider the needs of each child and whether they require a CSP.

The lack of CSPs for looked-after children was flagged up as a matter of concern by the president of the Additional Support Needs Tribunals for Scotland and in HMIE’s report. Although the ASNTS president noted the change programme, she wrote in her submission:

“The apparent failure of the legislation to adequately encompass the needs of ... looked after children is evidenced by”

the fact that there have been no

“references to the Tribunal”

involving looked-after children. She also says:

“These children all have needs which already involve agencies other than education but there may be an absence of a person to advocate on behalf of the child to ensure that the support in relation to the child’s educational development is appropriate or sufficient.”

We know that looked-after children have a statutory entitlement to a care plan, but thousands of them still have no such plan. There needs to be a focus on their education, and I believe that the bill is the right place for such a focus.

Although costs will be involved, I believe that many of them are already covered by the funding that has been in place since the 2004 act came into force. If every looked-after child living away from their parents were to be given a CSP, the number of plans would increase by around 4,500. That would bring the total number of CSPs up to approximately 6,500 across Scotland, which is still substantially less than the 13,500 CSPs that were anticipated in the financial memorandum to the 2004 act and for which funding has been provided in subsequent budget allocations to local authorities.

10:15

Funding is important, but even more important is the fact that the Parliament should respond to ongoing concerns about looked-after children. I acknowledge the work that the minister has done on this matter. Ensuring that these children have the best possible childhood and the best possible future is the most important work that we can do. I know that we all share that concern, and I therefore urge colleagues to support amendment 14.

I move amendment 14.

Ken Macintosh: From the evidence that we have heard, members will be aware that many children and young people whom we would like to have a CSP have not been given one. HMIE identified in particular looked-after children, carers and young people with a mental disorder as missing out in that regard. The National Deaf Children’s Society has also identified deaf, partially deaf, blind and partially sighted children as being similarly overlooked.

None of the amendments that we are discussing automatically grants a right to a CSP; they merely grant the right to an assessment. I should state, for the record, that I would not wish any category of children to be automatically granted a CSP, as that could return to the problems of the old record of needs system. The point of the 2004 act was to extend new rights to all children with additional needs, not just those with a document created in statute.

However, five years on from the 2004 act, it is clear that there are particular problems with the act’s implementation and that there is widespread variation across the country in terms of how the act has been put into practice. The problem is not just that some children are not getting a CSP; it is that too many children are not even being assessed.

Each of the amendments in this group offers a practical solution to the problem of underassessment. It is difficult to argue with the proposition that any child meeting the criteria that are set out in these amendments will have additional needs.
Margaret Smith has already made the case for looked-after children, and I will not repeat her arguments. However, I emphasise that the committee's report highlighted the needs of that group as being of particular concern.

I believe that the same arguments that apply to looked-after children apply to carers and young people with a mental disorder. Who is there to ensure that a young carer's needs are identified, never mind met? The responsibilities of adulthood are already resting on their too-young shoulders, and we should not expect them to negotiate their own way through the labyrinth of additional support needs legislation and provision. As with children with a mental disorder, young carers should be automatically assessed, and their needs should be met, with or without a CSP.

For children with a sensory impairment, the evidence and the argument are equally convincing. The National Deaf Children's Society has circulated a comprehensive briefing on why the amendments are necessary, including some good examples of case studies. I will not repeat the whole briefing, but I will quote selectively from it.

With regard to the definition of additional support needs in the 2004 act, the briefing points out that a deaf child has an additional support need arising from a complex factor that “has a significant adverse affect on their school education”.

It goes on to say that ministers have confirmed that “there is a gap between S4 attainment rates of deaf children in Scotland when compared to their hearing peers”.

A deaf child requires “high level involvement from audiologists, ear, nose and throat specialists, speech and language therapists, as well as specialist education support” and has a long-term need of such support.

The briefing continues:

“Despite meeting these criteria, relatively few deaf children appear to be receiving a CSP. For example, in one local authority area alone, NDCS has established that whilst there are over 180 deaf children identified as receiving support from the education authority and NHS services, less than a fifth of these deaf children have a CSP or an IEP in place.”

It is believed that that is because of underassessment. There are a number of theories about why that happens, but it is worth pointing out, as the NDCS does, that “Only around 40% of deaf children are diagnosed at birth—the remainder acquire permanent hearing loss later in childhood”.

The briefing says:

“Currently, we believe that there is too much emphasis on parental responsibility—if a parent does not present their child as potentially requiring a CSP, it is very rare that a child will be assessed for one. This is a great burden for parents to shoulder, at what is often a very emotional time for them—90% of deaf children are born to hearing parents with no prior experience of deafness. We believe that information from Audiology departments confirming hearing loss should be the trigger point for deaf children to have their additional support for learning needs assessed automatically … Even if that assessment concludes that a CSP is not the appropriate plan for that child … parents can be satisfied that their child's needs have been fully assessed and will have access to the findings of that professional assessment as a basis on which to negotiate an IEP or other form of support plan, and teachers working with that deaf pupil, particularly in mainstream teaching environments, will have a full understanding of that child’s needs.”

Finally, it is interesting to note that there is a legal precedent. The briefing says:

“The Requirements for Teachers (Scotland) Regulations 2005, a Scottish Statutory Instrument … establishes a legal requirement of teachers employed wholly or mainly to work with hearing impaired pupils to have an appropriate qualification to teach such groups of pupils. Therefore there is a precedent in law which states that hearing impaired children have needs which require additional support beyond that which would normally be provided by teachers without a specialist qualification.

These Regulations also cover teachers working with visually impaired pupils, and those who are both hearing and visually impaired.”

Therefore, I believe that it is appropriate to expand amendment 14 to include those groups of children.

I will not move amendment 14F. That amendment was drawn up with the best of intentions and it enjoys the support of many parents and children with a disability, but it is clear that that support is far from unanimous. The amendment could provide practical help, but I have no wish to impose it without that unanimity.

I move amendment 14A.

Aileen Campbell (South of Scotland) (SNP): We heard much about the need to care adequately for looked-after children and young people during our evidence-taking sessions, and I support any moves to ensure that looked-after children and young people have the same opportunities and support that their non-cared-for peers have. In light of the publication of “These Are Our Bairns” last September, the Government recognises the need to provide greater support and to strengthen support. However, under the 2004 act, local authorities are already under a duty to make arrangements to identify those who need additional support and a CSP, including children and young people who are looked after. Therefore, subsection (2) of the section that amendment 14 seeks to introduce does not add to the bill or the 2004 act. Moreover, the amendment is flawed because it assumes that every looked-after child
and young person has an additional need. I grant that a higher proportion of looked-after children and young people have additional support needs, but the amendment’s approach is disproportionate, and it assumes that no looked-after child could ever be capable of making good educational progress.

On amendments 14A to 14F, I again point out that local authorities are already duty bound to identify children and young children for whose education they are responsible who have additional support needs. That means that many of the groups that are listed in the amendments are dealt with in the 2004 act. Extending the list of children who are automatically deemed to have an additional support need in that way is therefore unnecessary. The amendments could also weaken the act because listing categories in the way that Ken Macintosh has done means that other children and young people will be missed out. I am sure that people with an interest in, for example, children and young people with attention deficit hyperactivity disorder or autism, Gypsy Traveller children, children who are being bullied, or children for whom English is an additional language, will be concerned about being missed out by those amendments.

We have received a briefing from Children in Scotland saying that amendment 14 and amendments 14A to 14F represent

“a significant step backwards in law and policy”

and that the

“basic principles of inclusivity and equality would be undermined by Amendment 14.”

The briefing that we have received this morning from North Ayrshire Council says that the amendments

“fundamentally undermine the basic premise of the legislation itself.”

No matter how well-intentioned amendment 14 and amendments 14A to 14F are, it appears to me that they could be damaging, disproportionate and not in keeping. I therefore urge committee members to reject them all.

The Convener: As no other member has indicated a wish to speak, I invite the minister to contribute to the debate on this group of amendments.

Adam Ingram: Thank you, convener.

I think we all agree that we want to do all we can to ensure that children and young people who are looked after away from home have the best possible opportunities to make the most of their education. We know that this is an area in which practice can be strengthened. However, I believe that amendment 14 is not the best way of achieving that.

The first part of amendment 14 would require local authorities to treat all children and young people who are looked after away from home as if they have additional support needs, regardless of whether those children or young people actually need additional support in order to benefit from school education. However, we know that there are children and young people who are living with foster carers and are making perfectly good progress in school. I do not believe that those young people would want or need to be treated as having additional support needs. Their foster carers would not want it, either.

Any child or young person who is looked after away from home and who does require additional support in order to benefit from school education is already covered by the 2004 act. Amendment 14 would introduce a twin-track approach, with one system for those who are looked after away from home, and another system for those who are not. In doing so, amendment 14 would undercut the current regime. Currently, a child or young person only has additional support needs if additional support is required in order for that child to benefit from school education. Amendment 14 would create a hierarchy of rights.

The second part of amendment 14 would require education authorities to consider whether every child or young person who is looked after away from home, and for whose education the authorities are responsible, requires a co-ordinated support plan. However, again, the 2004 act already covers this. Under section 6, the act requires education authorities to make arrangements to identify, from among the children and young people for whose education they are responsible, those who have additional support needs and who require a co-ordinated support plan. The duty then includes, and applies to, children who are looked after away from home. Therefore, the second part of amendment 14 would add nothing to existing duties and is not required. All children and young people who are looked after away from home and who have additional support needs are already covered by the 2004 act. In certain cases, there might be no actual additional support needs, which would leave the education authority in the bizarre position of being under a duty to provide something that a child did not actually require.
In the majority of cases where it is already accepted that the child has additional support needs, how will the authority assess those needs? The answer would surely be to assess what the child needs in order to benefit from school education—but that is precisely the test that amendment 14 would prevent the authority from applying. The original test could not be applied, because it could have the effect of undeeming the deeming provision. So, amendment 14 would deem a child to have additional support needs without providing a meaningful test to apply in assessing those needs.

If, on the other hand, the existing test is somehow still meant to apply to deemed cases—we do not believe that the drafting of amendment 14 would achieve that—the amendment is pointless, as it would simply bring us back to the existing position and achieve nothing. The only certain result of the amendment would be to add confusion to the 2004 act’s provisions.

10:30

Please be assured that we want to do all we can to ensure that looked-after children and young people have the same opportunities and support as their non-care peers. I believe that we need to look at the whole range of factors that can be barriers to looked-after children fulfilling their potential, including educational ones. That is why the role of local authorities as corporate parents is vital in ensuring that all partners play their part in improving outcomes for looked-after children. As Margaret Smith and others have pointed out, we published in September last year, to assist local authorities, “These Are Our Bairns—A guide for community planning partnerships on being a good corporate parent”. We have also employed a champion to work with them to raise awareness of corporate parenting and to challenge them to improve. We know that this is an area in which practice can be strengthened and are committed to working with authorities to improve outcomes for all looked-after children.

It is important to note that the Scottish Government has produced, in partnership with COSLA, local authorities and Learning and Teaching Scotland, guidance entitled “Designated Senior Managers for looked after children and young people within educational and residential child care establishments”. The guidance was published in September last year and lists core tasks to clarify the roles and responsibilities of the designated senior manager for looked-after children and young people in each school or residential establishment. One of the tasks of the person who undertakes that important role is to ensure that looked-after children and young people with additional support needs have appropriate additional support needs assessment and planning in place, and that those are reflected in care planning documentation—things have moved on over the past couple of years or so. The revised ASL code of practice will reiterate the task to ensure that, where appropriate, looked-after children and young people are assessed and that the assessment is linked to other planning arrangements.

The committee may be interested to know that on 26 March this year a guide for local authorities and service providers was published. That signifies the completion of the Scottish Government-funded programme of local authority pilot initiatives that are aimed at improving the educational attainment of looked-after children and young people. To achieve the best outcomes for our looked-after children and young people and care leavers, we need to ensure that the right sorts of support, guidance and educational stimulation are available at the appropriate ages and stages of their lives, from early years through to further and higher education. The pilot initiatives and national research have helped to identify professional practice that can make a real difference to our looked-after children and young people.

Additionally, the Scottish Government is issuing a chief executive’s letter to all health boards to clarify their responsibilities to looked-after children and young people and care leavers. The letter will ask boards to nominate a responsible director to champion the needs of looked-after children and to take responsibility for the board’s meeting those needs. It is essential that health services are aware of their responsibilities to looked-after children and that they work effectively with partner agencies to provide the services that they need. Multi-agency assessment of need and child-centred planning and service delivery are essential to improving outcomes for this vulnerable group.

I was slightly surprised that amendment 14—and amendments 14A to 14F—were judged to be admissible. I accept that that is entirely a matter for the convener, but introducing the deeming provision would change the essential character of the 2004 act system, which is based on each individual child being assessed so that they get the provision that they need to benefit from school education. The amendment not only does not make sense in itself, but will confuse the existing test.

I will talk about amendments 14A to 14F, although I understand that Mr Macintosh will not move amendment 14F. I appreciate the sentiment behind the amendments, but everything that I said on amendment 14 applies equally to them. They would exacerbate the twin-track approach, would risk categorising as having additional support
needs children who require no additional support in order to benefit from school education and are—as far as the effect of subsection (2) of the proposed new section that amendment 14 would insert goes—unnecessary.

However, even if amendment 14 were agreed to, amendments 14A to 14F would, if accepted, destroy a fundamental principle that underpins the 2004 act. The act rests on a broad definition of additional support needs and deliberately avoids drawing out specific groups of children for particular treatment. To start to draw out and list specific groups now would undermine the ethos of the act. One danger of the list is that stakeholders who are not included in it would feel second class. As Aileen Campbell said, there is no mention of children who have autistic spectrum disorder, dyslexia, attention deficit hyperactivity disorder or English as an additional language or whose education suffers because of parental substance misuse. I could go on.

In its parliamentary briefing for the bill, Children in Scotland said:

“The original ASL Act is an aspirational and visionary piece of legislation. The Scottish vision of ‘additional support for learning’ still covers physical conditions and behavioural difficulties, but also includes a range of other personal obstacles to success in school—including limited English, being a young carer, bullying, depression, living in secure accommodation ... The ASL Act covers any circumstance that impedes a child from succeeding at school.”

Amendments 14A to 14F run counter to that inspirational and much-admired vision. They would provide that certain limited categories of children and young persons were automatically deemed to have additional support needs, whereas children who do fall into those categories would not. At the same time, all children and young persons who fell into those categories would be categorised as having additional support needs regardless of whether they required additional support to benefit from school education.

I said that I appreciate the sentiment behind amendments 14 and 14A to 14F. We will consider what we can do in the revised code of practice to reinforce and strengthen our advice and guidance to education authorities to ensure that all the children who are mentioned in the amendments will benefit from the bill. However, I believe that the amendments would seriously undermine the ethos of the 2004 act.

Members should be assured that my aim is that every child and young person should know that they are valued and will be supported to become a successful learner, an effective contributor, a confident individual and a responsible citizen. To achieve that aim, we are undertaking a number of policy initiatives to improve education provision for the specific groups of children that amendments 14 and 14A to 14F target.

We have developed a young carers services self-evaluation guide with HMIE. It is intended to support all services that are in contact with young carers to ensure that the best possible provision is available for that group. It focuses on delivering positive outcomes for young carers through partnership working.

We are, throughout 2009, revising our national carers strategy for Scotland, in partnership with COSLA. The strategy will include a lift-out young carers section that will focus on the specific needs of that group. That section will also examine how young carers can be best supported to reach their full educational potential. We are committed to ensuring that the strategy has a strong young carer voice and that it reflects the views that were highlighted by young carers who attended the young carers festival last September. It will focus on delivering positive outcomes for young carers and their families.

We are working with national health service boards and other partners to deliver the objectives that were set in ‘The Mental Health of Children and Young People—A Framework for Promotion, Prevention and Care”, “Delivering a Healthy Future—An Action Framework for Children and Young People’s Health in Scotland” and “Delivering for Mental Health”. Those provide a combined framework that has key timetabled milestones, with attention to training and workforce planning; increasing bed numbers; early intervention; supported transitions; improved primary care; and better planning and delivery of specialist care for children and young people with mental health problems.

We have delivered on our commitment to ensure that a named mental health link worker is available to every school to ensure that pupils’ mental health needs are identified at the earliest possible opportunity. We have also developed the early years framework to ensure that support is in place to promote children’s emotional wellbeing and help those who are finding things difficult. The early years framework builds on our existing commitment to the getting it right for every child initiative, which has a core component of streamlining planning, assessment and decision-making processes to ensure that the right help is delivered at the right time for young people who are at risk. Our soon-to-be-published policy and action plan for mental health improvement—“Towards a Mentally Flourishing Scotland”—will also include a focus on the mental health of infants, children and young people.

The Scottish Government funds the communication aids for language and learning—CALL—centre, which is based at the University of
Edinburgh and which is working with Learning and Teaching Scotland on the books for all database, which will be available to all schools via glow or the Scottish cultural resources access network. The database will allow teachers to obtain adapted curriculum materials and make them available to any pupil in Scotland. From April 2008, the Copyright Licensing Agency has agreed to extend the licence to cover people who are visually or otherwise impaired.

The Scottish Government also funds the Scottish sensory centre, which is a national centre that promotes innovation and good practice in the education of children and young people with sensory impairment. The centre provides a comprehensive programme of continuing professional development relating to the education of deaf, visually impaired and deafblind pupils, and of dissemination of best practice in the education of Scottish children who have sensory impairments. Teachers are therefore provided with training to enable them to improve the attainment and experiences of such children.

Disabled children and young people are among the most vulnerable in our society. The Scottish Government is working in partnership with a range of stakeholders, including the for Scotland's disabled children coalition, local authorities and families to support the delivery of effective, equitable and empowering services that meet the needs of all Scotland's disabled children and young people. We are providing substantial direct support to a range of organisations in the children's disability sector, including the Family Fund, Capability Scotland, Contact a Family and Sense Scotland. The support comes to more than £3.3 million in the current financial year. Under the concordat with local government, additional resources for disabled children stemming from a report in England entitled “Aiming high for disabled children—better support for families” have already flowed to local authorities. Although those resources were rolled up in the local government settlement and were not ring fenced, they are still available to support vulnerable and disabled children.

In discussion with FSDC, we agreed that the establishment of a liaison project with a dedicated project manager would be valuable in driving forward change. The liaison project will address key issues such as respite, transition, child care and the review of the Education (Additional Support for Learning) (Scotland) Act 2004 and will serve as a conduit between the Scottish Government and significant players in the sector. That will generate intelligence about services on the ground and better connect us with our key stakeholders.

We welcome Kate Higgins starting in post as the FSDC liaison project manager. Kate brings to the role a wealth of experience and energy and she will serve as a key figure in the children's disability sector by engaging with children, young people and their families, policy-makers and practitioners throughout the sector to ensure that families’ needs are articulated and addressed.

I am afraid that I have to go on, convener, because I want to cover a number of other groups of children. We have recently completed a series of discussions with parents of disabled children and young people from throughout Scotland to gather at first hand intelligence about parents’ experiences, priorities and desires for change, which will inform future policy. Those meetings have included extensive discussion of issues such as flexibility of services, crisis and trigger points for the release of resources, orienting services around the needs of the child in line with getting it right for every child, and a range of financial support issues.

We are revising Government guidance on disability accessibility strategies for education authorities in order to reflect the current legislative context and to showcase good practice. That guidance is scheduled to be published over the course of the next few months.

Through a two-year action plan that has been agreed by the Scottish Government and all initial teacher education establishments in Scotland, the aim is to embed inclusive approaches to teaching pupils with additional support needs and disabilities.

We have funded teaching resources to assist pupils with learning disabilities, such as the autism toolbox, which was published on 3 April, which is a resource for Scottish education authorities and schools that draws on a range of practice experience, literature and research to support education authorities in delivery of services to, and in planning for, children and young people with autism in Scotland.

We are also working to build on the central position of GIRFEC in policy that relates to all children. Under GIRFEC, every aspect of children’s services will embody central principles around locating the child at the centre of planning, listening to children, building partnerships and integration, improving information sharing, having individual children’s plans and having a lead professional as a single point of contact.

I hope that those examples go a long way towards demonstrating to the committee that the Scottish Government will continue to strive to improve education services for these groups of children. I will also ensure that the revised code of
practice will highlight those initiatives and encourage authorities to develop good practice for these groups of vulnerable children. In addition, I will ensure that HMIE and the Scottish Commission for the Regulation of Care continue to monitor and evaluate provision, where appropriate.

I ask Margaret Smith and Ken Macintosh to seek to withdraw their amendments in the light of my rather lengthy comments.

Margaret Smith: I do not doubt for a second either the minister’s sincerity in relation to these children, or that progress is possible. The fact that progress is possible stems initially from the understanding that the system that is in place is not working. My problem with the comments that Aileen Campbell and the minister have made is that we are returning to the 2004 legislation, which has failed to deliver. They have continued to say that there are duties in the existing legislation, but the fact is that, to date, those duties have not delivered what people and Parliament wanted. The reality is that those duties are not working—looked-after children are not having assessments and CSPs or appearing before tribunals, even if their needs are not being met. The system is not working.

The minister said that amendment 14 runs counter to the inspirational backdrop of the 2004 act, but for the past five years, many local authorities across the country have acted in a way that is totally and utterly counter to the inspirational backdrop of the 2004 act. There comes a point when we as a Parliament must again underline the circumstances in which we think that action needs to be taken. I believe that amendment 14 is proportionate. As far as I am concerned, it is an acceptable position to say that children who are looked after and accommodated away from home and away from their parents have additional support needs when it comes to learning. I do not think that that is disproportionate. We are not even talking about the majority of children who are seen as being looked after.

One of my major reasons for lodging amendment 14, which I will press, is not just because of the needs that those children have in relation to other children; it is because they have a fundamentally different relationship with the council in that the council is their parent. They are in a fundamentally different position from many other children in the sense that, very often, their own parents are not there to push on their behalf. I believe that they are in the unique position of requiring our assistance and support.

I have a great deal of sympathy with the points that Ken Macintosh has made, but once we go beyond the group of looked-after and accommodated children, we risk creating a hierarchical list of children who have particular needs, depending on their prognosis. Looked-after and accommodated children have fundamentally different relationships not only with their own parents but with their corporate parent, who is the gatekeeper to services. Time and again across Scotland, the corporate parent has failed to open that gate. The educational attainment of those children is not good enough. At what point will we turn round and reiterate our views on the educational and other needs of those children, which we thought that we had made clear in 2004?

Amendment 14 says that local authorities must consider whether such children require a CSP. Like Aileen Campbell, I am utterly convinced that there are some children who will manage fine without a CSP. I am also utterly convinced that an awful lot of children would perform a great deal better in their schools if they had a CSP or a care plan—which they are statutorily required to have—in place. We know that in 2007, 76 per cent of looked-after children had care plans, which means that a quarter of them did not.

If we were in a perfect world in which local authorities were responding to the inspirational backdrop of the 2004 act as we intended and hoped that they would, I would feel able to seek to withdraw amendment 14. The sad fact is that they are not doing so, so I will press amendment 14.

The Convener: I will put the question on amendment 14 at a later point.

I invite Mr Macintosh to wind up the debate on amendment 14A.

Ken Macintosh: I again find myself entirely in agreement with Margaret Smith, so I apologise if I repeat many of the arguments that she has just made.

I acknowledge the minister’s good intentions. It is clear that, despite the difficulties that we have had over recent weeks, all of us wish to help Scotland’s children and address their full range of needs. Both the minister and Aileen Campbell questioned whether the amendments in group 2 were necessary and pointed out that the rights that they would grant are already contained in the 2004 act. That is the case. The amendments in question would not create new powers or provide looked-after and accommodated children with new rights; they are merely about good practice as regards implementation.

It is interesting to note that the amendments have been described as cost neutral by the Presiding Officer, similar to amendment 8 from the Executive. In the Executive’s financial paper that was presented to us when we discussed the financial implications of all our amendments last week, the minister argued that amendment 8 was
lodged as a way of ensuring that rights that already existed under the 2004 act would be properly implemented. I think that he said that the amendment would act as a safety net. That is exactly what I hope amendments 14 to 14E will do—not introduce new rights but merely ensure that existing rights are properly implemented.

The minister presented several other arguments about why it might not be desirable to go down the route of listing groups or categories of children to whom attention needs to be drawn. Aileen Campbell mentioned that, too. It is common to debate what is called the deficit model and the social model of disability, and I will not pretend that I am not sympathetic to that inclusive approach, which we have debated at length in the Parliament, including back in 2004. Some people in this country believe that we should adopt a totally inclusive approach as in Italy. The trouble is that that is not the approach we have taken; we have always had compromises in this country, and compromises are still made all the time.

It is a question of judgment as to what needs to be stipulated in legislation and what extra action needs to be taken. As evidence of that, I quote two points. A specific exception is made in the 2004 act for those who already have a record of needs. In other words, the supposedly truly inclusive approach that we captured in the 2004 act was never an entirely principled approach without exceptions. We specifically made the exception for—

Adam Ingram: For transitions.

Ken Macintosh: For transitions—exactly. All that we are trying to do through amendments 14 to 14E is apply the same rights that we gave to children who have a record of needs—not even the same rights, actually; we are trying to grant them the same recognition. I referred earlier to the Requirements for Teachers (Scotland) Regulations 2005, which also single out certain groups of children who require special attention.

I do not think that there is a principle in the 2004 act that we are somehow undermining with amendments 14 to 14E. I am sympathetic to the deficit model versus social model of disability—more so to the latter—but it has been five years since we implemented the 2004 act and it is not working as well as it should.

The minister argued that life has moved on and that, even now, life is moving on with councils addressing the issues. He spoke about various policies that are soon to be published—strategies and action plans—all of which are laudable and which I certainly hope are effective. However, it is difficult to accept that they are currently effective. The evidence heard by the committee identified all the groups of children referred to in the practical amendments in this group as requiring a specific focus. That is all that the amendments seek to do—put a specific focus on certain groups that are underassessed. They would not give people in those groups a CSP; they just mean that their needs would be looked at, which is what should happen to every child in this country.

In talking about life moving on and councils’ approaches, the minister implied that there will be a change of attitude. One of the unspoken worries about additional support for learning is that it is an underfunded area. The fact that the minister has refused to fund the bill by introducing a financial resolution does not exactly fill one with confidence that there is much money in the system to fund any additional needs that are recognised in the community. Our local authorities are working under a far tighter financial regime now than they have done in the past five years so there is no reason to think that they will have a change of heart when it comes to distributing resources.

11:00

Perhaps more important—although I almost hate to bring it up—the historic concordat that the Government is always referring to and its relationship with local government are effectively a device to explain why the Government cannot implement policies for which it has responsibility. The concordat is used all the time to explain why the Government’s good intentions do not work out. That applies across a range of issues, from class sizes to school buildings, teacher numbers and everything. This is another example.

Unless the minister is signalling to me and to the committee that he is moving away from the approach that is enshrined in the concordat, which effectively hands over responsibility for all the minister’s good intentions to local authorities, and unless he says that he can do something practical about the situation, I do not see how any member of the committee can have any confidence that the minister’s words will be translated into action. The concordat works specifically against that.

Margaret Smith made a very good point. The minister talked about our undermining the ethos of the 2004 act. Its ethos is not undermined by the practical amendments that we are proposing; it has been undermined over the past five years by the inability of some local authorities to implement it efficiently, properly and fairly across the board.

There is a balance to be struck between the principles of legislation and the practical impact. I see our proposals as a straightforward form of practical implementation, and the parents of deaf children, among others, are united in believing that they will make a difference for them. It will be one less battle for parents to fight and one less
obstacle in the way of providing the support that a child needs. I urge members to support all the amendments in this group.

The Convener: The question is, that amendment 14A be agreed to. Are we all agreed?

Members: No.

The Convener: There will be a division.

For
Baker, Claire (Mid Scotland and Fife) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)

Against
Campbell, Aileen (South of Scotland) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
McKelvie, Christina (Central Scotland) (SNP)

Abstentions
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Smith, Margaret (Edinburgh West) (LD)

The Convener: The result of the division is: For 3, Against 3, Abstentions 2.

Although I would have preferred not to have to do this, because the division has resulted in three members voting for the amendment and three members voting against I am required to use my casting vote. I vote for amendment 14A.

Amendment 14A agreed to.

Amendment 14B moved—[Ken Macintosh].

The Convener: The question is, that amendment 14B be agreed to. Are we all agreed?

Members: No.

The Convener: There will be a division.

For
Baker, Claire (Mid Scotland and Fife) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)

Against
Campbell, Aileen (South of Scotland) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
McKelvie, Christina (Central Scotland) (SNP)

Abstentions
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Smith, Margaret (Edinburgh West) (LD)

The Convener: The result of the division is: For 3, Against 3, Abstentions 2.

Once again, I am required to use my casting vote. I vote in support of amendment 14C.

Amendment 14C agreed to.

Amendment 14D moved—[Ken Macintosh].

The Convener: The question is, that amendment 14D be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Baker, Claire (Mid Scotland and Fife) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)

Against
Campbell, Aileen (South of Scotland) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
McKelvie, Christina (Central Scotland) (SNP)

Abstentions
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Smith, Margaret (Edinburgh West) (LD)

The Convener: The result of the division is: For 3, Against 3, Abstentions 2.

Once again, I am required to use my casting vote. I vote in support of amendment 14D.

Amendment 14D agreed to.

Amendment 14E moved—[Ken Macintosh].

The Convener: The question is, that amendment 14E be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Baker, Claire (Mid Scotland and Fife) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)

Against
Campbell, Aileen (South of Scotland) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
ABSTENTIONS
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Smith, Margaret (Edinburgh West) (LD)

The Convener: The result of the division is: For 3, Against 3, Abstentions 2.

Once again, I am required to use my casting vote. I vote in support of amendment 14E.

Amendment 14E agreed to.
Amendment 14F not moved.

The Convener: I ask Margaret Smith whether she wishes to press or withdraw amendment 14.

Margaret Smith: I wish to press the amendment.

The Convener: The question is, that amendment 14, as amended, be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR
Baker, Claire (Mid Scotland and Fife) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Smith, Margaret (Edinburgh West) (LD)
Whitefield, Karen (Airdrie and Shotts) (Lab)

AGAINST
Campbell, Aileen (South of Scotland) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
McKelvie, Christina (Central Scotland) (SNP)

ABSTENTIONS
Smith, Elizabeth (Mid Scotland and Fife) (Con)

The Convener: The result of the division is: For 4, Against 3, Abstentions 1.

Amendment 14, as amended, agreed to.

The Convener: I cannot call amendment 13 because it has been ruled by the Presiding Officer to have significant costs and, under rule 9.12.6, no proceedings can be taken on the amendment because the bill does not have a financial resolution.

Amendment 31, which amends section 5 of the 2004 act, is designed specifically to help parents and their children aged from birth to three.

I will describe two scenarios. On the one hand, it is very easy for a child who has additional support needs but is otherwise healthy to go through the vital period in their learning from nought to three without any real on-going contact with the health service. Members will be aware of a number of proposed changes to the health visiting service, and it is easy to envisage that this might become the norm for many children.

On the other hand, under section 5 of the 2004 act, the NHS is the gatekeeper to additional support for those at an early age. There is no support for children if they do not have an NHS referral. Members will be aware of a lot of evidence on that point and that the diagnosis of a condition—already a stressful and difficult experience for parents—can become the only way to secure and access additional help with learning.

I have already quoted the National Deaf Children’s Society, which has good examples from learning from the experience of the member, and it has highlighted the need to address that point. In its briefing it states that at present

“local authorities can provide support to the pre-3 age group but are not under a legislative obligation to do so for all children with additional support needs. As with access to CSPs, the decision as to whether a child under 3 has a significant additional support need arising from their disability rests with the local authority concerned.”

In practice, that requires a reference from the local health board.

The society also states:

“Early years support for a deaf baby is vital in order to develop access to language and therefore the curriculum in later life. An undiagnosed deaf child aged 3 will have a vocabulary of around 25 words, compared to 700 words for a hearing child of the same age.”

and that

“To complement the delivery of the forthcoming Early Years Strategy, NDCS Scotland believes that the statutory requirement to enter the process of establishing additional support for learning needs for a deaf child should not begin only once that child enters pre-school education – if it does, then the intended benefits of early intervention following diagnosis at birth could potentially be lost.”

We have clear evidence of need among this age group. We also know from evidence submitted to the committee that health boards interpret their role in relation to the 2004 act in a widely different manner. Not only are they a further unnecessary obstacle to families wishing to address their child’s needs, they introduce an unfair element of regional disparity.
The suggestion I propose in amendment 31 is to keep the qualifying criteria essentially the same but to remove the role of the health authority.

I move amendment 31.

Christina McKelvie (Central Scotland) (SNP): Last week, I had quite a few concerns about the original amendment. The redraft addresses all of those concerns, and I am quite happy. One of my real concerns was about who has responsibility for referral. It is a confusing landscape anyway, and the previous amendment would have confused it further. Amendment 31 defines it a bit better, and I welcome the redrafted amendment in its present form.

The Convener: As no other member has indicated a wish to speak, I invite the minister to make his contribution.

Adam Ingram: I am pleased that we have been able to find a mutually agreeable approach to the issue of how this group of children can be brought to the attention of the education authority and that as a result we now have a broader group of stakeholders, including of course parents themselves, who have the ability to act.

I have no doubt that the amendment will be of assistance to the education authority in monitoring the numbers of disabled children under three years of age who receive support and the nature of that support in order that plans can be made to ensure their needs are met on transition to pre-school provision. I am happy to support the amendment.

The Convener: As no other member wishes to speak, I invite the minister to speak to the amendment.

Adam Ingram: Amendment 21 will provide that a mediation services provider that has any involvement in the exercise by the local authority of any of its functions, whether or not those functions relate to education, cannot be regarded as independent.

If the aim of the amendment is to prevent authorities from using in-house mediators and require those authorities that currently provide an in-house mediation service to employ an independent mediation service provider, it fails to meet that objective.

Removing the words “under this Act (apart from this section)”, would mean that, as soon as a mediator enters into an agreement with an authority to provide mediation services, the mediator would be carrying out an education authority function under section 15 of the 2004 act and would therefore be excluded from providing the mediation.

Basically, amendment 21 as drafted would exclude absolutely everyone from providing mediation services. Accordingly, I ask Kenneth Gibson to withdraw it.

Kenneth Gibson: Given the comments of the minister, I seek leave to withdraw the amendment.

The Convener: Do we agree to the amendment being withdrawn?

Margaret Smith: I would like to clarify one point. As the problem is purely a drafting matter, I assume that Mr Gibson will be able to bring the issue back at stage 3, in a properly drafted
amendment, so that we can have a chance to action the proposal?

Kenneth Gibson: There are only a few words that are causing the problem, so I will certainly consider re-presenting the proposal at stage 3.

The Convener: I think that it is the wish of the committee that the proposal come back at stage 3, once the appropriate changes have been made to the wording.

Amendment 21, by agreement, withdrawn.

The Convener: Amendment 22 is in the name of Kenneth Gibson.

Kenneth Gibson: Section 16 of the 2004 act enables the Scottish ministers to require, by regulations, education authorities to put in place arrangements to resolve disputes between the authority and any parents or young people. Those arrangements must be free of charge. Regulations may prescribe which disputes relating to particular functions of the authority under the 2004 act will be subject to dispute resolution. Parents and young people will not be compelled to use any dispute resolution procedure that is put in place, nor will their entitlement to make a referral to a tribunal be affected.

Anecdotal evidence suggests that the current process is not working, as parents are required to make a reference for an independent adjudication to their local authority. Instances are cited of delays in receiving correspondence, or of the reference getting lost or simply being ignored by the authority.

Amendment 22 would put in place a process whereby the initial contact is made to ministers. That would make it easier to obtain an independent adjudication and therefore enhance the rights of parents and young people. It would also provide a more accurate picture of how many such references are made and received. Most important, it would remove the delays and problems that many parents experience and increase parental confidence.

I move amendment 22.

The Convener: As no other member wishes to speak, I invite the minister to speak to the amendment.

Adam Ingram: Amendment 22 would require that, when a parent or young person makes an application for dispute resolution, that application must be made, in the first instance, to the Scottish ministers. However, the amendment raises a number of questions about what is to happen after ministers receive an application. The words “in the first instance” suggest that the parent would then be required to do something else. Placing unnecessary burdens on parents and young people is something that we seek to avoid.

Currently, under the dispute resolution regulations, if an authority considers that an application for referral to dispute resolution relates to a specified matter and that all of the supporting material has been provided, it must send the applicant confirmation of acceptance of the application within 10 days. At the same time, the authority must send a request to the Scottish ministers for a nomination by them of an independent adjudicator. On receiving such a request, ministers must nominate a person from their panel of independent adjudicators.

I understand that some authorities can be tardy when it comes to contacting ministers to nominate an independent adjudicator, which is simply unacceptable. To address that, I intend to issue a direction under section 27(9) of the 2004 act to direct authorities to comply with the relevant timescales that are laid down in the dispute resolution regulations. The whole dispute resolution process must not exceed 60 working days.

Furthermore, I recognise that it might be beneficial for ministers to be alerted to the fact that a parent or young person has submitted an application for referral to dispute resolution. That would enable ministers to contact authorities directly on a case-by-case basis if it was brought to their attention that an authority might be in breach of the relevant timescales. However, it is vital that any new process that we introduce is as easy as possible for parents. It must not be overly onerous, and I am considering the ways in which we could best achieve that.

Accordingly, I ask Kenneth Gibson to withdraw his amendment, pending my consideration of ways of taking the matter forward.

Kenneth Gibson: The minister’s commitment to ensuring that the legislation works properly is important. I look forward to seeing the implementation of the additional measures that he refers to.

Amendment 22, by agreement, withdrawn.

The Convener: One of the members of the committee has asked for a short comfort break. Accordingly, we will suspend for two minutes.

11:24
Meeting suspended.

11:28
On resuming—
The Convener: Amendment 29, in the name of the minister, is grouped with amendments 10, 19 and 33.

Adam Ingram: Amendment 29 would place authorities under a duty to ensure that the information that they are required to publish under section 26 of the 2004 act is available, on request, from each school under the management of the authority. Therefore, the amendment would expand the range of locations from which information that is published under section 26 might be obtained.

The Additional Support for Learning (Publication of Information) (Scotland) Regulations 2005 already place local authorities under a duty to publish all the information that is detailed in section 26 of the 2004 act in printed and electronic form and to hold that information in those forms at the authority’s head offices and at such public libraries as are located within the area of the education authority. The published information should also be made available on request in alternative forms such as on audio tape, in Braille or through sign language.

I intend to exercise the direction-making power under section 27(9) of the 2004 act to ensure that the requirements of that statutory duty are met in as useful and efficient a fashion as possible. However, by expanding the range of locations from which information can be obtained to include local authority schools, amendment 29 would ensure that parents can access the relevant information, either in its entirety or in part, from the school, which is the place from where they are most likely to seek it.

11:30

Amendment 29 would also place authorities under a duty to provide parents of children with additional support needs and young people with additional support needs with information on how to access the information that is published under section 26.

Amendment 29 is intended as an alternative to amendments 10 and 19, which were lodged by Elizabeth Smith and Margaret Smith. I note that Margaret Smith has also lodged amendment 33, which has some similarities to amendment 29. However, amendment 29 would provide parents with access to a greater amount of information than amendment 33 would. Amendment 33 would require that parents are able to access a “summary” of the published information under section 26 of the 2004 act, whereas amendment 29 would require the school to give access to all the information that is published under section 26. In that respect, amendment 29 would enable parents to access all relevant information. It is also worth highlighting that amendments 29 and 33 are alternatives. If both amendments were agreed to, the result would be a confusing and contradictory piece of legislation.

Amendment 10 would require education authorities to provide parents of children with additional support needs and young people with such needs with all the information that authorities are required to publish under section 26 of the 2004 act. However, that section was amended by the Additional Support for Learning (Publication of Information) (Scotland) Regulations 2005. Amendment 10 does not specify how or when such information should be provided to parents or young people. The distribution method, along with the staff time involved, could have significant cost implications for authorities.

Amendment 10 would place authorities under a duty to provide the information that is published under section 26 of the 2004 act to all parents of children with additional support needs and to all young people with additional support needs, not just to those for whose school education the authority is responsible. Potentially, that means that the authority would be under a duty to provide the published information to every parent of a child with additional support needs and to every young person with additional support needs in the country. Furthermore, that could lead to a situation in which the parents of a child with transitory additional support needs would receive vast amounts of local authority information that was neither requested nor required and that would be relevant for only a short period of time. Clearly, that would be completely disproportionate.

I completely agree that more must be done to raise parents’ awareness of their rights under the 2004 act, but I am not convinced that amendment 10 is the best way to proceed. Under the current legislation, authorities are required to publish, in electronic and printed form, the following details: information on the authority’s policy in relation to provision for additional support needs; the arrangements for identifying children and young people with additional support needs; information on mediation; and details of a local authority officer from whom parents can seek further information and advice. I accept that some authorities are failing in that statutory duty. That is why, as I stated earlier, I intend to exercise the direction-making power under section 27(9) of the 2004 act. Furthermore, I will ask my officials to collate the information that is published by each authority to ensure that the statutory requirement has been met. I therefore ask Elizabeth Smith not to move amendment 10.

Amendment 19 would place authorities under a duty to ensure that the information that they are required to publish under section 26 will be
available from every place that provides school education in their area, in any publications that provide general information about the school or the services that are provided by the authority, and on any website that is maintained by the school or the authority for those purposes.

As I explained earlier, the publication of information regulations already place local authorities under a duty to publish all the information that is detailed in section 26 of the 2004 act in printed and electronic form and include requirements on where the information should be published. The direction-making power under section 27(9) of the 2004 act, which I have already stated that I will exercise, will ensure that the requirements of that statutory duty are met.

Schools are under a duty to publish information in their school handbooks on the provision that is made for pupils who have additional support needs and on the number of pupils attending the school who have been identified as having additional support needs. On request, authorities must make information available on one or more addresses and telephone numbers to which a parent who considers that their child may have additional support needs may make inquiries.

Amendment 19 would have some bizarre practical implications. For example, it would require authorities to send out all the information that they publish under section 26 of the 2004 act every time they send out some general information about the school. I am sure that members will agree that it would be completely disproportionate if a single-sheet general information flyer that is relevant to every parent, and not just those parents who have children with additional support needs, suddenly turned into a vast amount of information about additional support needs that was neither requested nor required by the parent.

Further, amendment 19 would require the school handbook to contain all the published information—which of course is already published—thereby increasing the size of the handbook considerably and turning a useful handbook into a manual on additional support needs.

Accordingly, I ask Margaret Smith not to move amendment 19.

The effect of amendment 33, which appears similar in intent to amendment 29, would be that information published by an education authority under section 26 of the 2004 act is available on request from each place in the authority’s area in which school education is provided. However, although amendment 29 would enable parents to access that information in full on request, amendment 33 would allow them access only to a summary of that information. It is not clear exactly how abridged such a summary might be, and an authority could meet such a requirement with a couple of simple lines explaining that they provide additional support but without stipulating how. In that respect, amendment 33 offers far less to the parent than amendment 29 does.

Amendment 33 takes a different approach to raising awareness of the information by requiring authorities to include that summary

“in any handbook or other publications provided by schools in the authority’s area or by the authority for the purposes of providing general information about the school or, as the case may be, the services provided by the authority”

as well as websites maintained by the authority.

As I said earlier, the school handbook regulations already require schools to include in their handbooks information about the provision that is made for pupils who have additional support needs and, in the case of a school other than a nursery school, whether any pupils attending the school have additional support needs, the number of such pupils and whether the school is a special school or has a special class or unit.

Again, it must be remembered that the publication of information regulations already place local authorities under a duty to publish all the information that is detailed in section 26 of the 2004 act. As I have indicated several times, I will exercise the direction-making power under section 27(9) of the 2004 act, which will ensure that the requirements of that statutory duty are met in as useful and efficient a fashion as possible.

It should also be noted that, although amendment 29 would require that the information be made available on request

“from each school under the management of the authority”,

amendment 33 would require that the information be made available on request

“from each place in the authority’s area where school education is provided”.

That means that amendment 33 would require education authorities to make information available in independent and special schools over whose management the education authority has no say. It would be unfair to ask that of a local authority.

As I said earlier in the discussion on amendment 29, it is not the case that either of these amendments pre-empt the other. However, should both amendments be included in the bill, the result would be a confusing and contradictory piece of legislation. In that respect, it should be considered that there is a direct choice between the two.
I emphasise that amendment 33 would allow parents less information provision than would amendment 29 and that there is already provision in place for many of the things that are required by amendment 33—for example, the duty to publish information on websites.

I am delighted to announce that, in addition to seeking to change the legislation on information provision to parents and issuing a direction to all authorities, I have been able to secure some funds from our central advertising budget to conduct an awareness-raising campaign aimed at parents. The campaign will involve the services of a creative company and a public relations company, and I expect the work to be carried out in the summer and autumn. My officials are working on the details of the campaign and I hope to be better placed to provide members with further details of it at stage 3.

Accordingly, I ask Margaret Smith not to move amendment 33.

I move amendment 29

The Convener: I invite Elizabeth Smith to speak to amendment 10 and the other amendments in the group.

Elizabeth Smith (Mid Scotland and Fife) (Con): As I said at last week’s meeting, what struck me most frequently during our evidence sessions—and again when I spoke to experts in the field—were the contrasts between Scotland and some other countries regarding the provision of adequate and accurate information on the rights of parents and their children to access good-quality care and support. I was particularly struck by the examples of countries where, from day one of a specific additional support need being identified, a clear parent partnership officer structure is put in place with a mandatory obligation placed on the local authority to provide not only a plan of the educational, health and social support for the child in question, but a clearly set out code of practice plus a full list of the rights of parents associated with those two provisions.

Although there is evidence that some local authorities are exceptionally good in this area, some are clearly not. As a result, some children’s support services are falling woefully short of the expected standard and are, in some cases, frankly, non-existent. There is a need to provide a level playing field in that respect and to ensure that we are doing everything possible to identify all the cases in which there are additional support needs.

It is our duty to ensure that, as soon as an additional support need is identified, the parents and carers of the child are provided with—not just told where to find—a personal support plan that includes a statement of the educational, health and social assistance that must be provided—something that should already be undertaken by local authorities. Parents and carers must also be given information about how they can access relevant additional support bodies and information about the rights of the different parties involved, including what procedures can be put in place if there is a failure to deliver the appropriate support.

I have listened carefully to what the minister has said in discussions over the past 10 days. It is my impression that the Government considers the request that is made by amendment 10 to be excessive and believes that it would burden parents and carers with too much information. I have looked again at it and I do not believe that that is the case, as there is no request to provide every piece of ASN documentation to the parents or carers of every child who has additional support needs. Instead, the amendment requests that the documentation that is provided be relevant to their specific needs and that it be provided at the same time as the support document.

11:45

From looking at best practice elsewhere and considering the evidence that four independent groups provided, I do not believe that providing that information would be particularly expensive. I am aware that additional costs would be incurred but, on the basis of the cost of similar documents that the Government has produced in the past two years, I do not consider those costs to be in any way excessive. I note that the Presiding Officer says that the cost would be £50,000, but we have no details on how that was calculated.

Amendment 10 would improve the information process by creating a statutory obligation for local authorities to give parents and carers the necessary information about the holistic support plan for their child and their rights in that process. It is unacceptable for local authorities merely to flag up where people can access some of that information, as experience proves that far too many parents do not know where to look for it.

If amendment 10 is agreed to, we will hugely improve the support process in every local authority and reduce future costs by addressing ASN issues much more effectively and much earlier. I will press amendment 10.

The Convener: The only amendment that has required to be moved is amendment 29, because it is the first in the group. We will deal with whether other amendments are to be moved later.

I invite Margaret Smith to speak to amendments 19 and 33, in her name, and the other amendments in the group. I remind her that she is not to move her amendments at this point.
Margaret Smith: As Liz Smith said, the importance of access to information has been raised with us time and again. That is why I am pleased to speak to this group of amendments. I support amendment 10, in the name of Liz Smith, which would place a clear duty on local authorities to provide published information to the parents of children with additional support needs and to young people with additional support needs. I am pleased that she and I met the minister to discuss our amendments and that the Government has lodged an amendment that was to an extent inspired by the amendments that Liz Smith and I presented to the committee last week. I welcomed the opportunity to meet the minister and the bill team to discuss the issue.

The fact that the Government has lodged an amendment on access to information highlights the issue’s importance and the Government’s acceptance that more can and should be done to inform parents of their rights and to ensure that local authorities fulfil their duties under the 2004 act. However, the amendments that Liz Smith and I lodged are preferable to the Government’s amendment.

The minister is right: the amendments in the group provide a choice to committee members. Amendment 19 or its alternative, amendment 33, would ensure that information about a council’s additional support for learning policy is available on request from each school and is in school handbooks and any other publications that are given to parents about the services that an authority provides. The amendments would also ensure that such information is on any website that is maintained by a school or a local authority.

The minister is correct to say that local authorities have a duty to provide information. However, information is not necessarily being provided. Local authorities know that they should put information about their ASL policies on their websites and in handbooks. However, the sad fact is that Independent Special Education Advice (Scotland), which has monitored the situation, says that some authorities do not provide that information at all. Of those that do, some provide misleading information and others provide poor content. I could name councils that are being pursued on such issues, but I choose not to.

In the normal course of events, all parents—not just those whose children have been identified as having additional support needs—would be given the information in the school handbook when their children joined a school. They could also access the information on the council’s or school’s website and ask for it from the school. As I said last week, the information might be provided in a leaflet or in a relevant part of a school handbook.

I am a bit disconcerted by some of the minister’s arguments. He appears to be arguing both ways at once. I lodged amendment 33 as the direct result of concern that committee members expressed last week, when Aileen Campbell said that amendment 19 could leave parents drowning in a sea of information. I am sure that many parents who at the moment cannot get information would love to drown in such a sea. However, I have taken her comments on board and, to cope with the issue, amendment 33 seeks to make it possible to produce a summary of the published information. The council would still have a degree of discretion about what constitutes a reasonable and relevant amount of information.

The Presiding Officer has determined that, if amendment 33 rather than amendment 19 were agreed to, costs would be reduced from £100,000 to £25,000. As no one wishes to be profligate with public money, amendment 33 might be preferable for the reasons that I have set out.

Crucially, amendment 33 seeks to ensure that the information will be available in schools. I am rather surprised that that has not been the case in the past and, no matter whether the committee accepts the amendment in my name or the amendment in the name of the minister—I should say that I am pleased that he has accepted the point—I think that such a move would be a step in the right direction.

It is important that the information is as accessible as possible to parents. That is why I support amendment 10 instead of amendment 29, as a result of which councils would simply direct parents to where they can receive information from a third party instead of giving them the information directly. We have to try to reduce the barriers between the parents and the information that they require.

As I have said, the 2004 act already requires education authorities to publish information on their policy, to keep it under review and to publish revised information. We know that some councils are already doing that. Indeed, I believe that a very good part of Stirling Council’s website focuses on these issues. Some councils are doing what they ought to be doing, but some are not.

Neither amendment 19 nor amendment 33 seeks to introduce any new requirement with regard to the production of information about policy; they simply suggest where and how that existing information might be accessed. I expect that costs will be associated mainly with the printing of leaflets that people can access on request at schools and elsewhere, and I think it most likely that it will be the parents of the 20 per cent of children with ASN—the 5 per cent who have already been identified and the 15 per cent
who have not—who will want to access that information.

I am pleased that the Government has confirmed that, as I have contested, the duty to provide information already sits with local authorities as a result of the 2004 act and that it accepts that many councils already make the information available on websites and in handbooks. In fact, the Government has confirmed to me and Liz Smith that it has just issued guidance that revises the advice in handbooks in line with ASL legislation. However, it has said that the school handbook will also include information about the services that are available in any particular school. As we know, that is not the same as ensuring that parents are aware of their entitlements under the 2004 act.

I hope that colleagues will support amendments 10 and 33, which I believe represent the best and most proportionate way of improving the availability of information to parents.

**Aileen Campbell:** As I said last week, we all want to ensure that parents are as well equipped and as well informed as possible. However, I am still doubtful about the effectiveness of the amendments.

The 2004 act requires authorities to publish information about a range of specified matters relating to additional support needs and to revise it when required. Of course, we must do all that we can to enhance the provisions in the act and ensure that they work. If, as Margaret Smith says, some councils are meeting those requirements well within the scope of the act, we should look at how they have been able to do so. I do not believe that amendments 10, 19 and 33 would enhance the provisions in the act or fulfil the obvious policy intentions that Liz Smith and Margaret Smith have outlined.

If amendments 10 and 19 are agreed to, a vast amount of information will be sent to parents who have not requested it and do not require it. For example, amendment 19 would require authorities to send out all the information that they publish under section 26 of the 2004 act every time they send out general information about the school. As the minister has made clear, amendment 10 would potentially require an authority to provide information to every parent of a child with additional support needs throughout the entire country.

I hope that colleagues realise that the amendments, although they are well intentioned, are not a proportionate response, will still drown parents in paperwork and might still, despite the Presiding Officer’s ruling, be very costly. We probably have not benefited from being unable to find out where the Presiding Officer got his costings from. He gives us a figure of £50,000 for amendment 10, but the Government estimates a figure of up to £2 million.

More important, though, is the fact that agreeing to amendments 10, 19 and 33 could mean that parents would not be well informed and would miss relevant and important information. That is why I would not be happy to agree to the amendments, despite Margaret Smith’s assurances. An unintended consequence of their provisions would be that their practical impact would run contrary to their policy intent.

Like the minister, I believe that amendment 29 is better than amendment 33 because it would require education authorities to make all information under section 26 available on request, whereas amendment 33 would require only a summary.

We all agree that parents need to be empowered and equipped with all the necessary information, but I do not believe that amendments 10, 19 and 33 would achieve that. We have an opportunity to enhance the bill to make it better for vulnerable people, but amendments 10, 19 and 33 would not make the bill better or help vulnerable people in the way that we want. I therefore urge the committee to reject amendments 10, 19 and 33.

**Ken Macintosh:** I am pleased that all the amendments have been brought before us today because, as Margaret Smith said, they acknowledge that there is a problem.

Aileen Campbell pointed out that the 2004 act has provisions for giving information, but it is clear from all the evidence we have heard from parents that they cannot access required information that is convenient, suitable or readable. Amendments 10, 19 and 33 would address that issue in one way or another.

Margaret Smith made it clear that amendment 19 would not be moved, so we must choose between amendment 29 and amendments 10 and 33. The provision in amendment 29 would merely make information available to parents, rather than provide it. The key difference between amendment 29 and amendment 10 is that the latter will provide information to a parent whose child has additional support needs. I cannot understand why the minister would object to a requirement to give parents information. I would have thought not only that would it be good practice to do so, but that it should be the first thing for any education authority to do.

I am aware that some authorities have very good practice and a good record on additional support but that parents in those authorities do not know their rights or know how to access information. If that is the case in authorities with a
good reputation, I am worried about what happens in authorities that sometimes give the impression of avoiding their duties.

Aileen Campbell said that the provisions in amendments 10, 19 and 33 would create vast amounts of information that would drown parents in paperwork, but I do not see any evidence that that would happen. The minister made similar assertions: I regard them as assertions because he did not refer to any particular wording. If we leave aside amendment 19, can the minister refer me to the exact wording in amendments 10 and 33 that suggests that parents would drown in information?

I, too, hesitate to use the estimated costs as evidence of much. However, assuming that the costs are accurate—we are working on that basis and they have been used to rule out other desirable amendments—the provisions in amendments 10 and 33 would not be expensive. They are extremely modest and would make extremely reasonable demands on education authorities to provide information.

Will the minister point to the exact wording that backs up his assertion that the provisions in amendments 10 and 33 are overbureaucratic and would drown parents in paperwork? I prefer the two options that are presented in those amendments to the option of making information available in a public library in the hope that parents will pick it up.

12:00
The Convener: I invite the minister to wind up the debate on the group.

Adam Ingram: First, I will pick up on Ken Macintosh's final point. Amendment 10 inserts new paragraph (d) into section 26(1) of the 2004 act. It says:

"provide the persons mentioned in subsection (2A) with any information published under paragraph (a) or (c)."

That means everything.

Ken Macintosh: Can I ask for a point of clarification?

Adam Ingram: No, if I could carry on—

The Convener: Mr Macintosh, you do not have a right to come in again at this point, and the minister should remain uninterrupted.

Adam Ingram: I remind Mr Macintosh that that is a legal definition; it is not open to individual interpretation. That is why the officials have come up with the estimates of costings as they are. I would like members to take that on board if possible. My own ability to impart information seems to be somewhat deficient if I cannot get across some of these points, which I have made to committee members several times.

On amendment 10, Elizabeth Smith has been describing her ideal situation. She has referred to a practice in England whereby a statement of needs is actually presented to parents, in the form of a support document. However, that is not what amendment 10 says; it seeks to provide and publish all the information available. My view is that what Elizabeth Smith suggests is good practice, which I would like to be adopted throughout the country. We can do that by specifying it in the code of practice, on which the committee may have an input further down the line.

In amendment 29, I propose to focus on parents getting the quality and type of information that they require to exercise their rights. The amendment does that in an efficient and effective fashion.

Margaret Smith appears to be saying that it does not matter what the law says, because it is not happening. She wants to reinforce or gold-plate measures. I have stated several times this morning that I will issue directives to ensure that local authorities fulfil their statutory obligations regarding the provision of information. That will improve the current situation, in which the law is not being adhered to. There will be no escape from it. I shall report back to the committee on those issues.

Amendment 29 extends to local schools the obligations that local authorities are under to make information available to parents. Local schools are the very places where parents would ask for such information. There has been a deficiency there under the existing legislation. All the relevant information that a parent would need is covered in the existing legislation, in section 26 of the 2004 act. In amendment 29, I propose to ensure that that information is made available to parents in an appropriate, efficient and effective fashion.

Resources matter. Any resources that are being used in an excessive or disproportionate way, with vast quantities of information being sent out, could otherwise be used to meet the additional support needs of the children affected. Clearly, I have not been able to get across those points as well as I might have done in speaking to members. Hopefully, the points are made now.

The Convener: The question is, that amendment 29 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Campbell, Aileen (South of Scotland) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
AGAINST
Baker, Claire (Mid Scotland and Fife) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Smith, Margaret (Edinburgh West) (LD)
Whitefield, Karen (Airdrie and Shotts) (Lab)

The Convener: The result of the division is: For 3, Against 5, Abstentions 0.

Amendment 29 disagreed to.

Amendment 10 moved—[Elizabeth Smith].

The Convener: The question is, that amendment 10 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR
Baker, Claire (Mid Scotland and Fife) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Smith, Margaret (Edinburgh West) (LD)
Whitefield, Karen (Airdrie and Shotts) (Lab)

AGAINST
Campbell, Aileen (South of Scotland) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
McKelvie, Christina (Central Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 10 agreed to.

Amendment 19 not moved.

Amendment 33 moved—[Margaret Smith].

The Convener: The question is, that amendment 33 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR
Baker, Claire (Mid Scotland and Fife) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Smith, Margaret (Edinburgh West) (LD)
Whitefield, Karen (Airdrie and Shotts) (Lab)

AGAINST
Campbell, Aileen (South of Scotland) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
McKelvie, Christina (Central Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 33 agreed to.

The Convener: Amendment 11, in the name of Elizabeth Smith, is grouped with amendments 20 and 24.

Elizabeth Smith: The specific purpose of amendment 11 is to provide information about dispute resolution as well as advocacy, which is lacking in the 2004 act. The committee heard several times in evidence sessions that tribunals are often seen as adversarial and that many parents do not seem to know their dispute resolution rights. The dispute resolution process can often be stressful for parents with ASN children, and that has often led to parents or guardians not feeling comfortable with or able to accept the best advice. Obviously, that can be detrimental to the best interests of the child.

I move amendment 11.

Margaret Smith: I support amendment 11. It is important that parents have information about dispute resolution.

As we have heard, requirements to do with the publication of information are in place in the 2004 act and regulations. Amendment 20 would simply add to those requirements that there should be other specified bodies from which people can get information and that those bodies should be specified by ministers. Basically, the intent is to name national bodies that are specified by the Government from time to time as organisations that will give out information nationally. It is clear that we cannot at any given time put the names of such organisations into legislation or regulations. The amendment is a way of ensuring that where a national body gives information that is supported by the Government, that information is made available to people.

I think that there is a minor drafting error in the amendment, as there is already a paragraph (g); “(g)” should therefore read “(h)”. A tidying-up measure should be able to deal with that. If not, I am sure that we can deal with it at stage 3.

The provenance of amendment 24 is the ongoing concern that the data on children and young people with additional support needs remain weak. We need information so that we know what services we need to provide and plan for, and we need information about outputs. The for Scotland’s disabled children campaign has said that no one knows how many children have ASN. People who are involved in that campaign are keen, as others are, to have more detailed and accurate information so that there can be effective planning, resourcing and delivery of services. Amendment 24 would require every education authority to publish an annual report by school and year group on the number of children and young people with ASN for whose school education they are responsible and the principal grounds on which they have been identified as having ASN. I understand that information is already collected in the pupil census on the total number of pupils with ASN in Scotland by local authority.

Figures are usually broken down by reasons for support, nature of support and main difficulty, although there is no table for main difficulty this
year. I am aware that seeking to have information made available at a lower level may be deemed disclosive—that is, it would allow a pupil to be identified in, for example, a small rural school.

Amendment 20 asks for data on pupils with ASN and the principal ground for their ASN to be collected by school and year group. There are some gaps in the information that is currently gathered. As far as I understand, the current statistics define a child with ASN as one with a CSP, a record of needs or an IEP. That is a measure of those with identified ASN for whom a plan has been put in place. It is not the same as identifying everyone who has ASN. Data on the main reason for support are not collected for pre-school pupils either.

COSLA questions the financial ruling, which I find strange, as much of the information is gathered already. It also questions the value of having to publish such detailed information by year group and school and argues that the by-council information that is already published in the pupil census is sufficient.

There is a clear need for consistent definitions of the principal factors so that reliable data can be gathered. I seek assurances from the minister that the Government is serious about trying to improve the quality and depth of the data that are available. In its response to the United Nations Committee on the Rights of the Child, the Government has committed itself to considering data needs on children and young people with disabilities. That would move data collection away from impairments and towards the identification of the supports that are in place and the gaps in support. It would also allow us to see whether any support needs are being missed.

Amendment 20 would create a statutory duty rather than relying on political will and voluntary co-operation. I look forward to hearing what the minister says on data gathering in relation to children and young people with additional support needs.

**Christina McKelvie:** Amendment 11 implements a commitment that the minister made in the stage 1 debate and will negate the need to introduce a Scottish statutory instrument at a later date. Therefore, I welcome it and think it appropriate to support it.

Amendment 20 is a lesser provision on the responsibilities of local authorities than the current legislation. The 2005 regulations already have information on support and advocacy as well as advice and information, unlike the provision in the 2004 act. Additionally, there is no balancing amendment to remove that provision from the legislation so, if amendment 20 were agreed to, there would be two similar provisions but the current provision, being the wider, would have precedence and amendment 20 would do nothing except impose a restricted list on local authorities. I could not possibly support it, because it would create a confused landscape.

Amendment 24 would require an education authority to develop and pay for a new data collection system, as well as cover production costs, to fulfil the statutory requirement that it would introduce rather than develop the data set that is already used by ScotXed, which produces the pupils in Scotland census. Although we have information that says that no costs would be attached to the amendment, the costs for the development of a new system are unquantifiable. We cannot consider that now because we have no understanding of what a new data collection system would cost.

The census that is already taken describes the education system by providing information on the numbers of schools and pupils, types and size of schools and classes that they learn in and some characteristics of pupils, including those with additional support needs, a CSP, an IEP and/or provision levels set by a record of needs. Amendment 24 would involve an unquantifiable cost and would create a new data collection system that we do not need. We should develop the current system.

12:15

**Ken Macintosh:** There is obvious merit in all the amendments in the group, particularly amendments 11 and 20, which, subject to the minister's remarks, I am minded to support.

I am particularly keen to see amendment 24, which Margaret Smith lodged, addressed. I think it was during the stage 1 debate that I highlighted the not just confusing, but conflicting, sources of information that are available. They do not match up. We have various figures on various conditions, none of which add up to a clear picture. That matters for any number of reasons. It is difficult to shape policy if we do not have a firm grasp of the area that we are addressing.

Perhaps more worrying, we are aware from evidence that the committee has heard that there can be a tendency for providers—local authorities and others—to shape their provision for children with additional support needs according to their facilities rather than the needs that they need to address. In other words, if an education authority has invested in a certain area, it tends to identify many children with needs in that area and cater for them in that direction. That is difficult to counter if parents have different views about their children’s needs and how they should be addressed because we do not have the information to
compare like with like. It is important that we take 
firm steps to address that problem and to collate, 
collect and publish information that gives us a firm 
evidence base on which to proceed. Amendment 
24 proposes a practical step in that direction; 
perhaps the minister will let the committee know 
his views.

Adam Ingram: I welcome amendment 11. As 
Christina McKelvie said, I gave a commitment at 
stage 1 to ensure that parents are made aware of 
their rights, particularly with regard to services for 
resolving disagreements. Elizabeth Smith has 
kindly saved me further considerations and I am 
happy to support amendment 11.

Amendment 20 proposes an extension to the list 
of matters on which authorities are required to 
publish information to include information about 
other persons or bodies, to be specified in an 
order made by the Scottish ministers, from whom 
advice and information about provision for 
additional support needs can be obtained by 
parents and young people.

I do not know whether Margaret Smith is aware 
that there is already a similar provision in the 2004 
act. The Additional Support for Learning 
(Publication of Information) (Scotland) Regulations 
2005 (SSI 2005/267) amended the 2004 act and 
extended the matters on which authorities are 
required to publish information. Therefore, under 
the 2004 act, authorities must publish information 
on 
“any other persons which the authority think appropriate 
from which” 
parents and young people 
“can obtain advice, further information and support in 
relation to the provision for such needs, including such 
support and advocacy as is referred to in section 14” 
of the 2004 act. The regulations also require 
education authorities to have published that 
information in electronic and printed form.

Amendment 20 does not takeaccount of the 
changes to the 2004 act made by the regulations, 
which require authorities to publish information on 
any other person they think appropriate. The main 
difference between the existing provision and the 
amendment is that whereas under the existing 
provision the authority must publish information on 
persons it thinks appropriate, the amendment 
would require such persons to be specified by the 
Scottish ministers.

Allowing the authority to determine who it thinks 
appropriate allows greater flexibility than requiring 
the Scottish ministers to specify such persons by 
order. Appropriate persons will no doubt vary from 
authority to authority. The existing provision allows 
the authority, as opposed to the Scottish ministers, 
to decide which persons are best placed to 
provide advice, information and support to parents 
and young people in their area.

The existing provision is in fact wider than what 
is proposed in amendment 20. Whereas the 
amendment would require the authority to publish 
information on persons or bodies from whom 
parents and young persons might obtain advice 
and further information about provision for 
additional support needs, the existing provision 
refers to support and advocacy as well as advice 
and information.

Further, amendment 20 would not delete the 
existing provision, so two, similar, duties would co-
exist, which would create confusion in the 
legislation. I accept that some authorities are 
falling in this statutory duty. I therefore intend to 
exercise the direction-making power under section 
27(9) of the 2004 act to ensure that the 
requirements of that statutory duty are met. 
Therefore, I ask Margaret Smith to withdraw 
amendment 20.

Amendment 24 would place a duty on education 
authorities to publish an annual report detailing the 
number of children and young people for whose 
school education they are responsible who have 
additional support needs and the reasons that give 
rise to those needs. The amendment requires that 
the information should be set out by school and 
year group. Although the Scottish exchange of 
education data system—ScotXed—already 
collects national data on the number of pupils with 
a co-ordinated support plan, an individualised 
educational programme and/or provision levels set 
by a record of needs, data are not collected on 
those pupils who are receiving additional support 
who do not have a CSP, an IEP and/or a provision 
level set by a record of needs.

Amendment 24 would therefore require 
education authorities to develop new data 
collection systems and pay the production costs to 
meet what would be a statutory requirement. I am 
sure—I certainly hope—that the committee agrees 
that the proposal would involve an unnecessary 
and overly bureaucratic process and that it would 
made much more sense to develop the data set 
that is already used by ScotXed to produce the 
pupils in Scotland census.

Moreover, given the terms in which the new 
relationship between the Scottish Government and 
local government is set out in the concordat, it is 
clear that local government should not be asked to 
submit any other monitoring returns or plans 
without prior agreement. The concordat states:

“bureaucracy will be reduced in other ways including the 
extent of monitoring and reporting currently required of 
local government by the Scottish Government, including a 
reduction in monitoring and reporting not directly linked to 
ring fenced funding.”
However, the committee might be interested to learn that we are currently in discussions with education authorities—at their request—to develop proposals for the collation of more robust statistics, at a national level through ScotXed, on disabled pupils. Such statistics would assist education authorities to meet their requirements under the disability equality duty and allow them to continue to develop more detailed statistics at authority level to inform local planning processes.

I recognise that there may be ways to improve the additional support needs data that are collected through ScotXed. I would be more than happy for my officials to enter into discussion with voluntary organisations—or, indeed, any other interested stakeholders—to discuss the ways in which the current data collection system for all children with additional support needs could be improved. Of course, we would need to discuss any policy or technical changes with COSLA and local authorities. Accordingly, I ask Margaret Smith to withdraw amendment 24.

The Convener: I invite Elizabeth Smith to wind up the debate and to indicate whether she will press or withdraw amendment 11.

Elizabeth Smith: I have already made the case for amendment 11 clear—as has the response from around the table, for which I am grateful—so I will press amendment 11.

Amendment 11 agreed to.

The Convener: Amendment 20, in the name of Margaret Smith, has already been debated with amendment 11. Ms Smith, do you wish to move your amendment?

Margaret Smith: I do not wish to move it, but I might lodge a similar amendment at stage 3.

Amendment 20 not moved.

The Convener: Amendment 24, in the name of Margaret Smith, has also already been debated with amendment 11. Ms Smith, do you wish to move amendment 24?

Margaret Smith: Bearing in mind the comments from the minister, I seek to have discussions with him on this matter. I might lodge an amendment at stage 3, but I do not wish to move amendment 24.

Amendment 24 not moved.

The Convener: I cannot call amendments 25 and 34 because the Presiding Officer has ruled that they have significant cost and, under rule 9.12.6 of the standing orders, no proceedings can be taken on them because the bill does not have a financial resolution.

Section 6 agreed to.

After section 6

The Convener: Amendment 12, in the name of Elizabeth Smith, is in a group on its own.

Elizabeth Smith: The reason for amendment 12 is to address further an issue that was raised in the early stages of discussion of amendment 16, to ensure that, through the tribunal process, measures will be in place if a local authority fails to fulfil its duty properly in ensuring that transitions are in place for young people beyond the school leaving age who are identified as having additional support needs. I took advice and was satisfied that the amendment would have only fairly minimal costs.

I move amendment 12.

Aileen Campbell: Currently, authorities must approach other agencies that are concerned with children and young people when they are going to leave school. That has to be done at least six months before the young person leaves school, but it can be done earlier—it can happen for someone as young as 15. I agree that we must do all we can to ensure that transition works in the best interests of the child or young person but, given that mechanisms already exist in the 2004 act, I remain doubtful of the need for the amendment.

Adam Ingram: Amendment 12 seeks to extend the jurisdiction of the tribunal to allow it to consider references in relation to an authority’s failure to comply with its duties in terms of post-school transitions.

I emphasise that, under the 2004 act, dispute mechanisms for such cases are already in place. If the parent of a child with additional support needs, or a young person with additional support needs, felt that transitional arrangements were necessary but the authority disagreed, the parent or young person could refer the case to dispute resolution. If the child or young person has a co-ordinated support plan, a case can be referred to the tribunal regarding the level of provision being delivered during the child’s last year at school. I would be happy to strengthen the code of practice to make it absolutely clear that those rights of appeal apply to transitional arrangements and, in particular, to provisions that are in place for at least the final 12 months.

Some stakeholders have already commented on the complexity of the bill. Amendment 12 could overcomplicate things by introducing yet another route for dealing with the same matter, although I appreciate that HMIE’s report on the implementation of the 2004 act identified post-school transitions as an area where provision could and should be improved. To address that, I have appointed an additional support for learning/more choices more chances national
transitions development officer from 1 April 2009. They will lead, manage and co-ordinate local and national partnership approaches to the effective implementation of the act, with a specific focus on transitions and preparation for adulthood.

12:30

The national development officer will work with local authorities, schools and wider partnerships that support young people’s learning, including Skills Development Scotland, Careers Scotland and so on, and post-school psychological services. By relating and adding value to the wider activity of the 32 local authority additional support for learning implementation officers, the project will help to spread the good practice that was identified in the recent HMIE report on successful transitions from secondary school.

Amendment 12 proposes that the ability to refer to the tribunal an education authority’s failure to comply with its transition duties should apply to all children and young people with additional support needs, but that could prove difficult to administer in light of the fact that some additional support needs are transitory.

In light of those comments, and given the undertaking that the code of practice will be strengthened significantly, I ask Elizabeth Smith to seek to withdraw amendment 12.

Elizabeth Smith: I hear what the minister says, but I believe that loopholes exist. We have heard concerns about that in evidence, particularly from HMIE. I therefore wish to press the amendment to a vote.

The Convener: The question is, that amendment 12 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Baker, Claire (Mid Scotland and Fife) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Smith, Margaret (Edinburgh West) (LD)
Whitefield, Karen (Airdrie and Shotts) (Lab)

AGAINST

Campbell, Aileen (South of Scotland) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
McKelvie, Christina (Central Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 12 agreed to.

Section 7 agreed to.

The Convener: We are nearing the end of our consideration of amendments, but there might be a bit of debate on the next two groups, so I suggest that we have a short comfort break. I ask members not to stray too far so that we can get started again as quickly as possible.

12:32

Meeting suspended.

12:37

On resuming—

After section 7

The Convener: We return to our stage 2 consideration of the Education (Additional Support for Learning) (Scotland) Bill. Amendment 27, in the name of Ken Macintosh, is in a group on its own.

Ken Macintosh: I thought that we were in the home stretch and that the remaining, uncontroversial, amendments would go through on the nod, but what the convener said before the suspension has alarmed me.

Amendment 27 would introduce a section entitled “Power to monitor implementation of Tribunal decisions”, although it should probably be called “Power to monitor implementation of Tribunal decisions and to refer matters to the minister”, because that latter issue is the key part of the amendment. The amendment was suggested by ISEA, which, as members know, alerted us to the fact that, although the tribunal is important to, if not the pinnacle of, the ASL complaints system, there have been problems with decisions not being implemented timeously.

As we know, the system of redress is complex. One mechanism that could be used is the one that members will know as a section 70 referral to ministers. Parents, or any concerned individual, may make a referral directly to the education minister. That power or right exists in theory, but it is rarely, if ever, used in practice. Amendment 27 would give the president of the Additional Support Needs Tribunal for Scotland a specific power to make such referrals. That would be a modest extension of the tribunal’s powers, but it would mean that its decisions would be taken more seriously.

I move amendment 27.

Christina McKelvie: Like Ken Macintosh, I had hoped that we were in the home stretch and that all the remaining amendments would go through on the nod, but I am afraid that I disagree with amendment 27. The amendment would change the role of the president, and thereby the tribunal, from that of an independent adjudicator to that of an active and partisan participant. If the president had a policing role, she or he would head into HMIE’s territory, which would be a concern. The
president makes impartial and balanced decisions and is trusted by both sides but, under the amendment, she or he would take on a policing and prosecuting role. That would be damaging to the role of the ASN tribunals and, if it set a precedent, it could also be damaging to the roles of other tribunals.

At present, the tribunal’s decision is binding and there is a deadline for implementing it. If an education authority fails to implement a tribunal’s decision, a parent can refer a complaint to Scottish ministers—as Ken Macintosh said—under section 70 of the Education (Scotland) Act 1980, which deals with failure to comply with a decision. Alternatively, a parent can write to Scottish ministers directly, requesting them to issue a direction.

We could be verging into the territory of giving the president a policing role. In my opinion, the trust that already exists could be put in jeopardy if amendment 27 were agreed to. I will not support it.

Margaret Smith: I will support amendment 27. This important issue came up during our evidence taking. It is important that the tribunal is trusted by both sides, but it is equally important that the president should be able to trust both sides.

Amendment 27 would not give the president a wider remit; it would simply allow them to go back and consider decisions that the tribunal has already taken, to see whether what it has asked to be put into practice is actually being put into practice. That would allow the president—given that there is to be trust on all sides—to consider the reasons why something might not have happened when it should have happened. A decision has already been taken that a local authority should do something within a certain time. We are not talking about wider policing powers; we are talking about a tribunal being able to find out why what it has said should happen is not happening.

At the moment, many parents feel a real sense of powerlessness. On many occasions in committee meetings, we have discussed the inequality of arms in relation to the way in which tribunals work in practice for families. They do not have the same resources that all local authorities have.

Amendment 27 is short but it would have a massive impact. We have to redress the balance and ensure that tribunal decisions are followed through as timeously as possible. The tribunal will have taken all the evidence into account before reaching a decision on what should happen. Amendment 27 is not only perfectly acceptable but very important. I will be happy to support it.

The Convener: I invite the minister to contribute to the debate.

Adam Ingram: As committee members have said, amendment 27 would provide that, following a tribunal decision that required an education authority to do anything, the president of the tribunal would have the unilateral power to require the authority to provide her with information about the authority’s implementation of the tribunal decision. The amendment would also provide the president with the power to refer the matter to Scottish ministers when she was satisfied that the authority was not complying with the tribunal decision.

The president would be able to carry out all those powers without a statutory requirement to seek and take account of the parent’s or young person’s views. Although I am sure that the president would choose to exercise her powers responsibly, the pertinent point here is that, legally, she would not be required to. Not only would that be absolute nonsense, but amendment 27 would be seen as changing fundamentally the role of the president, and I have no doubt that it would result in the independence of the role being questioned. Furthermore, local authorities might feel that their past performance in the implementation of tribunal decisions could prejudice future tribunal cases. That is a perception that we should take every step to avoid.

At present, the tribunal’s decision is binding, and there will be a deadline for carrying it out. If an authority fails to implement the decision of a tribunal, a parent can refer a complaint to Scottish ministers under section 70 of the Education (Scotland) Act 1980, which deals with failure to comply with education legislation. Alternatively, a parent can write to Scottish ministers requesting that ministers issue a direction under section 27 of the 2004 act directing the authority to carry out the decision of the tribunal.

I realise that Mr Macintosh, like me, feels that section 70 cases take some time to deal with. Complaints about the exercise by an authority of their functions under education legislation must be properly investigated, and that process takes time. However, cases that are put forward about non-compliance with a decision of the tribunal would be relatively less onerous to deal with, as the facts in those cases are likely to be established by the act of non-compliance—either the authority has complied with the tribunal’s decision or it has not. It can take some time to unravel the complexity of other section 70 cases that are referred to ministers.

I think that it would also be useful for me to highlight the fact that the tribunal already notifies parents and young people in writing of their right to
complain to Scottish ministers if the authority does not comply with the decision. However, that information is provided in an annex that accompanies the tribunal’s decision letter, and I intend to ask the tribunal to make that information more up-front by including it in the decision letter.

I should also stress that any direction that is issued by Scottish ministers can be challenged by judicial review. If the tribunal was provided with the power to monitor its decisions and it investigated and established that an authority had failed to implement a decision, on receipt of any section 70 complaint or request under section 27 of the 2004 Act from the tribunal, Scottish ministers would still be required to conduct their own investigation before issuing a direction under section 27 or an order under section 70.

Amendment 27 is, therefore, unnecessary and, if included in the bill, would only add an unnecessary layer of bureaucracy and delay to the process, as a parent can already refer a case directly to Scottish ministers in such instances. Further, it could, ultimately, undermine the role of the tribunal as decision maker.

Accordingly, I ask Ken Macintosh to withdraw amendment 27.

Ken Macintosh: I find the arguments that the minister presented to be entirely unconvincing. I am surprised to say that, but I do not know why. I normally follow the minister’s line of thought and can understand the principles behind his views but, in this case, he used a lot of grand and hyperbolic language to little effect. He talked about the unilateral power to ask the local authorities for information and the unilateral power to refer the matter to ministers—in other words, the president of the tribunal could write to a local authority, and ministers could be asked to intervene. He also talked about the proposal in amendment 27 fundamentally undermining the tribunal’s role. That is very strange. I do not understand that line of thought.

Christina McKelvie talked about the amendment giving the tribunal a policing or prosecuting role. That is not really true. The tribunal is an adjudicating body and its decisions are binding. We are talking purely about a mechanism by which the tribunal could refer decisions to the minister, rather than asking parents to do so. Amendment 27 would introduce no new powers—I referred to section 70 orders because the powers already exist. All that the amendment would do is allow the president to refer matters to the minister. It is the minister, if anyone, who would have the policing or prosecuting role, and he already has those powers. In fact, the minister undermined his own case in that regard. When he talked about the arguments around complexity, he suggested that a section 70 complaint would be complex but that cases that were put forward about non-compliance with a decision of the tribunal would simply be matters of compliance. That is exactly what they would be. The question is simple: should someone go down the section 70 route, which is open to most people, or should they go down the route that I am suggesting?

Earlier, I said that we had heard evidence that nobody uses section 70 orders because that mechanism does not really work. However, we could put in place a simple mechanism whereby the tribunal could write to the local authority to ask whether it had abided by the decision and, if it had not, the matter could be referred to the minister.

I honestly do not understand why the minister should object so forcefully to what is a very modest power to refer to him matters over which he already has powers of adjudication.

I intend, therefore, to press amendment 27.

The Convener: The question is, that amendment 27 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR
Baker, Claire (Mid Scotland and Fife) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Smith, Margaret (Edinburgh West) (LD)
Whitefield, Karen (Airdrie and Shotts) (Lab)

AGAINST
Campbell, Aileen (South of Scotland) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
McKelvie, Christina (Central Scotland) (SNP)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 27 agreed to.

The Convener: Amendment 28, in the name of Ken Macintosh, is in a group on its own.

Ken Macintosh: The background to amendment 28 is an on-going dispute between East Renfrewshire Council and Glasgow City Council. However, I emphasise that I am not simply using legislation to tackle a local concern—far from it. The amendment seeks to restate a principle that is already in legislation but which has, perhaps, been eroded over time.

It is important, in order to avoid disagreement or dispute, to state in the bill that the home authority is responsible for meeting the cost of additional support needs for children who are educated in mainstream schools in a different host authority’s area. That has long been established practice, and is stated explicitly in section 23 of the Education (Scotland) Act 1980—I have taken the wording of that section for my amendment 28. However, a
number of legislative reforms appear to have cast some doubt on the matter and I believe that the principle needs to be reaffirmed in the bill. As well as the reference in section 23 of the 1980 act, the old record of needs legislation also enshrined in statute the principle of the home authority repaying costs to the host authority. However, we know that, when that statutory reference was repealed, on the day that the 2004 act came into force in 2005, one local authority stopped making contributions to another.

At the time, the matter was referred to ministers, and a decision was taken in one authority’s favour. When that decision was ignored, the matter was taken to court. All the adjudication went in favour of that one authority, but the problem has continued for many years. I should report to the committee that a payment has been made in connection with some of the outstanding cases, but concern remains about how much money—which could have been spent on support for children with additional learning needs—has been spent during the process.

The problem is that the bill might move the goal posts. It provides for mediation costs to be met by the host authority, which is fine, because mediation involves only the host authority and the parent. However, that provision could be read as reinforcing the principle that the host authority should normally pay. In other words, although the reference to the host authority’s responsibility with regard to mediation is included because, in general, the home authority should be paying the costs, I believe—from experience—that people will find it possible to read the words the other way, and say that the bill is moving away from the idea that a home authority should meet the costs and towards the idea that a host authority should meet the costs. People might say that, if that is what is happening with regard to mediation, we should understand that there has been a shift in responsibility. The matter must be clarified, and that should be done in statute.

The issue affects only children with additional support needs who are being educated in mainstream schools. However, to give an idea of the scale of the problem, there are 2,000 children on placing requests in East Renfrewshire’s schools, out of a total of 16,000, which means that the cost could be large.

The principle is important, but it is also important that there is no blank cheque. Therefore, amendment 28 includes the word “reasonable” to ensure that a host authority does not gold plate services for which it is not financially accountable.

I move amendment 28.

Kenneth Gibson: Ken Macintosh said that amendment 28 restates a principle that has been eroded over time, but I think that the opposite is the case. Amendment 28 is simply unnecessary. I will refer to the case that Mr Macintosh discussed.

Section 23(2) of the Education (Scotland) Act 1980 deals with recovery of costs between authorities when one authority has provided education and additional support to a child who belongs to another authority area. Under that provision, Scottish ministers are entitled to determine quantification. Once Scottish ministers have issued notice of quantification, any refusal to pay on the part of the authority concerned is a breach of a statutory obligation.

Such a scenario arose in the case of East Renfrewshire District Council v Glasgow City Council, to which Mr Macintosh referred. Lord Penrose upheld the Scottish ministers’ determination of quantification of East Renfrewshire’s claim and found that that local authority was entitled to payment of the amount that had been determined by Scottish ministers. In making his ruling, Lord Penrose held that the plain language of the 1980 act

“entitles the pursuers to recover from the defenders appropriate sums reflecting the cost of additional support services provided by them to children belonging to the defenders’ area notwithstanding that the children were placed in response to parental choice.”

I believe that that ruling reinforced the relevant provision in the 1980 act.

The 2004 act places responsibility for the provision of additional support on the authority that is responsible for the school education of relevant children. The scope of the powers of an education authority to provide services for the benefit of children who do not belong to its area continues to be a matter that is regulated by the 1980 act, as are the financial implications of the supply of such services. There is no suggestion that the 1980 act should be amended to replace the existing regime for the recovery of costs, which has operated effectively for almost 30 years. Difficulties have arisen only recently because of one education authority’s interpretation of the act. The matter appears to have been resolved satisfactorily and clarified by the recent Court of Session ruling.

Mr Macintosh talked about the recovery of “reasonable” costs, but amendment 28 does not specify what reasonable costs are or who should decide whether any such costs are reasonable. I believe that amendment 28 should be withdrawn.

Adam Ingram: I agree totally with Mr Gibson’s interpretation of amendment 28. As well as being unnecessary, it could create some legal uncertainty. There is no question that the principles that are outlined in section 23 of the 1980 act have been eroded over the past 30 years. That is underlined by Mr Macintosh’s
acknowledgement of the fact that a pay-out has been made in the case that he mentioned.

The powers of an education authority to provide services for the benefit of children who do not belong to its area are dealt with in the 1980 act, as are the financial implications of the supply of such services. There is no suggestion that the 1980 act should be amended to replace the existing regime for the recovery of costs. Amending the 2004 act to include in it a provision that is substantially the same as a provision that is already contained in the 1980 act could cast doubt on the meaning and application of section 23 of the 1980 act. If anything, it could encourage a rash of court cases. Mr Macintosh might shake his head, but that is precisely the risk he runs by pressing amendment 28. I repeat that the law in that area is already clear and has worked for 30-odd years. Accordingly, I ask Mr Macintosh to seek to withdraw amendment 28.

The Convener: I invite Mr Macintosh to wind up the debate and to indicate whether he wishes to press or withdraw amendment 28.

Ken Macintosh: It seems to me that everyone accepts the principle. The basic argument that I am trying to reinforce through the amendment is that the home authority should contribute reasonably to the provision of ASL in the host authority. There is no doubt about that—it is merely a question of whether the bill needs to amend the 2004 act.

13:00

Both Mr Gibson and the minister referred to the fact that the legislation has operated effectively for 30 years. I am pointing out that it operated effectively until the 2004 act was implemented in 2005. On the day of that act’s implementation, the first real problem emerged, because the 2004 act removed the record of needs legislation and the statutory obligation that existed under that. In other words, we created a problem by passing the 2004 act. Was that problem unforeseen? We debated the issue at the time, but we took it on trust that things would be okay. The legislation has not operated effectively for 30 years—it operated until we passed the 2004 act, which undermined it. I am trying to amend the 2004 act to reintroduce the statutory obligation that it removed when we repealed the record of needs legislation.

I am not the one who will create rashes of court cases—quite the reverse. The decision by Lord Penrose to which Mr Gibson correctly referred reinforced the 1980 act, but the cases that were taken to the court affected only children who were already on placing requests under the existing legislation—in other words, cases that predated the 2004 act. All the cases that were taken to which Lord Penrose referred were old cases—the children concerned were already on placing requests in East Renfrewshire and had received support from Glasgow City Council until October 2005, when it stopped paying. There are many other cases that have not gone to court; Glasgow City Council has not paid in those cases, which are not resolved and are to be resolved under the 2004 act.

We want the problem to be resolved, but there are outstanding difficulties. We do not have an established protocol and it is important for us to reinforce the principle. It is also important to ensure that parents and, where possible, legal costs are kept out of such matters.

There is no doubt around the table that home authorities should make contributions to host authorities, so I see no problem in our placing in the bill almost the exact wording that appears in the 1980 act. The minister’s suggestion that that would cause some doubt about interpretation is a spurious argument—it does not, as I am using the exact wording of the 1980 act. If we restate that principle in the bill, there will be no doubt that home authorities have a duty to make contributions. It will still be up to home authorities to do that—they will still have to pay over the cheque, so a lot of control will remain in their hands.

If we find that the system is being abused, home authorities will be able to report cases to the minister for adjudication; yet again, the minister will be able to intervene, although I hope that that does not happen. There is no evidence to suggest that it will because, in the end, host authorities are merely asking for contributions. If those contributions are forthcoming, there will be no difficulty. However, the principle is important. Amendment 28 would keep parents out of the matter, keep costs to a minimum and establish clarity that is lacking at the moment. I will press amendment 28.

The Convener: The question is, that amendment 28 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Baker, Claire (Mid Scotland and Fife) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Smith, Margaret (Edinburgh West) (LD)
Whitefield, Karen (Airdrie and Shotts) (Lab)

Against

Campbell, Aileen (South of Scotland) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
Smith, Elizabeth (Mid Scotland and Fife) (Con)

The Convener: There are equal numbers of members for and against amendment 28, so I am
required to use my casting vote. I vote in support of the amendment.

Amendment 28 agreed to.
Sections 8, 9 and 10 agreed to.

Amendment 9 moved—[Adam Ingram]—and agreed to.

Long title, as amended, agreed to.

Meeting closed at 13:05.
Education (Additional Support for Learning) (Scotland) Bill
[AS AMENDED AT STAGE 2]

CONTENTS

Section

Placing requests etc.
1 Placing requests
2 Mediation services
3 Dispute resolution
4 Contributions not recoverable in respect of certain services
5 Arrangements between education authorities

Additional support needs
5A Additional support
5B Assessments and examination
5C Additional support needs etc.: specified children and young people

Pre-school children
5D Functions of education authority in relation to certain pre-school children with additional support needs

Publication of information by education authority
5E Provision of published information to certain persons
5F Availability of published information
5G Publication of information on dispute resolution

Additional Support Needs Tribunals for Scotland
6 References to Tribunal in relation to co-ordinated support plan
6A References to Tribunal in relation to duties under section 12(6) and 13
7 Power to make rules in respect of Tribunal practice and procedure
7A Power to monitor implementation of Tribunal decisions

Recovery of costs
7B Provision by education authority for education of pupils belonging to areas of other authorities: recovery of costs where pupil has additional support needs

General
8 Ancillary provision
9 Orders
10 Short title and commencement
Amendments to the Bill since the previous version are indicated by sideling in the right margin. Wherever possible, provisions that were in the Bill as introduced retain the original numbering.

Education (Additional Support for Learning) (Scotland) Bill

[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to amend the law in respect of placing requests in relation to the school education of children and young persons having additional support needs and in respect of arrangements between education authorities in relation to such school education; to make minor provision in relation to additional support needs; to make further provision in relation to the practice and procedure of the Additional Support Needs Tribunals for Scotland; and for connected purposes.

Placing requests etc.

1 Placing requests

(1) The Education (Additional Support for Learning) (Scotland) Act 2004 (asp 4) (“the 2004 Act”) is amended in accordance with this section.

(2) In section 1(3)(a) (additional support needs), after “authority” insert “responsible for the school education of the child or young person, or in the case where there is no such authority, the education authority”.

(3) In section 7(1)(b) (other children and young persons), for “the” substitute “an”.

(4) In section 10 (reviews of co-ordinated support plans)—

(a) in subsection (1), for “belonging to their area” substitute “for whose school education they are responsible”,

(b) after subsection (5) insert—

“(5A) Where any such co-ordinated support plan as is mentioned in subsection (1) is transferred to the education authority by virtue of regulations made in pursuance of section 11(8), the authority must carry out a review of the plan as soon as practicable after the date of transfer.”.

(5) In section 11(8) (co-ordinated support plans: further provision), in paragraph (e) the words from “when” to the end of the paragraph are repealed.

(5A) In section 12 (duties to seek and take account of views, advice and information), after subsection (3) insert—
“(3A) Where any such co-ordinated support plan as is mentioned in section 10(1) is transferred to the education authority by virtue of regulations made in pursuance of section 11(8), the authority’s duty under subsection (2)(a) includes a duty to seek and take account of information and advice (within such period as will enable the authority to comply with their duty under section 10(5A)) from the education authority from which the plan was transferred and any agencies or persons involved in providing support under the plan prior to its transfer.”.

(6) In section 18 (references to Tribunal in relation to co-ordinated support plan)—

(za) after paragraph (d) of subsection (3) insert—

“(da) a decision of an education authority refusing a placing request made in respect of a child or young person (including such a decision in respect of a child or young person for whose school education the authority refusing the request are not responsible)—

(i) made under sub-paragraph (1) of paragraph 2 of schedule 2 in relation to a special school, or

(ii) made under sub-paragraph (2) of paragraph 2 of schedule 2 in relation to a school mentioned in paragraph (a) or (b) of that sub-paragraph.”,

(a) in paragraph (e) of subsection (3)—

(i) for “the”, where it occurs for the first time, substitute “an”,

(ia) after “request” insert “, other than a placing request mentioned in paragraph (da),”,

(ii) for “the”, where it occurs for the second time, substitute “a”,

(iii) at the end add “(including such a decision in respect of a child or young person for whose school education the authority refusing the request are not responsible)”,

(b) after that paragraph insert—

“(f) a decision of an appeal committee on a reference made to them under paragraph 5 of schedule 2 but only where the things mentioned in any of paragraphs (a), (b), (ba) and (c) of subsection (4) occur—

(i) after the decision of the appeal committee, but

(ii) before the time by which any appeal must be lodged in accordance with paragraph 7(3) of schedule 2.”,

(c) in subsection (4)—

(i) the words “, at the time the placing request is refused” are repealed,

(ii) after paragraph (b) insert—

“(ba) no such plan has been prepared, but under subsection (2)(a) of section 11 the education authority have informed the persons mentioned in subsection (3) of that section of their proposal to establish whether the child or young person requires, or would require, such a plan,”,

(d) in subsection (7), for “(3)(e)” substitute “(3)(da) or (e)”. 

(7) In section 19 (powers of Tribunal in relation to reference)—
(za) after subsection (4) insert—

“(4A) Where the reference relates to a decision referred to in subsection (3)(da) of that section the Tribunal may—

(a) confirm the decision if satisfied that—

(i) one or more grounds of refusal specified in paragraph 3(1) or (3) of schedule 2 exists or exist, and

(ii) in all the circumstances it is appropriate to do so,

(b) overturn the decision and require the education authority to—

(i) place the child or young person in the school specified in the placing request to which the decision related by such time as the Tribunal may require, and

(ii) make such amendments to any co-ordinated support plan prepared for the child or young person as the Tribunal considers appropriate by such time as the Tribunal may require.”;

(a) in subsection (5)—

(zi) in paragraph (b), at the end of sub-paragraph (i) insert “by such time as the Tribunal may require”;

(i) after paragraph (b) insert—

“(ba) where—

(i) the decision was referred to the Tribunal by virtue of the application of subsection (4)(ba) of that section, and

(ii) the education authority have decided the child or young person does not require a co-ordinated support plan and that decision has not been referred to the Tribunal under subsection (1) of that section by the time within which such references are to be made, refer the decision to an appeal committee set up under section 28D of the 1980 Act.”;

(ii) after paragraph (c) add—

“(d) where—

(i) the decision was transferred from an appeal committee to the Tribunal by virtue of paragraph 6(4) and (5) of schedule 2 because the thing described in subsection (4)(ba) of that section occurred, and

(ii) the education authority have decided the child or young person does not require a co-ordinated support plan and that decision has not been referred to the Tribunal under subsection (1) of that section by the time within which such references are to be made, refer the decision back to the appeal committee,

(e) where—

(i) the decision was transferred from an appeal committee to the Tribunal by virtue of paragraph 6(4) and (5) of schedule 2 because the things described in subsection (4)(c) of that section occurred, and
(ii) the Tribunal has confirmed the decision of the education authority that the child or young person does not require a co-ordinated support plan,

refer the decision back to the appeal committee,

(f) where—

(i) the decision was transferred from the sheriff to the Tribunal by virtue of paragraph 7(8) and (9) of schedule 2 because the thing described in subsection (4)(ba) of that section occurred, and

(ii) the education authority have decided the child or young person does not require a co-ordinated support plan and that decision has not been referred to the Tribunal under subsection (1) of that section by the time within which such references are to be made,

refer the decision back to the sheriff,

(g) where—

(i) the decision was transferred from the sheriff to the Tribunal by virtue of paragraph 7(8) and (9) of schedule 2 because the things described in subsection (4)(c) of that section occurred, and

(ii) the Tribunal has confirmed the decision of the education authority that the child or young person does not require a co-ordinated support plan,

refer the decision back to the sheriff.

(5A) Where the reference relates to a decision referred to in subsection (3)(f) of that section the Tribunal has the powers as mentioned in paragraphs (a) and (b) of subsection (5) of this section."

(b) in subsection (6), for the words “subsection (5)(c)” substitute “paragraph (ba) or (c) of subsection (5)”.

(8) In schedule 2 (placing requests)—

(a) after paragraph 2(4) add—

“(5) In sub-paragraph (1), the reference to an education authority includes an education authority which are not responsible for the school education of the child.”,

(b) after paragraph 4(2) insert—

“(2A) Sub-paragraph (2) does not apply where the placing request was made to an education authority which, at the time of the request, were not responsible for the school education of the child.”,

(c) in paragraph 6—

(i) in sub-paragraph (1), after “paragraph 5” insert “(including such a reference relating to a decision which has been referred back under section 19(5)(d) or (e))”,

(ii) in sub-paragraph (4), for the words from “there” to the end of the sub-paragraph substitute—

“the things mentioned in any of paragraphs (a), (b), (ba) and (c) of section 18(4) occur.”,
(d) in paragraph 7—
   (i) in sub-paragraph (1), after “paragraph 5” insert “(including such a reference relating to a decision which has been referred back under section 19(5)(d) or (e))”,
   (ii) after that sub-paragraph insert—
  “(1A) Sub-paragraph (1) does not apply where the decision of the appeal committee may be referred to a Tribunal under section 18(1).”,
   (iii) in sub-paragraph (8), for the words from “there” to the end of the sub-paragraph substitute—
   “the things mentioned in any of paragraphs (a), (b), (ba) and (c) of section 18(4) occur.”,
   (iv) after sub-paragraph (11), add—
   “(12) Any references to an appeal under this paragraph (however expressed), except such references in sub-paragraphs (3)(a) and (b) and (5), include references to an appeal relating to a decision which has been referred back under section 19(5)(f) or (g).”.

2 Mediation services
In section 15(1) of the 2004 Act (mediation services)—
   (a) for paragraph (a) substitute—
       “(a) the parents of any children,”,
   (b) for paragraph (b) substitute—
       “(b) any young persons,”,
   (c) in paragraph (c), the word “such” is repealed,
   (d) after the word “of”, where it occurs for the fifth time, insert “any of”,
   (e) for the word “such”, where it occurs for the third time, substitute “the”.

3 Dispute resolution
In section 16(1) of the 2004 Act (dispute resolution), the following are repealed—
   (a) in paragraph (a), the words “belonging to the area of the authority”,
   (b) in paragraph (b), the words “belonging to that area”,
   (c) in paragraph (c), the word “such” where it occurs for the first time.

4 Contributions not recoverable in respect of certain services
In section 23 of the Education (Scotland) Act 1980 (c.44) (provision by education authority for education of pupils belonging to areas of other authorities), after subsection (2) insert—
   “(2A) Subsection (2) does not permit an education authority to recover contributions in respect of—
       (a) mediation services provided under arrangements made in pursuance of section 15(1) of the 2004 Act (mediation services), or
(b) services provided by the authority forming part of any procedure provided for in regulations under section 16(1) of that Act (dispute resolution).”.

5 Arrangements between education authorities

In section 29 of the 2004 Act (interpretation)—

(a) in subsection (3), after the word “Act” insert “and subject to subsection (3A),”;

(b) after that subsection insert—

“(3A) For the purposes of this Act, where arrangements are made or entered into by an education authority in respect of the school education of a child or young person with another education authority, the authority responsible for that school education is the authority for the area to which the child or young person belongs despite the education being, or about to be, provided in a school under the management of another authority.”.

Additional support needs

5A Additional support

In section 1(3)(a) of the 2004 Act (additional support needs), after “provision”, where it occurs for the first time, insert “(whether or not educational provision)”.

5B Assessments and examination

After section 8 of the 2004 Act insert—

“8A Assessments and examinations: further provision

(1) A person specified in subsection (3) may request that the education authority arrange for a child or young person to whom section 4(1)(a) applies to undergo, for the purpose of considering the additional support needs of the child or young person, a process of assessment or examination.

(2) The education authority must comply with the request unless it is unreasonable.

(3) The persons referred to in subsection (1) are—

(a) where the request relates to a child, the child’s parent,

(b) where the request relates to a young person, the young person or, where the authority are satisfied the young person lacks capacity to make the request, the young person’s parent.

(4) The education authority must, in accordance with the arrangements made by them under section 4(1)(b), take into account the results of any assessment or examination undertaken by virtue of this section.

(5) A process of assessment or examination undertaken by virtue of this section is to be carried out by such person as the education authority consider appropriate.

(6) In this section the reference to assessment or examination includes educational, psychological or medical assessment or examination.”.
5C Additional support needs etc.: specified children and young people

(1) In section 1 (additional support needs) of the 2004 Act, after subsection (1) insert—

“(1A) Without prejudice to the generality of subsection (1), a child or young person has additional support needs if the child or young person—

(a) is looked after and accommodated by a local authority under section 26 of the Children (Scotland) Act 1995 (c.36),

(b) is a carer (within the meaning of section 12AA of the Social Work (Scotland) Act 1968 (c.49) or section 24 of the Children (Scotland) Act 1995 (c.36)),

(b) has a mental disorder (within the meaning of section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13)),

(c) is deaf or partially deaf,

(d) is blind or partially sighted,

(e) is (any or all) deaf, partially deaf, blind or partially sighted.”.

(2) In section 6 (children and young persons for whom education authority are responsible) after subsection (1) insert—

“(1A) Without prejudice to the generality of subsection (1), every education authority must in particular consider whether each child or young person falling within section 1(1A) for whose school education they are responsible requires a co-ordinated support plan.”.

5D Functions of education authority in relation to certain pre-school children with additional support needs

In section 5 of the 2004 Act (general functions of education authority in relation to additional support needs), for subsections (2) and (3) substitute—

“(2) Where a child falling within subsection (3) has been brought to the education authority’s attention as appearing to have needs of the type mentioned in subsection (3)(c), the authority must (unless the child’s parent does not consent)—

(a) in accordance with the arrangements made by them under section 6(1), establish whether the child does have such needs, and

(b) provide such additional support as is appropriate for the child.

(3) A child falls within this subsection if the child—

(a) is under school age (unless the child is a prescribed pre-school child),

(b) belongs to the authority’s area, and

(c) appears to have additional support needs arising from a disability (within the meaning of the Disability Discrimination Act 1995 (c.50)) which the child has.”.
Publication of information by education authority

5E Provision of published information to certain persons

In section 26 of the 2004 Act—

(a) in subsection (1)—

(i) the word “and” immediately following paragraph (b) is omitted, and

(ii) after paragraph (c), insert “, and

(d) provide the persons mentioned in subsection (2A) with any information published under paragraph (a) or (c).”;

(b) after subsection (2), insert—

“(2A) The persons referred to in subsection (1)(d) are—

(a) in the case of a child with additional support needs, the child’s parent,

(b) in the case of a young person with additional support needs—

(i) the young person, or

(ii) if the authority are satisfied that the young person lacks capacity to understand the information or advice, the young person’s parent.”.

5F Availability of published information

In section 26(1) of the 2004 Act (publication of information by education authority), after paragraph (a) insert—

“(aa) ensure that a summary of the published information is available—

(i) on request, from each place in the authority’s area where school education is provided,

(ii) in any handbook or other publications provided by any school in the authority’s area or by the authority for the purposes of providing general information about the school or, as the case may be, the services provided by the authority, and

(iii) on any website maintained by any such school or the authority for that purpose (whether or not the website is also maintained for any other reason).”.

5G Publication of information on dispute resolution

In section 26(2) of the 2004 Act (publication of information by education authority), after paragraph (e) insert—

“(ea) any dispute resolution procedures established by the authority in pursuance of section 16,”.

Additional Support Needs Tribunals for Scotland

6 References to Tribunal in relation to co-ordinated support plan

In section 18 of the 2004 Act (references to Tribunal in relation to co-ordinated support plan), after subsection (5) insert—
“(5A) Where an education authority fail, in response to a request referred to in section 6(2)(b)—

(a) to inform under subsection (2)(a) of section 11 the persons mentioned in subsection (3) of that section of their proposal to establish whether a child or young person requires, or would require, a co-ordinated support plan by the time required by regulations made in pursuance of subsection (8) of that section, or

(b) to inform those persons of any decision not to comply with the request by the time required by such regulations,

that failure is to be treated for the purposes of this section as a decision of the authority that the child or young person does not require a co-ordinated support plan.

(5B) Where under subsection (2)(a) of section 11 the education authority have informed the persons mentioned in subsection (3) of that section of their proposal to establish whether the child or young person requires, or would require, a co-ordinated support plan, failure by the authority so to establish by the time required by regulations made in pursuance of subsection (8) of that section is to be treated for the purposes of this section as a decision of the authority that the child or young person does not require a co-ordinated support plan.”.

6A References to Tribunal in relation to duties under section 12(6) and 13

(1) In section 18 of the 2004 Act—

(a) in the title, omit “in relation to co-ordinated support plan”, and

(b) in subsection (3), after paragraph (f) (as inserted by section 1(6)(b) of this Act), insert—

“(g) failure by the education authority to comply with their duties under section 12(6) and 13 in respect of the child or young person (except where consent for information to be provided under section 13(2)(a) or (4) has not been given under section 13(5)) .”.

(2) In section 19(3) of the 2004 Act, for “or (d)(ii) or (iii)”, substitute “, (d)(ii) or (iii) or (g)”.

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

In paragraph 11(2) of schedule 1 to the 2004 Act (Additional Support Needs Tribunals for Scotland)—

(a) after paragraph (k) insert—

“(ka) enabling specified matters relating to the failure by an education authority to comply with time limits required by virtue of this Act to be determined by the convener of a Tribunal alone,“,

(b) after paragraph (i) add—

“(u) enabling a Tribunal, in specified circumstances, to—

(i) review,

(ii) vary or revoke,
any of its decisions, orders or awards,

(v) enabling a Tribunal, in specified circumstances, to review the decisions, orders or awards of another Tribunal and take such action (including variation and revocation) in respect of those decisions, orders or awards as it thinks fit.”.

7A Power to monitor implementation of Tribunal decisions

In schedule 1 of the 2004 Act (Additional Support Needs Tribunals for Scotland) after paragraph 11, insert—

“Power to monitor implementation of Tribunal decisions

11A The President may, in any case where a decision of a Tribunal required an education authority to do anything, keep under review the authority’s compliance with the decision and, in particular, may—

(a) require the authority to provide information about the authority’s implementation of the Tribunal decision,

(b) where the President is not satisfied that the authority is complying with the decision, refer the matter to the Scottish Ministers.”.

Recovery of costs

7B Provision by education authority for education of pupils belonging to areas of other authorities: recovery of costs where pupil has additional support needs

After section 27 of the 2004 Act insert—

“Recovery of costs

27A Provision by education authority for education of pupils belonging to areas of other authorities: recovery of costs where pupil has additional support needs

Where the responsible education authority make a claim to recover reasonable costs for the education of pupils belonging to areas of other authorities, where the child or young person has additional support needs and in respect of those additional needs, that other education authority must make payment.”.

General

8 Ancillary provision

(1) The Scottish Ministers may by order make such transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, or in consequence of, or for the purposes of giving full effect to, any provision of this Act.

(2) An order under this section may modify any enactment, instrument or document.

9 Orders

(1) Any power conferred by this Act on the Scottish Ministers to make an order—

(a) must be exercised by statutory instrument,

(b) may be exercised so as to make different provision for different purposes.
(2) A statutory instrument containing an order under section 8 is, subject to subsection (3), subject to annulment in pursuance of a resolution of the Scottish Parliament.

(3) An order containing provisions which add to, replace or omit any part of the text of an Act is not to be made unless a draft of the statutory instrument containing the order has been laid before, and approved by resolution of, the Parliament.

10 Short title and commencement

(1) This Act may be cited as the Education (Additional Support for Learning) (Scotland) Act 2009.

(2) This section and sections 8 and 9 come into force on Royal Assent.

(3) The remaining provisions of this Act come into force on such day as the Scottish Ministers may by order appoint.
Education (Additional Support for Learning) (Scotland) Bill

[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to amend the law in respect of placing requests in relation to the school education of children and young persons having additional support needs and in respect of arrangements between education authorities in relation to such school education; to make minor provision in relation to additional support needs; to make further provision in relation to the practice and procedure of the Additional Support Needs Tribunals for Scotland; and for connected purposes.

Introduced by: Fiona Hyslop
On: 6 October 2008
Bill type: Executive Bill
EDUCATION (ADDITIONAL SUPPORT FOR LEARNING) (SCOTLAND) BILL
[AS AMENDED AT STAGE 2]

REVISED EXPLANATORY NOTES

CONTENTS

1. As required under Rule 9.7.8A of the Parliament’s Standing Orders, these revised Explanatory Notes are published to accompany the Education (Additional Support for Learning) (Scotland) Bill as amended at Stage 2. Text has been added or deleted as necessary to reflect the amendments made to the Bill at Stage 2 and these changes are indicated by sidelining in the right margin.

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill as amended at Stage 2. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

BACKGROUND TO THE BILL

4. The Bill amends the Education (Additional Support for Learning) (Scotland) Act 2004 (“the 2004 Act”) which came into force on 14 November 2005. The 2004 Act introduced a new system for identifying and addressing the additional support needs of children and young persons who face a barrier to learning. References to young persons are to those aged 16 or 17 who are still receiving school education.

5. The 2004 Act sets out how children with additional support needs should be provided for by education authorities (“EAs”), supported, where necessary, by appropriate agencies, such as Health Boards, Careers Scotland and other local authorities.
6. The 2004 Act made provision for the establishment of new independent Additional Support Needs Tribunals for Scotland (“the Tribunal”). The Tribunal hears and decides appeals made by parents against the decisions by or failures of EAs in relation to a co-ordinated support plan (“CSP”). Reference to the Tribunal may also be made regarding the refusal of a placing request in certain circumstances.

7. In determining all its decisions and directions, the Tribunal must take account of the code of practice published by the Scottish Ministers. The 2004 Act also provides for the Tribunal to be governed by rules of procedure and regulations separate from the code of practice.

8. Her Majesty’s Inspectorate of Education (“HMIE”) conducted a 2 year inspection programme into how local authorities were implementing the 2004 Act. An interim report of their findings was published in October 2006 and the final report was published on 14 November 2007. The report highlighted that authorities did not always provide sufficient information for parents, children and young people about their rights under the new legislation.

9. There have been two recent Court of Session judgements which concerned the interpretation of the 2004 Act:

- *Gordon, Appellant* 2007 FamLR 76, in which Lady Dorrian accepted the appellant’s argument that none of the circumstances described in section 18(4)(a) to (c) existed on the day on which the placing request was refused, namely:
  
  - Section 18(4)(a): a CSP has been prepared (and not discontinued) for the child or young person,
  
  - Section 18(4)(b): no such plan has been prepared, but it has been established by the education authority that the child or young person requires such a plan, or
  
  - Section 18(4)(c): the education authority have decided that the child or young person does not require such a plan and that decision has been referred to a Tribunal under subsection (1).

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

- *WD v Glasgow City Council* 2007 SLT 1057, held that the Tribunal does not have jurisdiction to hear appeals in relation to out of area placing request decisions and that parents of children with a CSP cannot make out of area placing requests. The ruling also infers that parents of children with additional support needs cannot make out of area placing requests.

10. This Bill amends the 2004 Act in light of the HMIE reports, recent Court of Session rulings, the annual report from the President of the Additional Support Needs Tribunals for Scotland and informed observations in light of practice.

11. The Bill makes the following adjustments to the 2004 Act:
it permits parents of children with additional support needs and young people with additional support needs, including those with CSPs, to make out of area placing requests.

following the refusal of an out of area placing request, a parent or young person will be able to appeal the decision to refuse the request to the Tribunal.

following the submission of an out of area placing request, a parent or young person will be able to access mediation from the potential host authority regarding the placing request.

following a successful out of area placing request, parents or a young person will be able to access mediation and/or dispute resolution from the host authority regarding that authority’s functions under the 2004 Act.

following a successful out of area placing request for a child or young person with a co-ordinated support plan, the new host authority is under a duty to seek and take account of information and advice from the education authority from which the CSP was transferred as well as any agencies or persons involved in providing support under the CSP prior to its transfer.

it enables the decision of an education authority refusing a placing request in respect of a place in a Scottish special school to be referred to the Tribunal and also allows the decision of an education authority refusing a placing request in respect of a place in a school in England, Wales and Northern Ireland which is a school making provision mainly or wholly for children or young people with additional support needs to be referred to the Tribunal.

it provides that when hearing a placing request appeal in respect of a place in a special school, the Tribunal has the power to confirm the decision of the authority or overturn the decision of the authority and specify when the placing request should commence and make any amendments to a CSP.

it extends the power of the Tribunal, when considering a placing request appeal, to enable it to specify a time scale for placing the child in the school specified in the placing request.

it ensures that any reference transferred back to the Sheriff from the Tribunal will be treated as if it were an appeal made directly to the Sheriff in the first instance.

where a child is being educated outwith the area in which he or she lives as a result of a successful out of area placing request, it prevents the EA (the host authority) from recovering the cost of providing any mediation and/or dispute resolution services from the authority for the area in which the child lives (the home authority).

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

where a child is being educated outwith his or her home authority as a result of arrangements made or entered into by the authority for the area to which the child or young person belongs with another authority, responsibility for the school education of the child or young person will remain with the authority for the area to which the child belongs.

it clarifies the definition of additional support by specifying that it is not limited to support provided in an educational environment.
This document relates to the Education (Additional Support for Learning) (Scotland) Bill as amended at Stage 2 (SP Bill 16A)

- it extends the rights of parents of children with additional support needs and young people with additional support needs to enable them to request a specific assessment, such as an educational, psychological or medical assessment, at any time.
- it automatically deems children and young people within certain specified groups to have additional support needs without requiring regard to be had to whether the child needs additional support to benefit from education.
- it provides that if a child under school age (generally under 5 years old), who belongs to the authority’s area, is brought to the attention of the authority as appearing to have additional support needs arising from a disability, then the authority must provide additional support as appropriate.
- it requires education authorities to provide parents of children with additional support needs (and young persons with additional support needs) with all the information authorities are required to publish under section 26 of the 2004 Act.
- it places authorities under a duty to ensure that a summary of the published information is available, on request, from each place in the authority’s area where school education is provided and in any handbook or other publications provided by the school that is for the purposes of providing general information about the school or, as the case may be, the services provided by the authority, and on any website maintained the school or the authority for that purpose.
- it extends the list of matters on which authorities are required to publish information to include any procedures established for the resolution of disputes.
- it permits the Tribunal to consider any placing request appeal, where a CSP has been prepared or is being considered, at any time before final determination by an education appeal committee (“EAC”) or sheriff.
- it extends the circumstances in which the decision of an education authority to refuse a placing request can be referred to a Tribunal, to include those decisions where an EA has issued its proposal to establish whether a CSP is required.
- it extends the circumstances in which parents and young persons can make references to the Tribunal consequent on certain procedural failures of the EAs.
- it extends the jurisdiction of the Tribunal to allow it to consider references in relation to an authority’s failure to comply with its duties in terms of post-school transitions.
- it enables Scottish Ministers to make rules to allow a convener sitting alone to consider certain references and to allow the Tribunal to review its decisions in certain specified circumstances.
- it provides that following a decision of a Tribunal that requires an education authority to do anything, the President of the Tribunal will have the power to require the authority to provide him or her with information about the authority’s implementation of the Tribunal decision.
- it provides the President of the Tribunal with the power to refer the matter to Scottish Ministers where he or she is satisfied that the authority is not complying with the Tribunal decision.
- it ensures a right of recovery where an education authority have provided additional support for any pupil belonging to the area of another authority.
• it clarifies the definition of “a child or young person for whose school education an education authority are responsible”.

THE BILL – SECTION BY SECTION

Section 1: Placing requests

12. Section 1 of the Bill enables parents of children with additional support needs and young persons with additional support needs including those with CSPs to make requests for their children or themselves (as appropriate) to attend a school outwith the local authority area in which the child or young person lives. It does this by amending paragraph 2 of schedule 2 to the 2004 Act to ensure that the description of the EA which is to consider a placing request is not restricted to the EA which is currently responsible for the child or young person’s education (see subsection (8)(a)). It also extends the jurisdiction of the Tribunal to enable it to hear appeals on refusals of such out of area placing requests by amending section 18(3)(e) of the 2004 Act to allow referral to the Tribunal of a placing request decision by an EA which is not the EA responsible for the child (or young person) (see subsection (6)(a)(iii)).

13. The other provisions in section 1 make amendments that relate to placing requests to ensure the existing system continues to operate in a logical manner. They also ensure the system properly accommodates the possibility of an “out of area” placing request being made.

14. For children or young persons with additional support needs who are attending a school outwith the area in which they live following a successful out of area placing request, section 1 also transfers the duty to keep under review any CSP from the original home authority to the new host authority (see subsection (4)(a)). New subsection (5A) is inserted to section 10 of the 2004 Act which places a duty on the new host authority to carry out a review of the co-ordinated support plan as soon as possible after the date of any transfer of the CSP from the home authority to the host authority (time limits for conducting this review will be specified in secondary legislation).

15. Section 1 of the 2004 Act defines what is meant by the term “additional support needs”. Subsection (2) amends the basis on which additional support needs are assessed to accommodate out of area placing requests. It provides that a child’s or young person’s additional support needs will be assessed against the provision made for children or young people of the same age in schools run by the education authority that is responsible for his/her education. Where no education authority is responsible for the child’s or young person’s education e.g. the child or young person is home or privately educated, his/her additional support needs will be assessed against the provision made for children or young people of the same age in schools run by the education authority in which he/she lives.

16. Section 7 of the 2004 Act enables a request to be made to an EA to establish whether a child or young person belonging to that EA’s area, but for whose education the EA are not responsible, has additional support needs or requires a co-ordinated support plan. This allows the education authority for the area to which the child belongs (the home authority) to comply with such a request where the child or young person is home educated, privately schooled or attending school under the management of another authority (a host authority). Subsection (3)
amends section 7 of the 2004 Act to restrict a home authority from complying with such a request in relation to children and young people for whose school education any education authority are responsible. The effect of this is that where a successful out of area placing request is made, the child or young person will be covered by the provisions in section 6 of the 2004 Act and will be unable to utilise the provision in section 7.

17. Subsection (5A) inserts new subsection (3A) into section 12 of the 2004 Act and provides that, where a child or young person with a CSP moves from a school in one authority area to a school in another authority (e.g. following a change of residential address or a successful out of area placing request for a child or young person with a CSP), the new host authority is under a duty to seek and take account of information and advice from the education authority from which the CSP was transferred as well as any agencies or persons involved in providing support under the CSP prior to its transfer.

18. Section 18(3) of the 2004 Act lists the matters that can be referred to the Tribunal. Subsection (6) inserts a new paragraph (da) into section 18(3) to enable the decision of an education authority refusing a placing request in respect of a place in a Scottish special school to be referred to the Tribunal. It also allows the decision of an education authority refusing a placing request in respect of a place in a school in England, Wales and Northern Ireland which is a school making provision mainly or wholly for children or young people with additional support needs to be referred to the Tribunal.

19. Section 18(3)(e) of the 2004 Act enables a decision of an education authority refusing a placing request to be referred to the Tribunal in cases where a CSP has been prepared or is being considered. Subsection (6)(a)(ia) provides that where a placing request to a special school (including those in England, Wales and Northern Ireland) is submitted on behalf of a child or young person with additional support needs who has a CSP on the horizon, there is only one appropriate appeal route in place under section 18(3)(da). Without this amendment there would be two different appeal routes: one for children with additional support needs wanting to go to a special school and the other for those that have a CSP on the horizon.

20. Section 18(7) of the 2004 Act provides that references to the Tribunal on the refusal of a placing request can only be made once in each 12 month period unless the CSP has been reviewed in that period, or a Tribunal has ordered a CSP to be amended or prepared. Subsection (6)(d) will extend the provisions in section 18(7) to prevent repeated references to the Tribunal under section 18(3)(da). A period of 12 months will have to lapse before another reference can be submitted to the Tribunal under section 18(3)(da).

21. Section 19 of the 2004 Act specifies the powers that a Tribunal has in relation to references. Subsection (7)(za) inserts new subsection (4A) into section 19 of the 2004 Act to give the Tribunal powers in relation to the new decisions referable under section 18(3)(da). It provides that when hearing a placing request appeal in respect of a place in a special school, the Tribunal has the power to confirm the decision of the authority or overturn the decision of the authority and specify when the placing request should commence and make any amendments to a CSP.
22. Subsection (7)(a) amends subsection 19(5)(b)(i) to extend the power of the Tribunal, when considering a placing request appeal, to enable it to specify a time scale for placing the child in the school specified in the placing request.

23. Subsection (6)(b) inserts new paragraph (f) into section 18(3) of the 2004 Act to provide that a decision made by an EAC to refuse a placing request may be referred to the Tribunal if, before the expiry of the time limit for appeal to the sheriff court (28 days), a CSP is involved or being considered.

24. Section 18(4) of the 2004 Act sets out circumstances which indicate (for the purposes of the 2004 Act) when a CSP is involved or is being considered. Subsection (6)(c)(ii) adds a new circumstance to that list. The new circumstance is that the EA have advised the parent or young person that they will establish whether a CSP is required. The effect of this amendment is that a decision by an EA referred to in section 18(3)(e) of the 2004 Act or by an EAC referred to in section 18(3)(f) of that Act refusing a placing request can now be referred to the Tribunal if the EA have advised the parent that they will establish whether a CSP is required.

25. Subsection (8)(d)(ii) inserts a new sub-paragraph (1A) to paragraph 7 of schedule 2 to ensure that where a child or young person has a CSP or is being considered for a CSP, appeals regarding placing requests should be referred to the Tribunal rather than to the sheriff.

26. Subsection (8)(c)(ii) and (d)(iii) extend the circumstances in which a placing request appeal must be transferred from the EAC or sheriff to the Tribunal from being limited to the event described in section 18(4)(c) of the 2004 Act to include the things described in the other paragraphs of section 18(4) (as amended by this Bill). The effect of this extension, and subsection (6)(c)(i) (which removes the words “at the time the placing request is refused” from section 18(4) of the 2004 Act), is that if, at any time before the EAC or sheriff has made their final decision on a placing request appeal, a CSP is being prepared or is being considered, the appeal is to be transferred to the Tribunal. Subsection (8)(d)(iv) inserts a new sub-paragraph (12) into paragraph 7 of schedule 2 to ensure that any reference transferred back to the Sheriff from the Tribunal will be treated as if it were an appeal made directly to the Sheriff in the first instance thus ensuring the Sheriff has the power to deal with such a reference.

27. Subsection (7) extends the circumstances in which a placing request appeal can be transferred from the Tribunal to the Education Appeal Committee (see subsection (7)(a)(ii)). This section also provides the Tribunal with the discretion to transfer placing request decisions back to the EAC or sheriff where it has been decided that no CSP is required (see subsection (7)(a)(i)).

Section 2: Mediation services

28. Section 2 amends section 15 of the 2004 Act. Section 15 places a duty on EAs to arrange for independent mediation services in relation to the exercise of the EA’s functions under the 2004 Act to be provided, free of charge, to parents of children or young people belonging to its area. Mediation aims to bring parties together to discuss the issues and to help broker a way forward. Section 2 removes the requirement for the child or young person to belong to the authority’s area. This will allow parents of children or young persons who have submitted an out
of area placing request or are being educated in an authority outwith the authority in which they live as a result of a successful out of area placing request, to access the mediation services provided by the host authority.

Section 3: Dispute resolution

29. Section 3 amends section 16 of the 2004 Act. Section 16 enables Scottish Ministers, by regulations, to require EAs to put in place arrangements to resolve disputes between the authority and any parents or young persons belonging to that authority’s area in relation to the EA’s functions under the 2004 Act. Dispute resolution is carried out by an independent third party who considers the facts of the case and makes recommendations to the EA. As with section 2, section 3 removes the requirement for the child or young person to belong to the authority’s area. This will allow parents of children or young persons who are being educated in an authority outwith the authority in which they live as a result of a successful out of area placing request, to access the dispute resolution services provided by the host authority.

Section 4: Contributions not recoverable in respect of certain services

30. Section 23 of the Education (Scotland) Act 1980 (c.44) (“the 1980 Act”) provides that where a child or young person is being educated outwith the authority in which he or she lives, the EA for the area in which the child or young person is being educated (the host authority) may recover from the home authority contributions in respect of provision of the child’s/young person’s school education and/or other services, including additional support under the 2004 Act.

31. Section 4 of the Bill amends section 23 of the 1980 Act to prevent the “host” authority from recovering the cost of providing any mediation or dispute resolution services under the 2004 Act for pupils being educated in their area as a result of a successful out of area placing request.

Section 5: Arrangements between education authorities

32. Section 29(3) of the 2004 provides the definition of “a child or young person for whose school education an education authority are responsible”. However Lord Brailsford’s Court of Session ruling, RB v. a decision of an Additional Support Needs Tribunal [2007] CSOH 126, which concerned a child who was being educated at home, stated that if, as a matter of fact, a particular authority controlled the education of the child, then that authority was responsible within the terms of section 29(3). Section 5 amends section 29(3) of the 2004 Act to provide that where arrangements are entered into between two authorities in respect of the school education of a child or young person, it will always be the authority for the area to which the child or the young person belongs (known as the “home authority”) that is the responsible authority.

33. A successful out of area placing request does not involve any arrangements being made between authorities. Therefore, where a child is being educated outwith his or her home authority as a result of a successful out of area placing request, the host authority will be the EA with responsibility for the child’s or young person’s education and carrying out all of the duties under the 2004 Act (see section 29(3)(a) of the 2004 Act).
Section 5A: Additional support

34. Section 5A amends section 1(3)(a) of the 2004 Act and provides clarification on the
definition of “additional support” by making explicit that it is not confined to educational
support but also includes multi-agency support such as health, social work, voluntary agencies
etc.

Section 5B: Assessments and examination

35. Section 5B inserts section 8A into the 2004 Act to extend the rights of parents of children
with additional support needs and young people with additional support needs to enable them to
request a specific assessment, such as an educational, psychological or medical assessment, at
any time.

36. Education authorities are required to comply with the assessment request unless the
request is unreasonable.

37. The process of assessment or examination will be carried out by such person as the
education authority consider appropriate. Education authorities are not required to arrange for
examinations or assessments to be carried out by named individuals or organisations requested
by the parent or young person.

38. Authorities must take into account the results of the assessment or examination when
considering the additional support needs of the child or young person and the adequacy of the
additional support provided.

Section 5C: Additional support needs etc.: specified children and young people

39. Subsection (1) deems specified groups of children and young people to have additional
support needs regardless of whether they require additional support to enable them to benefit
from education. Therefore, all the provisions of the 2004 Act relating to children and young
persons with additional support needs apply to children and young people in these specified
groups.

40. The groups of children who are automatically deemed to have additional support needs
are:

- looked after and accommodated children and young people;
- children or young people who are carers;
- children or young people who have a mental disorder;
- children or young people who are deaf or partially deaf;
- children or young people who are blind or partially sighted; and
- children or young people who are (any or all) deaf, partially deaf, blind or partially
  sighted.
41. Subsection (2) requires that every education authority should consider whether children belonging to these specified groups, where the education authority are responsible for their education, require co-ordinated support plans.

Section 5D: Functions of education authority in relation to certain pre-school children with additional support needs

42. Section 5 of the 2004 Act requires an education authority to provide additional support to certain disabled pre-school children in their area, normally those who are under 3 years old. This duty applies where such children have been brought to the attention of the education authority by an NHS Board as having, or appearing to have, additional support needs arising from a disability within the meaning of the Disability Discrimination Act 1995. Section 5D broadens the persons who have the ability to bring such a child to the attention of the authority to enable any organisation or person (including a parent) to undertake this role. Section 5D also provides that the duty to provide such children with additional support will not apply in cases where the child’s parent does not give his or her consent.

Section 5E: Provision of published information to certain persons

43. Under section 26 of the 2004 Act, education authorities are under a duty to publish and keep up-to-date certain information. Section 5E requires education authorities to provide all parents of all children with additional support needs (and young persons with additional support needs) with all the information authorities are required to publish under section 26. This duty extends to children and young people for whose school education EAs are not responsible.

Section 5F: Availability of published information

44. Section 5F inserts new subsection (aa) into section 26(1) of the 2004 Act and places authorities under a duty to ensure that a summary of the information published under section 26 of the 2004 Act is available, on request, from each place in the authority’s area where school education is provided, regardless of whether the school is under the management of the education authority.

45. New subsection (aa) also requires education authorities to provide this summary in any handbook or other publications provided by any school in the authority’s area, that is provided by the authority for the purposes of providing general information about the school or, as the case may be, the services provided by the authority on any website maintained by any such school or the authority for that purpose.

Section 5G: Publication of information on dispute resolution

46. Section 5G inserts new subsection (ea) into section 26(2) of the 2004 Act to extend the list of matters on which authorities are required to publish information in section 26(2) of the 2004 Act to include any procedures established in accordance with section 16 of the 2004 Act for the resolution of disputes.
Section 6: References to Tribunal in relation to co-ordinated support plan

47. Section 6 extends the circumstances in which parents and young persons can make references to the Tribunal consequent on certain procedural failures of the EAs. It provides that where parents or young persons have requested that the authority establish whether the child or young person requires a CSP and the authority have not responded to that request within a specified period of time (set out in regulations), the failure so to respond is treated as if it were a decision by the EA that no CSP was required. It also provides that where an authority have notified a parent or young person that they will establish whether the child or young person requires a CSP but, after a specified period of time (set out in regulations), the authority has not made a decision on the matter either way, that failure is to be treated as if it were a decision of the EA that no CSP is required. Decisions of an EA that no CSP is required can be referred to the Tribunal.

Section 6A: References to Tribunal in relation to duties under section 12(6) and 13

48. Section 6A inserts new subsection (g) into section 18(3) of the 2004 Act to extend the jurisdiction of the Tribunal to allow it to consider references in relation to an authority’s failure to comply with its duties in terms of post-school transitions under sections 12(5) and (6) and 13 of the 2004 Act.

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

49. As detailed in paragraph 47 above, the Bill will extend the circumstances in which parents and young persons can make references to the Tribunal consequent on certain procedural failures of the EAs. These new circumstances relate to an authority’s failure to take action within a specified period of time. Section 7 enables Scottish Ministers to make rules regarding the ability of Convener of a Tribunal to sit alone to consider references where they relate to failures by EAs to comply with specified time scales.

50. Section 7 will also allow Scottish Ministers to make rules to allow the Tribunal to review its decisions in certain circumstances.

Section 7A: Power to monitor implementation of Tribunal decisions

51. Section 7A inserts new paragraph 11A into schedule 1 of the 2004 Act to provide that following a decision of a Tribunal that requires an education authority to do anything, the President of the Tribunal may require the authority to provide him or her with information about the authority’s implementation of the Tribunal decision. It will also provide the President with the power to refer the matter to Scottish Ministers where he or she is satisfied that the authority is not complying with the Tribunal decision.

Section 7B: Provision by education authority for education of pupils belonging to areas of other authorities: recovery of costs where pupil has additional support needs

52. Section 7B inserts a new section 27A into the 2004 Act to ensure a right of recovery where an education authority have provided additional support for any pupil belonging to the area of another authority.
Section 8: Ancillary provision

53. This section enables the Scottish Ministers to make further provision, by order, which is consequent upon the Bill.

Section 9: Orders

54. This section makes general provision about orders made under the Bill by Scottish Ministers. They will be made by statutory instrument. The section also specifies the Parliamentary procedure for an order under section 8.

Section 10: Short title and commencement

55. This section allows the Scottish Ministers to set different dates to commence different provisions of the Bill by order, other than sections 7, 8 and 9 which will come into force on Royal Assent.
This document relates to the Education (Additional Support for Learning) (Scotland) Bill as amended at Stage 2 (SP Bill 16A)

EDUCATION (ADDITIONAL SUPPORT FOR LEARNING) (SCOTLAND) BILL
[AS AMENDED AT STAGE 2]

REVISED FINANCIAL MEMORANDUM

INTRODUCTION

1. This document relates to the Education (Additional Support for Learning) (Scotland) Bill (the Bill) introduced in the Scottish Parliament on 6 October 2008 and includes the costs of the additional amendments that were agreed by Parliament during Stage 2 of the Bill’s Parliamentary journey. It has been prepared by the Scottish Government in relation to the Parliament’s consideration of the Bill at Stage 3 and additions or changes to the original financial memorandum are indicated by sidelining in the right margin. It does not form part of the Bill and has not been endorsed by the Parliament.

2. The Education (Additional Support for Learning) (Scotland) Bill amends the Education (Additional Support for Learning) (Scotland) Act 2004 (“the 2004 Act”), which came into force in November 2005 with the aim of creating a stronger, better system for supporting children’s learning. The 2004 Act, inter alia, places new duties on education authorities to make adequate and efficient provisions for the additional support needs of every child and young person for whom they are responsible and who requires additional support for learning. Education authorities must identify, support and keep under review the needs of all children with additional support needs.

3. The original policy intention behind the 2004 Act was to allow young people with additional support needs, and parents of children with additional support needs, including those with co-ordinated support plans (CSPs) to make out of area placing requests. However, this was called in to doubt by an Inner House, Court of Session ruling by Lord Macphail on 11 October 2007. Lord Macphail’s ruling held that the 2004 Act did not make, and should not be construed as making, any provision in respect of a child with additional support needs, who required a CSP, for the making of a placing request to any education authority who were not responsible for the child’s/young person’s education. The ruling also inferred that young people with additional support needs and parents of children with additional support needs could not make out of area placing requests. Prior to Lord Macphail’s ruling, local authorities were considering out of area placing requests for children with additional support needs, including those with co-ordinated support plans. Therefore, the estimated number of future out of area placing requests contained within this memorandum is likely to be fairly accurate.
4. The Convention of Scottish Local Authorities (COSLA) and 6 of the 32 local authorities in Scotland participated in a survey to assist the Scottish Government with the calculations contained within the Financial Memorandum that accompanied the Bill at its introduction to Parliament on 6 October 2008. The six authorities were Dumfries and Galloway Council, Dundee City Council, East Ayrshire Council, Highland Council, City of Edinburgh Council and West Lothian Council. These authorities represent a good cross section of all authorities in Scotland.

5. The survey indicated that each are involved in only a small number of cases which would be affected by this Bill per year and that cases vary considerably in their complexity and length. As such, the estimated cost of dealing with a case also varies, with a wide range of estimated cost per case both between and within local authorities.

6. Estimates used in this Memorandum are based on an examination of the data gathered with ranges given and representative averages chosen to indicate the likely scale of the impact. The estimates below should be treated as an indicative average only.

7. The costs of the additional amendments contained in the Bill as agreed by Parliament during Stage 2 have been estimated and agreed with an Economic Adviser in the Scottish Government’s Education Analytical Services Division and the Scottish Government’s Finance Division.

8. It is important to note that given both the very small number of cases involved and the large variability in cost due to the individual nature of cases, it is not possible to assess precisely either the number of cases or the cost involved. Both number and cost are likely to vary from year to year. Therefore, the total overall additional cost to all of the 32 local authorities as a result of this Bill is as follows:
   - Scottish Government estimate the total cost to be around £767,171 per annum
   - The Presiding Officer of the Scottish Parliament estimates the total cost to be £202,970 per annum.

**COST ON LOCAL AUTHORITIES**

**Extending the jurisdiction of the Tribunal to hear all placing request appeals involving a co-ordinated support plan (CSP) and appeals in respect of a place in a special school**

9. Currently, the 2004 Act makes provision for the transfer of a placing request appeal from the Education Appeal Committee (EAC) or the sheriff to the Additional Support Needs Tribunals for Scotland (the Tribunal) only in respect of the situation where the education authority has decided that no CSP is appropriate and that decision has been referred to the Tribunal.

10. The Bill extends the jurisdiction of the Tribunal to include consideration of any placing request appeal where a CSP has been prepared or is being considered, at any time before final determination by an EAC or sheriff (as appropriate). An example would be where the education authority is in the process of establishing whether a CSP is required.
11. The National Statistics publication “Placing Requests in Schools in Scotland, 2007/2008” states that of the 28,498 placing requests received for all pupils, 725 were appealed to the Education Appeal Committee (EAC), and 8 of those subsequently appealed to the sheriff. From a total school population of 681,573, the percentage of school pupils identified as having additional support needs 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 is currently 5.7% (38,716). Only 7.0% of those pupils identified as having additional support needs have a CSP (2,694). Therefore, based on these percentages, it is estimated that the number of placing request appeals referred to the Tribunal from the EAC or sheriff because a CSP has been prepared or is being considered will increase by no more than 2 or 3 cases per annum. Conversely, this will also mean a decrease in the number of placing request appeals heard by the EAC or sheriff by 2 or 3 cases per annum.

12. There is considerable variation in the estimated cost of a Tribunal which includes an oral hearing, both between individual cases within the same authority and between local authorities - the cost for a Tribunal case with representation ranges between £500 and £18,000. On the basis of information received, an indicative average cost per case is around £5,000. Therefore, the total cost to all authorities for Tribunals cases with representation at an oral hearing is estimated to be £15,000 per annum (3 x £5,000).

13. On the other hand, the survey indicates that the cost of a sheriff Court appearance ranges between £2,700 and £25,000. An indicative average cost per case is around £9,000. The cost of an appeal to EAC ranges between £350 and £4,800. An indicative average cost per case is around £2,000. Therefore the savings incurred by authorities for those cases that are transferred from either the EAC or sheriff to the Tribunal is estimated to range between £6,000 (3 cases from the EAC at £2,000 each) to £27,000 (3 cases from the sheriff at £9000 each). Depending on the make up of cases, this could result in either an increase in cost or a saving for local authorities. Assuming the reduction in cases is more likely to be an EAC appeal rather than a Sheriff Court appearance, this suggests an indicative saving of £13,000 per annum (2 EAC cases at £2,000 each + 1 sheriff case at £9,000).

14. To date, all placing request appeals dealt with by the Tribunal have related to special schools. The Bill will simplify and bring consistency to decision making in respect of placing requests by allowing all placing request appeals in respect of a place in a special school to be heard by the Tribunal.

15. The calculations provided in paragraphs 13 and 14 show that the local authority cost of referring a case to: its EAC is £2,000; the Sheriff is £9000; and the Tribunal is £5,000. The Placing Requests in Schools in Scotland 2007/2008 shows that there were 9 special school placing request references referred to the EAC (cost £2000 each) and 2 subsequently appealed to the Sheriff Court (cost £9,000 each). On the basis of the available evidence from 07/08, the local authority costs associated with this provision are estimated to be £9,000 (9 Tribunal cases at £5000 each – (9 EAC cases at £2000 + 2 Sheriff cases at £9000).

Out of area placing requests

16. As detailed in paragraph 3, the original policy intention behind the 2004 Act was to allow young people with additional support needs, and parents of children with additional
This document relates to the Education (Additional Support for Learning) (Scotland) Bill as amended at Stage 2 (SP Bill 16A)

support needs, including those with co-ordinated support plans (CSPs) to make out of area placing requests. However, this was called into doubt by Lord Macphail’s ruling.

17. The Bill will amend the legislation to make it clear that young people with additional support needs, and parents of children with additional support needs, including those with CSPs, are able to make a placing request to an education authority outwith the local authority area in which they live. Additionally, where a CSP has been prepared or is being considered, an appeal against a decision to refuse an out of area placing request can be referred to the Tribunal.

18. There is considerable variability among the authorities who responded to our survey on the reported cost of an out of area placing request – this ranged between £450 and £12,500. An indicative average cost is around £3,600. Following Lord Macphail’s ruling, the Scottish Government contacted COSLA in March 2008 to establish the extent of the impact of Lord Macphail’s ruling on authorities. COSLA confirmed that in their work with the Association of Directors of Education in Scotland (ADES), they could not find any evidence to suggest that authorities were refusing to accept placing requests for children with additional support needs who were resident in another authority’s area. As a result, there is unlikely to be any increase in cost to local authorities in processing out of area placing request for children with additional support needs (excluding those with a co-ordinated support plans). The National Statistics publication “Placing Requests in Schools in Scotland, 2007/2008” states the total number of “out of area” placing requests received for all pupils is 2999. The number of pupils identified as having a co-ordinated support plan, as detailed in paragraph 11 above is 2694 (5.7% of the total pupil population who have been identified has having additional support needs (38,716) and of those, 7.0% have a CSP). Therefore, the estimated number of out of area placing requests for pupils with a CSP is estimated to be around 9 per annum (5.7% of 2999 = 171, 7.0% of 171 = 12). The total estimated cost to all authorities for processing out of area placing requests for pupils with co-ordinated support plans is £43,200 per annum (12 x £3,600).

19. It should also be noted that under section 23(2) of the Education (Scotland) Act 1980, where an education authority has provided school education, with or without other services (excluding mediation or dispute resolution), for any pupil, child or young person belonging to the area of some other authority, or have provided additional support within the meaning of the 2004 Act for any such pupil, the education authority, may, if a claim is made, recover from that other authority such contributions in respect of such provision as may be agreed between the authorities or as the Scottish Ministers may determine. As such, successful placing requests are cost neutral overall.

20. The National Statistics publication “Placing Requests in Schools in Scotland, 2007/2008” states the total number of “out of area” placing requests received for all pupils is 2999. Of those, 2238 (75%) were granted. As detailed in paragraph 11, 5.7% of pupils have been identified with additional support needs, including those with CSPs. Therefore, the estimated number of out of area placing requests for pupils with additional support needs, including those with CSPs is 171 (5.7% of 2,999) and the estimated number granted is 128 (75% of 171). Based on these figures there could be a maximum of 43 (171 minus 128) appeals to either the EAC or the Tribunal for children with additional support needs/CSPs respectively. If only 7.0% of all pupils identified with additional support needs have a CSP, we would expect three of those cases (7.0% of 43) to be cases of children with a CSP. Those cases would go to the Tribunal and the remaining 40 cases could be appealed to the EAC. However, as only 19% of refused placing requests are actually appealed, the numbers could be as little as 1 appeal per annum to the
Tribunal and 8 appeals to the EAC. There is considerable variation in the estimated cost of a Tribunal case with representation at an oral hearing, both between individual cases within the same authority and between local authorities - the cost for a case ranges between £500 and £18,000. On the basis of information received, an indicative average cost per case is around £5,000. The results of the survey indicate that the cost of an appeal to EAC ranges between £350 and £4,800. An indicative average cost per case is around £2,000. Therefore, the estimated total increase in cost to all authorities for placing request appeals is around £21,000 per annum (1 x £5,000 plus 8 x £2,000).

**Mediation and dispute resolution**

21. The Bill provides that following the submission of an out of area placing request, a parent or young person will be able to access mediation from the potential host authority regarding the placing request. It will also provide that following a successful out of area placing request, the duty to provide mediation and dispute resolution services will lie with the new “host” authority. Any costs associated with providing these services to the parents of a child or a young person who does not belong to the authority’s area will not be recoverable under section 23(2) of the Education (Scotland) Act 1980.

22. To date, there have not been any cases in which a home authority has been required to provide mediation or dispute resolution for a child being educated in another authority’s area as a result of a placing request. Therefore, the cost to authorities is likely to be minimal. Of the 6 local authorities who responded to the survey, 5 authorities purchase mediation services from the voluntary sector using either a service level agreement or a case by case basis, and 1 authority provides mediation services in house. For those authorities that purchase mediation services from the voluntary sector this cost could range from £0 to £1790 per case depending upon whether they have a service level agreement or purchase services on a case by case basis.

23. The 6 local authorities who responded to the survey estimated the cost of staff time for mediation at around £800 per case. Scottish Ministers have set the fee payable by authorities to an Independent Adjudicator for dispute resolution at £355 per case. This excludes the cost of staff time estimated at around £850. If parents or young persons were to request mediation from the host authority in 1% - 5% of the estimated 171 out of area placing requests for pupils with additional support needs/CSPs (see paragraph 18), this could result in an increase of between 2 to 9 mediation cases per annum. If parents or young person were to request dispute resolution from the host authority in 1% - 5% of the estimated 128 out of area placing requests granted for pupils with additional support needs/CSPs (see paragraph 20), this could result in an increase of between 2 to 6 dispute resolution cases per annum. The total cost to all authorities per annum for providing mediation and/or dispute resolution services to pupils belonging to another authority’s area is estimated to range between £1,600 (2 x £800) for mediation only to £22,770 (6 x (£1,790+£800+£355+£850)) for provision of mediation and dispute resolution.

**Provision of published information to certain persons**

24. The Bill provides that education authorities are under a duty to provide parents of children with additional support needs (and young persons with additional support needs) with all the information authorities are required to publish under section 26 of the 2004 Act.
25. The *Pupils in Scotland, 2008* census shows that 5.7% of the total school population have been identified as having a CSP, an IEP and/or provision levels set by a RoN. However, *The Warnock Report (1978)* on special educational needs states that up to 1 in 5 school children will require some form of special educational provision.

26. Based on the above figures, this Bill could place authorities under a duty to provide all the information they are required to publish under section 26 to anywhere between 38,716 and 136,315 parents and young people. The Bill does not specify the method by which this information should be provided to parents and young people. However, as not all parents and young people will have access to a computer, it is assumed the preferred method would be by post.

27. In order to post the information to every parent of a child with additional support needs (and young persons with additional support needs), local authorities will be required to print/produce an appropriate number of copies for dissemination. The range of materials produced by authorities under section 26 of the 2004 Act can vary substantially from a booklet to a very detailed code of practice. In 2008, the Scottish Government produced the *health promotion guidance for local authorities and schools* and the cost of producing 4,500 copies was £4,155. Therefore, the cost of providing between 38,716 and 136,315 copies of a similarly formatted document would range between £35,748 and £125,864. The Scottish Government recently published ‘The Autism Toolbox’ for all schools; the cost of producing 6,000 copies was £38,345. Therefore, the cost of producing between 38,716 and 136,315 copies of a similarly formatted document would range between £247,427 and £871,166.

28. Similarly, the cost of posting this information is likely to range from £0.90 for a 500g second class large letter (max. 353mm (L) x 250mm (W) x 25mm (D)) to £2.49 for a 1kg second class packet (over 353mm (L) x 250mm (W) x 25mm (D)). The total cost to education authorities in distribution will range from approximately £34,844 to £339,425.

29. Combining the cost of production (ranging between £35,748 and £871,166) and distribution (ranging between £34,844 and £339,425) gives a range of costs between £70,592 and £1,210,591. With a median cost is £640,592. However, the Presiding Officer of the Scottish Parliament costed this duty at £50,000.

**Availability of published information**

30. The Bill places authorities under a duty to ensure that a summary of the information they are required to publish under section 26 of the 2004 Act is available, on request, from each place in the authority’s area where school education is provided and also requires education authorities to provide this summary in any handbook or other publications provided by any school in the authorities area, that is provided by the authority for the purposes of providing general information about the school or, as the case may be, the services provided by the authority on any website maintained by any such school or the authority for that purpose.

31. It is not anticipated that there would be any costs resulting from the duty for education authorities to ensure that the summary, mentioned in the amendment is available, on request from each place in the education authority’s area where school education is provided as this does
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not stipulate that each school must have their own copy, merely that they should be able to access one, should one be requested.

32. Any costs associated with this requirement would result from necessary revisions to the school handbook in order to include the summary of information published under section 26 of the 2004 Act. At the minimum end of the scale, should the summary represent a small amount of information, this could be done by inserting a sheet or flier inside the existing school handbook. This would require minimal printing costs and no extra costs in terms of distribution.

33. Should the summary be required to be more substantial, it could require the school handbooks to be revised and reprinted. 107,846 children entered P1 and S1 in Scotland in 2008 (52,106 into P1 and 55,740 into S1), each of whom received a school handbook. A conservative estimate of the costs of re-printing the handbook, based on the costs of printing a small sized document: the health promotion guidance for local authorities and schools comes to £0.92 per copy.

34. No further distribution costs will be incurred as these would be encompassed in the cost of distributing the school handbook. Therefore, the Scottish Government considers that a conservative estimate of the total cost of this amendment ranges from negligible costs to around £99,218 (£0.92 x 107,846). With a median cost of £49,609. However, the Presiding Officer of the Scottish Parliament costed this duty at £25,000.

Reviewing a co-ordinated support plan (CSP) following a successful out of area placing request

35. Section 10 of the 2004 Act provides for reviews of CSPs. The 2004 Act states that education authorities have a duty to keep under consideration the adequacy of any co-ordinated support plan prepared for a child or young person belonging to their area. The education authority must therefore review each plan every 12 months. It may be reviewed earlier if there has been a significant change in the circumstances of the child or young person, for example if their needs change or the level of additional support provided changes. In practice, it is likely that an authority would review a co-ordinated support plan when a child changes school, particularly if the new school was based in another local authority’s area.

36. Where an education authority accepts a placing request for a child who does not belong to its area, that authority will assume responsibility for the child’s education and will be required to review any CSP as soon as is reasonably practical after the date of transfer. The cost of reviewing a CSP in the Financial Memorandum which accompanied the 2004 Act was calculated at £440. The current estimated cost for reviewing a CSP is around £800 per plan. The estimated number of out of area placing requests granted for children with additional support needs is 128 and of those, only 7.0% are likely to have a CSP, indicating that there will be approximately 9 cases per annum. Total cost to authorities for reviewing a co-ordinated support plan following a successful out of area placing request is estimated to be around £7,200 per annum (9 x £800).

37. It is useful to note that under section 23(2) of the Education (Scotland) Act 1980, these costs can be recovered from the home authority.
Three new Tribunal reference categories - education authorities exceed specified timescales or failure to plan for post-school transitions

38. Parents will be able to submit references to the Tribunal in relation to two new procedural failures by local authorities to take action within specified timescales. The first is where an authority fails to acknowledge (within a specified time to be stipulated in secondary legislation) a request from a parent of a child with additional support needs or a young person with additional support needs to establish whether the child/young person requires a CSP. The second is where an authority has notified a parent or young person that it will establish whether their child/young person requires a CSP and after a specified period of time (to be stipulated in secondary legislation), the authority has not made a decision either way. **It is important to note that authorities can avoid references under these new categories by involving parents/young people in the process, keeping parents/young people abreast of the situation and taking action within the specified timescales.** Furthermore, with regard to the second new appealable failure, the 2004 Act currently enables a local authority to write out to a parent or young person to advise them that it requires an extension to the timescale. The extension cannot exceed 24 weeks starting from the date the authority issued its proposal to establish whether a CSP is required. It is estimated that these two new reference categories will result in a 5% to 10% increase per annum in the number of referrals to the Tribunal (4 – 8 cases). The costs of these extra cases are set out below in paragraph 42.

39. Section 6A of the Bill extends the jurisdiction of the Tribunal to allow it to consider references in relation to an authority’s failure to comply with its duties in terms of post-school transition planning under sections 12(5) and (6) and 13 of the 2004 Act.

40. On the basis of the available evidence from 07/08, the local authority costs associated with this particular amendment would be the change in the dispute route for a child/young person with additional support needs, but without a co-ordinated support plan. They would now be able to make a reference to the Tribunal at £5,000 per case, rather than Independent Adjudication at £1,205 per case (£355 for IA’s fee + £850 for staff time) with a variance of £3,795 per case.

41. The Scottish Government are of the opinion that this amendment is cost neutral as to date there have not been any cases that we are aware of involving an education authority’s failure to make adequate post school transitional arrangements that have been referred to Independent Adjudication. However, **the Presiding Officer of the Scottish Parliament costed this new reference category as £60,000.**

**Expedited Tribunal paper based decision making process**

42. The Bill will make possible a new expedited Tribunal paper based decision making process for those references in which authorities have exceeded any specified timescales. This will include the two new reference categories detailed in paragraph 38 above and those cases that are currently appealable under the 2004 Act (where it has been established by the authority that a child/young person requires a co-ordinated support plan and the authority fails to prepare a plan by the time specified in regulation (16 weeks, or 24 weeks if the authority has written to the parent or young person notifying them that it cannot meet the 16 week timescale). While the cases that are currently appealed under the 2004 Act could result in an oral hearing, experience to date indicates that these references have been decided without the need for an oral hearing. The reason for this is that these references have not been opposed or subject to dispute in terms
of facts. As mentioned in paragraph 38, authorities have the power to avoid appeals made under these categories by involving parents/young people in the process, keeping parents/young people abreast of the situation and taking action within the specified timescales. The new expedited paper based decision making process will enable the Convener of an Tribunal to consider such cases alone and this will keep the cost to authorities to a minimum – estimated to be around £2,800 per case. The total cost to all authorities for these new reference categories is estimated to range between £11,200 (4 x £2,800) - £22,400 (8 x £2,800). Using the mid range of 6 cases the cost is estimated to be £16,800 per annum.

Enabling the Tribunal to review its decisions

43. The Bill will enable the Tribunal to review, vary or revoke its decisions in certain circumstances which will be specified in regulations. Currently the 2004 Act enables any person who has made an appeal to the Tribunal, and the relevant education authority, to appeal the decision of the Tribunal to the Court of Session. Such an appeal to the Court of Session may only be made on a point of law. Therefore, if a Tribunal considered it appropriate to review its decision based on a point of law, this could result in possible savings for authorities as fewer cases will need to be referred to the Court of Session. The local authority cost of an appeal to the Court of Session ranges between £9000 and £28,000. An indicative average cost is around £14,000. The indicative average cost of a Tribunal case with an oral hearing is around £5,000. This would save authorities approximately £9,000 per case. Since the commencement of the 2004 Act, 5 cases per annum have been referred to the Court of Session on a point of law. Therefore, the total saving to all authorities in cases where the Tribunal reviews its decision on a point of law is estimated to be around £45,000 (5 x £9,000).

TOTAL ESTIMATED COSTS PER ANNUM ON ALL LOCAL AUTHORITIES:

Cost of the Bill as introduced to the Scottish Parliament on 6 October 2008

<table>
<thead>
<tr>
<th>Description</th>
<th>Increase in cost</th>
<th>Saving</th>
</tr>
</thead>
<tbody>
<tr>
<td>Coordinated support plan appeals - Tribunal cases with representation at an oral hearing (paragraph 12)</td>
<td>£15,000</td>
<td></td>
</tr>
<tr>
<td>Cases transferred from the EAC or sheriff to the Tribunal (paragraph 13)</td>
<td></td>
<td>£13,000</td>
</tr>
<tr>
<td>Processing out of area placing requests (paragraph 18)</td>
<td>£43,200</td>
<td></td>
</tr>
<tr>
<td>Increase in placing request appeals (paragraph 20)</td>
<td>£21,000</td>
<td></td>
</tr>
<tr>
<td>Providing mediation and/or dispute resolution (paragraph 23)</td>
<td>£22,770</td>
<td></td>
</tr>
<tr>
<td>Reviewing a co-ordinated support plan (paragraph 36)</td>
<td>£7,200</td>
<td></td>
</tr>
<tr>
<td>Expedited Tribunal paper based process (paragraph 42)</td>
<td>£16,800</td>
<td></td>
</tr>
<tr>
<td>Tribunal reviews its decision on a point of law (paragraph 43)</td>
<td></td>
<td>£45,000</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>£125,970</td>
<td>£58,000</td>
</tr>
</tbody>
</table>
Additional costs of amendments agreed to at Stage 2

<table>
<thead>
<tr>
<th>Description</th>
<th>Scottish Government costings</th>
<th>Presiding Officer’s costings</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appeals relating to a place at a special school – Tribunal cases with representation at an oral hearing (paragraph 15)</td>
<td>£9,000</td>
<td></td>
</tr>
<tr>
<td>Provision of published information to certain persons (paragraph 28)</td>
<td>£640,592 (median cost)</td>
<td>£50,000</td>
</tr>
<tr>
<td>Availability of published information (paragraph 33)</td>
<td>£49,609 (median cost)</td>
<td>£25,000</td>
</tr>
<tr>
<td>Duties for post school transitions planning (paragraph 1)</td>
<td>£0</td>
<td>£60,000</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>£699,201</strong></td>
<td><strong>£135,000</strong></td>
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</table>

Total cost of Bill including amendments agreed to at Stage 2

<table>
<thead>
<tr>
<th>Scottish Government costings</th>
<th>Cost of Bill as introduced plus Presiding Officer’s costings</th>
</tr>
</thead>
<tbody>
<tr>
<td>£767,171</td>
<td>£202,970 (£112,770 - £58,000 + £135,000)</td>
</tr>
</tbody>
</table>

COST ON THE SCOTTISH ADMINISTRATION

Additional Support Needs Tribunals for Scotland

44. The main on-going direct cost to the Scottish Government associated with the 2004 Act and the Bill will be the Additional Support Needs Tribunals for Scotland (the Tribunal), which the Scottish Government directly funds.

45. The Tribunal hears and decides appeals made by parents against the decisions or failures of education authorities about co-ordinated support plans. Reference to the Tribunal may also be made regarding the refusal of a placing request in certain circumstances. The Tribunal’s statutory functions, decisions and dealings with its users and the public are independent of government, national and local.

46. In the original Financial Memorandum that accompanied the 2004 Act, it was estimated that there would be around 300 appeals per annum to the Tribunal and that the cost of running the Tribunal in 2003/04 would be £760,000 per annum. This figure included staffing, members’ fees and expenses, training, travel, accommodation and central service overheads.

47. The actual annual cost of running the Tribunal since the commencement of the 2004 Act has been 2003/2004=£453,000; 2004/2005=£680,000; 2005/2006=£843,000 (this included £150,000 for the purchase and set up of a records management system); 2006/2007=£541,000;
and 2007/2008=£402,000. The cost of running the Tribunal in 2008/2009 is expected to be around £542,000.

48. As at 25 July 2008, the total number of appeals received since the commencement of the 2004 Act is 141, broken down as follows: 2005/06 = 2; 2006/07 = 42; 2007/08 = 76; 08/09 = 21.

49. It is expected that the overall changes contained in this Bill will generate an increase of no more than 12 to 18 references to the Tribunal per annum (16% to 24%) The estimated cost of a Tribunal hearing ranges between £1,250 and £8,200. Using the mid ranges of 15 references and a cost of £4,725 per hearing, this will result in an increase in cost to the Tribunal of £70,875. However, it should be noted that the Tribunal should be able to deal with any increase in the number of appeals as part of its day to day work.

50. The Tribunal has estimated that the new paper based expedited process will cut the Tribunal cost of a paper based hearing from £1050 per case to £310 – a 70% savings. As detailed in the third annual report of the President of the Tribunal, 10 references were decided by paper based process i.e. without the need for an oral hearing. Saving the Tribunal £7,400 (10 x (1050- 310)).

51. The Bill will not require the appointment of any additional Tribunal staff, members or conveners

52. However, it is useful to note that if the changes contained in this Bill were to generate any increase in the running costs of the Tribunal, these additional costs could be contained within the current portfolio budget.

**TOTAL ESTIMATED COST TO THE SCOTTISH ADMINISTRATION:**

<table>
<thead>
<tr>
<th></th>
<th>Increase in cost</th>
<th>Saving</th>
</tr>
</thead>
<tbody>
<tr>
<td>20% increase in the number of cases referred to the Tribunal</td>
<td>£70,875</td>
<td></td>
</tr>
<tr>
<td>Introduction of a new paper based Tribunal expedited process</td>
<td></td>
<td>£7,400</td>
</tr>
</tbody>
</table>

**Scottish Court Service**

53. Currently a small number of cases a year go to the Sheriff Court or Court of Session and this number is likely to be reduced as a result of this Bill. Due to the small number of cases involved, the considerable variability of the individual cases in terms of length of case and resources required, it has not been possible for the Scottish Court Service to estimate the likely savings to the courts as a result of fewer cases. However, as there have been fewer than 11 cases per annum (in 2007 there were 5 placing request appeals referred to the sheriff in respect of all pupils in Scotland, plus 5 Tribunal decisions referred to the Court of Session on a point of law as detailed in the President of the Tribunal’s annual report), the potential savings will be low and will not impact on the operation of the Courts.
COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

Parents

54. Cost implications of the Bill for individuals rest primarily with parents. There are no duties placed on parents that will result in them having to incur additional costs. Appeals to the Tribunal may be supported by legal representation if the parent wishes, but the Tribunals are intended to be a family-friendly process where legal representation will not be a necessity. Parents may also wish to seek their own legal advice and may wish to obtain independent assessments and reports of their child. These are optional costs that exist at present and are not a result of the Bill.

55. The Bill will enable the Tribunal to review, vary or revoke its decisions. It is anticipated that this provision will only be used where the Tribunal considers it appropriate to review its decision based on a point of law. This could result in fewer cases being referred to the Court of Session on a point of law and as a result, create a possible saving for parents who will no longer be required to secure legal representation to handle their case.

Other bodies and businesses

56. The Bill has no direct cost impact on businesses, charities or voluntary bodies. Therefore, there was no need for a Regulatory Impact Assessment to be completed. Independent schools have no new obligations placed on them by the Bill.
Marshalled List of Amendments selected for Stage 3

The Bill will be considered in the following order—

Sections 1 to 10          Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 5A

Margaret Smith

15 In section 5A, page 6, line 16, leave out <1(3)(a) of the 2004 Act (additional support needs)> and insert <1(3) of the 2004 Act (additional support needs)—

( ) in paragraph (a),>

Margaret Smith

16 In section 5A, page 6, line 17, at end insert—

<( ) in paragraph (b), for “educational provision” substitute “provision (whether or not educational provision)”>.>

Section 5C

Mr Adam Ingram

1 In section 5C, page 7, line 5, leave out <and accommodated by a local authority under section 26> and insert <by a local authority (within the meaning of section 17(6)>}

Mr Adam Ingram

2 In section 5C, page 7, leave out lines 7 to 14

Mr Adam Ingram

3 In section 5C, page 7, line 14, at end insert—

<(1B) But where a child or young person is, or is likely to be, able without the provision of additional support to benefit from school education provided to or to be provided for the child or young person, subsection (1A) does not apply.”.>
Margaret Smith

3A As an amendment to amendment 3, line 2, leave out <a> and insert <, in the course of identifying (in accordance with the arrangements made by them under section 6(1)(b)) the particular additional support needs of a child or young person who is looked after by a local authority (within the meaning of section 17(6) of the Children (Scotland) Act 1995 (c.36)), an education authority form the view that the>

Margaret Smith

3B As an amendment to amendment 3, line 4, leave out <does not> and insert <ceases to>

Margaret Smith

17 In section 5C, page 7, line 20, at end insert—

<(1B) For the avoidance of doubt, the reference in subsection (1)(b) to the children and young persons so identified includes reference to children and young persons having additional support needs by virtue of section 1(1A).”.

After section 5D

Claire Baker

18 After section 5D, insert—

<Advocacy services

Provision of advocacy service: Tribunal

After section 14 of the 2004 Act (supporters and advocacy), insert—

“14A Provision of advocacy service: Tribunal

(1) The Scottish Ministers must, in respect of Tribunal proceedings, secure the provision of an advocacy service to be available on request and free of charge to the persons mentioned in subsection (2).

(2) The persons are—

(a) in the case of a child, the child’s parent,

(b) in the case of a young person—

(i) the young person, or

(ii) where the young person lacks capacity to participate in discussions or make representations of the type referred to in subsection (3), the young person’s parent.

(3) In subsection (1) “advocacy service” means a service whereby another person conducts discussions with or makes representations to the Tribunal or any other person involved in the proceedings on behalf of a person mentioned in subsection (2).”.

Karen Whitefield

19 After section 5D, insert—
Mediation services

In section 15(2) (independence of mediation services) of the 2004 Act, for the words “under this Act” substitute “relating to education or any of their other functions.”.

Ken Macintosh

After section 5D, insert—

Dispute resolution

In section 16(2) (dispute resolution) of the 2004 Act, before paragraph (a), insert—

“(za) requiring any application by a person mentioned in subsection (1)(a) to (c) for referral to dispute resolution to be made to the Scottish Ministers,.”.

Section 5E

Mr Adam Ingram

4 In section 5E, page 8, line 7, leave out from <any> to the end of line 8 and insert—

<(i) a summary of the information published by the authority under this subsection, and
(ii) information on how to access the information so published.”.>

Mr Adam Ingram

5 In section 5E, page 8, line 11, after <needs> insert <for whose school education the authority are responsible>

Mr Adam Ingram

6 In section 5E, page 8, line 12, after <needs> insert <for whose school education the authority are responsible>

Mr Adam Ingram

7 In section 5E, page 8, line 15, leave out <or advice> and insert <published under this subsection by the authority>

Section 5F

Mr Adam Ingram

8 In section 5F, page 8, line 18, leave out <(a)> and insert <(d) (as inserted by section 5E(a)(ii) of this Act)>.

Mr Adam Ingram

9 In section 5F, page 8, line 19, leave out <(aa)> and insert <(e)>
Mr Adam Ingram

10 In section 5F, page 8, line 19, leave out <published information> and insert <information published by the authority under this subsection>

Mr Adam Ingram

11 In section 5F, page 8, line 20, leave out from <place> to the end of line 21 and insert <school under the management of the authority,>

Mr Adam Ingram

12 In section 5F, page 8, line 22, leave out <in the authority’s area> and insert <under the management of the authority>

After section 5G

Margaret Smith

21 After section 5G, insert—

<Power to specify additional sources of information>

In section 26(2) of the 2004 Act (publication of information by education authority), after paragraph (h) insert “, and

(i) any other persons specified by the Scottish Ministers by order as persons from which the persons referred to in subsection (2)(f)(i) and (ii) can obtain advice, further information and support in relation to the provision for such needs, including such support and advocacy as is referred to in section 14”.

Mr Adam Ingram

13 After section 5G, insert—

<Provision of information by education authority on occurrence of certain events>

Provision of information by education authority on occurrence of certain events

In section 13 of the 2004 Act (provision of information etc. on occurrence of certain events), after subsection (4) insert—

“(4A) In relation to the provision of any information under subsection (2)(a) or (4) in the case of a child, the education authority must seek and take account of the views of the child (unless the authority are satisfied that the child lacks capacity to express a view).”.

Section 6

Ken Macintosh

22 In section 6, page 8, line 37, after <plan),> insert—

<( ) after subsection (3)(d)(i) insert—}
“(ia) failure by the education authority to provide, or make arrangements for the provision of, the additional support (whether relating to education or not) identified by virtue of section 9(2)(a)(iii),

( )>

Ken Macintosh
23 In section 6, page 9, line 20, at end insert—

<(  ) In section 19(3) of the 2004 Act (powers of Tribunal in relation to reference) for “(d)(ii)” substitute “(d)(ia), (ii)”.

After section 7A

Margaret Smith
24 After section 7A, insert—

<Availability of information on additional support needs

Availability of information on additional support needs

After section 26 of the 2004 Act insert—

“26A Availability of information on additional support needs

The Scottish Ministers must report to the Scottish Parliament in each of the five years following the commencement of this section on what progress has been made in each of those years in ensuring that sufficient information relating to children and young persons with additional support needs is available to effectively monitor the implementation of this Act.”>

Margaret Smith
25 After section 7A, insert—

<Collection of data on additional support needs

Collection of data on additional support needs

After section 27 of the 2004 Act insert—

“27A Collection of data on additional support needs

(1) The Scottish Ministers must each year collect from each education authority information on—

(a) the number of children and young persons for whose school education the authority are responsible having additional support needs,

(b) the principal factors giving rise to the additional support needs of those children and young persons,

(c) the types of support provided to those children and young persons, and

(d) the cost of providing that support.

(2) The Scottish Ministers must publish the information collected each year under subsection (1).
(3) The Scottish Ministers may (after consulting such persons as they consider appropriate) by regulations specify the format in and method by which the information mentioned in subsection (1) is to be—

(a) provided to, and

(b) published by,

them.”.>

Section 7B

Mr Adam Ingram

14 Leave out section 7B
Education (Additional Support for Learning) (Scotland) Bill

Groupings of Amendments for Stage 3

This document provides procedural information which will assist members in preparing for and following proceedings on the above Bill. In this case, the information provided consists solely of the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted (including, for those amendments ruled to have a potential cumulative cost, the cost determined for each amendment. Where no cost is stated for an amendment, the cost has been ruled to be zero or de minimis).

The text of the amendments set out in the order in which they will be debated is not attached in this occasion as the debating order is the same as the order in which the amendments appear in the Marshalled List.

No amendments have been determined to have a significant cost. It was established at Stage 2 that amendments with costs totalling not over £300,000 could be agreed to without triggering Rule 9.12.6. The cost (as determined by the Presiding Officer) of the amendments agreed to at Stage 2 was £135,000. Amendments with costs totalling not over £165,000 can therefore be agreed to at Stage 3 without triggering Rule 9.12.6. As the total cost of all amendments ruled to have a potential cumulative cost is £165,000, proceedings may be taken on all of these amendments.

Groupings of amendments

Note: The time limits indicated are those set out in the timetabling motion to be considered by the Parliament before the Stage 3 proceedings begin. If that motion is agreed to, debate on the groups above each line must be concluded by the time indicated, although the amendments in those groups may still be moved formally and disposed of later in the proceedings.

Group 1: Provision other than educational provision for pre-school children
15, 16

Group 2: Deeming of specified children and young people as automatically having additional support needs
1, 2, 3, 3A, 3B, 17

Group 3: Provision of advocacy service
18

Notes on amendments in this group
Amendment 18 has been determined to cost £100,000

Debate to end no later than 45 minutes after proceedings begin
Group 4: Mediation services – independence from education authorities
19

Group 5: Dispute resolution – application to Scottish Ministers
20

Group 6: Publication of information – availability and content
4, 5, 6, 7, 8, 9, 10, 11, 12, 21

Group 7: Transition from school education – views of the child
13

Debate to end no later than 1 hour 25 minutes after proceedings begin

Group 8: Failure to provide additional support specified in co-ordinated support plan – reference to Tribunal
22, 23

Notes on amendments in this group
Amendment 22 has been determined to cost £65,000

Group 9: Information and data on additional support needs
24, 25

Group 10: Recovery of costs between authorities where pupil has additional support needs
14

Debate to end no later than 1 hour 55 minutes after proceedings begin
Note: (DT) signifies a decision taken at Decision Time.

**Education (Additional Support for Learning) (Scotland) Bill:** Bruce Crawford, on behalf of the Parliamentary Bureau, moved S3M-4184—That the Parliament agrees that, during Stage 3 of the Education (Additional Support for Learning) (Scotland) Bill, debate on groups of amendments shall, subject to Rule 9.8.4A, be brought to a conclusion by the time limits indicated, that time limit being calculated from when the Stage begins and excluding any periods when other business is under consideration or when a meeting of the Parliament is suspended (other than a suspension following the first division in the Stage being called) or otherwise not in progress:

Groups 1 to 3: 45 minutes
Groups 4 to 7: 1 hour 25 minutes Groups 8 to 10: 1 hour 55 minutes.

The motion was agreed to.

**Education (Additional Support for Learning) (Scotland) Bill – Stage 3:** The Bill was considered at Stage 3.

The following amendments were agreed to without division: 1, 3A, 3B, 3, 5, 6, 7, 9, 10, 21, 13, 22 and 23.

The following amendments were agreed to (by division)—

15 (For 69, Against 48, Abstentions 0)
16 (For 70, Against 47, Abstentions 1)
2 (For 79, Against 42, Abstentions 0)
18 (For 71, Against 48, Abstentions 0)
19 (For 73, Against 47, Abstentions 0)
20 (For 72, Against 47, Abstentions 0)
24 (For 73, Against 46, Abstentions 0)
25 (For 74, Against 46, Abstentions 0)
14 (For 77, Against 41, Abstentions 0).

The following amendments were disagreed to (by division)—

4 (For 49, Against 72, Abstentions 0)
8 (For 46, Against 73, Abstentions 2)
11 (For 47, Against 71, Abstentions 1)
12 (For 46, Against 69, Abstentions 1).

Amendment 17 was not moved.
Education (Additional Support for Learning) (Scotland) Bill: The Minister for Children and Early Years (Adam Ingram) moved S3M-4059—That the Parliament agrees that the Education (Additional Support for Learning) (Scotland) Bill be passed.

After debate, the motion was agreed to (DT).
The Presiding Officer (Alex Fergusson): The next item of business is consideration of motion S3M-4184, in the name of Bruce Crawford, on behalf of the Parliamentary Bureau, setting out a timetable for the stage 3 consideration of the Education (Additional Support for Learning) (Scotland) (Bill).

Motion moved,

That the Parliament agrees that, during Stage 3 of the Education (Additional Support for Learning) (Scotland) Bill, debate on groups of amendments shall, subject to Rule 9.8.4A, be brought to a conclusion by the time limits indicated, that time limit being calculated from when the Stage begins and excluding any periods when other business is under consideration or when a meeting of the Parliament is suspended (other than a suspension following the first division in the Stage being called) or otherwise not in progress:

Groups 1 to 3: 45 minutes
Groups 4 to 7: 1 hour 25 minutes
Groups 8 to 10: 1 hour 55 minutes.

— [Bruce Crawford.]

Motion agreed to.

The Presiding Officer (Alex Fergusson): The next item of business is stage 3 proceedings on the Education (Additional Support for Learning) (Scotland) Bill. In dealing with amendments, members should have the bill as amended at stage 2—SP bill 16A—the marshalled list and the groupings, which I have agreed.

The division bell will sound and proceedings will be suspended for five minutes for the first division this afternoon. The period of voting for the first division will be 30 seconds. Thereafter, I will allow a voting period of one minute for the first division after a debate and 30 seconds for all other divisions.

Section 5A—Additional support

The Presiding Officer: Amendment 15, in the name of Margaret Smith, is grouped with amendment 16.

Margaret Smith (Edinburgh West) (LD): The bill has been deemed necessary partly to restate some of the key messages of the Education (Additional Support for Learning) (Scotland) Act 2004 in the wake of various court judgments, one of which was a decision by Lord Wheatley. The Education, Lifelong Learning and Culture Committee was right to be concerned about that judgment, as it struck at one of the central features of the 2004 act: the definition of additional support needs. Lord Wheatley’s judgment restricted additional support to educational support offered in a teaching environment. However, as we know, a range of support is necessary to assist some children in accessing education. The code of practice lists a number of interventions—everything from social work support to psychiatric support.

I was pleased to support the Government’s amendment 7 at stage 2, which reiterated the intended definition of additional support.

Amendments 15 and 16 are based on the suggestion that was made in the joint submission from the Govan Law Centre, Scotland’s Commissioner for Children and Young People, Capability Scotland and many others that the bill’s provisions should cover not only section 1(3)(a) of the 2004 act, as amendment 7 at stage 2 did, but section 1(3)(b), which relates to early years provision, to ensure that they apply to children who are not based in school or who have a prescribed pre-school place. Those children are...
included in the original definition of additional support needs for a purpose.

Having spoken again to the various groups who supported the amendments previously, I know that they remain concerned that we could be leaving young children in their crucial early years at a disadvantage. For example, we might jeopardise early communication interventions by speech and language therapists and diminish the systems of preparation for pre-school and school education for children with special and additional needs.

The Govan Law Centre continues to argue strongly that an amendment to section 1(3)(b) of the 2004 act for pre-school children aged zero to three is really needed. Changing the definition of additional support for that group categorically would not require an authority to take responsibility for a child from age zero to three. However, it would ensure that, if they have that responsibility through the application of section 5 of the 2004 act, as amended by section 5D of the bill, which was inserted at stage 2, the additional support would not be confined to support in a classroom. That is obviously particularly important for under-threes.

Section 5 of the 2004 act provides that, for disabled children who are assessed as having additional support needs, the authority has a duty to provide such additional support as is appropriate. The authority then has to look at section 1 of the 2004 act to see what additional support means in the context of a child aged zero to three. At present, what they see in section 1 is reference only to “educational provision.” It makes less than no sense that additional support for school pupils is now not restricted to educational provision, but additional support for pre-schoolers is.

The Government’s approach at present removes the difficulties that were introduced by Lord Wheatley’s decision for pupils aged three to 18 but compounds them for children aged zero to three. It might even have the unintended effect of requiring education authorities to enrol disabled children at that young age in academic establishments, rather than allowing authorities to provide support in other, more appropriate contexts, such as at home or in health centres.

Amendment 15 is a technical amendment that will allow amendment 16 to be inserted properly. I urge colleagues to support amendments 15 and 16.

I move amendment 15.

The Presiding Officer: Before I call the Minister for Children and Early Years to respond, I remind members that if they wish to participate in the debate on any of the groups, they should press their request-to-speak buttons when the group is called.

I call Ken Macintosh.

Ken Macintosh (Eastwood) (Lab): Thank you for the reminder, Presiding Officer.

I add Labour’s support to amendments 15 and 16. It is important to remember that, although the 2004 act gave local authorities the power to address the needs of children from zero to three, it did not impose on them a duty to do that. Since 2004, we have found that, in practice, the needs of a number of children in that group have not been addressed or assessed.

I draw to members’ attention the needs of deaf children in particular, who are often diagnosed between the ages of zero and three.

Having accepted amendment 7, in the name of the minister, at stage 2, which addressed Lord Wheatley’s judgment, it is important that we transfer that to children aged zero to three, which is what amendments 15 and 16 do.

The Minister for Children and Early Years (Adam Ingram): It might be useful if I explain that the 2004 act currently requires an education authority to provide additional support to certain disabled children in their area who are under three years old. That duty applies where such children have been brought to the attention of the education authority as having, or appearing to have, additional support needs arising from a disability and the education authority establishes that they have such needs.

However, I do not believe that it is appropriate to place education authorities under the same statutory duty to make provision for disabled children under three as for children over three. It simply does not make sense for the same definition of additional support to apply to under-threes as that which will generally apply for those children for whom the authority has a responsibility from pre-school onwards.

That is because education authorities have completely different roles in relation to the different age groups of children. The role that education authorities can play to support disabled children who are under three is described—correctly—as that of educational support and is part of the early years framework, which recognises the right of all young children to high-quality relationships, environments and services that offer an holistic approach to meeting their needs. It is correct that a broader definition applies to children for whose school education the authorities have responsibility.

Approximately 200 severely disabled children are in the age range of zero to three and a high number who would be affected are less severely
disabled. Determining the costs exactly has not been possible, but one thing is certain: the proposed new duty will result in significant additional costs to education authorities. I reiterate that the effect of amendments 15 and 16 is that education authorities will take over a responsibility that is properly located with other agencies at the moment, so education authorities will incur extra costs but the children concerned will have no extra benefits.

The Presiding Officer: I call Margaret Smith to wind up.

Margaret Smith: I have nothing to add.

The Presiding Officer: Do you wish to press or withdraw amendment 15?

Margaret Smith: I will press amendment 15.

The Presiding Officer: The question is, that amendment 15 be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division. I suspend proceedings for five minutes.

14:41

Meeting suspended.

14:46

On resuming—

The Presiding Officer: We move to the division on amendment 15.

For

Aitken, Bill (Glasgow) (Con)
Baille, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Robert (Glasgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Carlaw, Jackson (West of Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craighie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glasgow Baillieston) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gillon, Karen (Clydesdale) (Lab)
Glen, Mairlyn (North East Scotland) (Lab)
Goldie, Annabel (West of Scotland) (Con)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Paisley South) (Lab)
Hume, Jim (South of Scotland) (LD)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Johnstone, Alex (North East Scotland) (Con)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John ( Roxburgh and Berwickshire) (Con)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
McArthur, Liam (Orkney) (LD)
McAvety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
McLeitchie, David (Edinburgh Pentlands) (Con)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mulligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
O’Donnell, Hugh (Central Scotland) (LD)
Oldfather, Irene (Cunninghame South) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nicol (Aberdeen South) (LD)
Stewart, David (Highlands and Islands) (Lab)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Tolson, Jim (Dunfermline West) (LD)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)

AGAINST

Adam, Brian (Aberdeen North) (SNP)
Allan, Alasdair (Westervis Isles) (SNP)
Brown, Keith (Ochill) (SNP)
Campbell, Aileen (South of Scotland) (SNP)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
FitzPatrick, Joe (Dundee West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Grahame, Christine (South of Scotland) (SNP)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Hepburn, Jamie (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Kidd, Bill (Glasgow) (SNP)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kelly (Edinburgh East and Musselburgh) (SNP)
MacDonald, Margo (Lothians) (Ind)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McMillan, Stuart (West of Scotland) (SNP)
Morgan, Alasdair (South of Scotland) (SNP)
Neil, Alex (Central Scotland) (SNP)
Paterson, Gil (West of Scotland) (SNP)
Robison, Shona (Dundee East) (SNP)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Somerville, Shirley-Anne (Lothians) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Jackie (Dunfermline East) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

The Presiding Officer: The result of the division is: For 69, Against 48, Abstentions 0.

Amendment 15 agreed to.

Amendment 16 moved—[Margaret Smith].

The Presiding Officer: The question is, that amendment 16 be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Robert (Glasgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Carlaw, Jackson (West of Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glasgow Baillieston) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gillon, Karen (Clydesdale) (Lab)
Glen, Martlyn (North East Scotland) (Lab)
Goldie, Annabelle (West of Scotland) (Con)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Harper, Robin (Lothians) (Green)
Henry, Hugh (Paisley South) (Lab)
Hume, Jim (South of Scotland) (LD)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Johnstone, Alex (North East Scotland) (Con)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Roxburgh and Berwickshire) (Con)
Livingstone, Marilyn (Kirkcaldy) (Lab)

Against

Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
McArthur, Liam (Orkney) (LD)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
Mclntee, David (Edinburgh Pentlands) (GL)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mulligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
O'Donnell, Hugh (Central Scotland) (LD)
Oldfather, Irene (Cunninghame South) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peatley, Cathy (Falkirk East) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elaine (Caithness and Chryston) (Lab)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nicol (Aberdeen South) (LD)
Stewart, David (Highlands and Islands) (Lab)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Tolson, Jim (Dunfermline West) (LD)
Whitton, David (Strathkelvin and Bearsden) (Lab)

AGAINST

Adam, Brian (Aberdeen North) (SNP)
Allan, Alasdair (Western Isles) (SNP)
Brown, Keith (Ochil) (SNP)
Campbell, Aileen (South of Scotland) (SNP)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Rosanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabian, Linda (Central Scotland) (SNP)
FitzPatrick, Joe (Dundee West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Grahame, Christine (South of Scotland) (SNP)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Hepburn, Jamie (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Kidd, Bill (Glasgow) (SNP)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McMillan, Stuart (West of Scotland) (SNP)
Morgan, Alasdair (South of Scotland) (SNP)
Neil, Alex (Central Scotland) (SNP)
Paterson, Gil (West of Scotland) (SNP)
Robison, Shona (Dundee East) (SNP)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Somerville, Shirley-Anne (Lothians) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

**ABSTENTIONS**
MacDonald, Margo (Lothians) (Ind)

**The Presiding Officer:** The result of the division is: For 70, Against 47, Abstentions 1.

**Amendment 16 agreed to.**

**Section 5C—Additional support needs etc: specified children and young people**

**The Presiding Officer:** Amendment 1, in the name of the minister, is grouped with amendments 2, 3, 3A, 3B and 17.

**Adam Ingram:** The bill, as amended at stage 2, requires authorities to treat all children and young people who fall into a number of specified categories as having additional support needs, regardless of whether they need additional support in order to benefit from school education. Many authorities and stakeholders, such as Children in Scotland, share the opinion that the provision will categorise children as having additional support needs when they do not, in fact, require additional support.

That said, I acknowledge that looked-after children and young people are a unique group—a group that does not fare as well educationally as others do. However, the bill omits the group of looked-after children who have the lowest educational attainment: those who are looked after at home. Our amendments in the group will rectify the situation.

The Scottish Government accepts and shares the concern of the Education, Lifelong Learning and Culture Committee on the position of the groups of children who are identified under section 5C of the bill. I thank Margaret Smith and the Liberal Democrats for their helpful suggestion that we create a working group to consider how the 2004 act is working for those groups of children and young people. I am more than happy to take on board Ms Smith’s suggestion and to establish such a group urgently to examine how the act is affecting the groups of children that are specified in section 5C. The working group will report in due course, and we will act on its recommendations. I therefore urge Parliament to support amendment 2, which will delete all the other categories of children that are contained in section 5C, and amendment 1, which will extend the provisions of the bill to encompass all looked-after children.

Amendment 3 makes it clear that, where a child or young person does not require additional support in order to benefit from education, the bill’s presumption that they have additional support needs will be rebutted. I assure Margaret Smith in particular that amendment 3 will not delete the deeming provision. Education authorities will still have to start from the assumption that such children have additional support needs, and they will still have to assess each child individually. The amendment will, however, remove the potential absurdity of authorities being under a duty to deliver additional support to children and young people who do not have additional support needs.

I understand the rationale behind amendments 3A and 3B and note that they relate only to looked-after children. I trust that that is the case because the Liberal Democrats are supportive of amendments 1 and 2 in my name, which would remove the other specified categories of children who are deemed to have additional support needs. I welcome that support.

I regret that I am unable to support amendment 17, because it is confusing and legislatively unnecessary. The amendment picks out only one reference to children with additional support needs in the whole 2004 act. Its effect would be that other references to "children and young people having additional support needs" in the 2004 act would not include those who are deemed to have additional support needs. Without a similar provision for every other such reference in the bill, practitioners would be left to assume that those other references did not include children who are deemed to have additional support needs. Clearly, that is not the intention of the amendment.

I ask Parliament to support amendments 1, 2 and 3, offer my support to amendments 3A and 3B, in the name of Margaret Smith, and ask Margaret Smith not to move amendment 17.

I move amendment 1.

**Margaret Smith:** The group contains a number of important amendments. Amendments 1, 3A, 3B and 17 relate to looked-after and accommodated children. Members will be aware that I argued successfully at stage 2 that accommodated children should be deemed to have ASN. After our evidence taking and from our work as MSPs, all of us are aware of the particular challenges that looked-after children face. Time and again, they are let down by the system and by those of us who are meant to be responsible for them.

The needs of looked-after children were highlighted in a number of submissions, including...
those from the Govan Law Centre and the president of the Additional Support Needs Tribunals for Scotland. Often they have been let down by their parents. Some will say that it is—because of the getting it right for every child policy and the inclusive nature of the 2004 act—wrong to pick out and give prominence to any one group of children, but I believe that looked-after children and young people are a different and unique group. Such children have no parents, or their parents are unable or unwilling to care for them. They find themselves with another parent—the local authority, which is often the gatekeeper to services. I want to ensure that no local authority is tempted to short-change any looked-after child and that no council official is tempted, because of departmental circumstances, not to ask for an assessment or a co-ordinated support plan for such children.

My stage 2 amendment covered, for the reasons that I have outlined, looked-after and accommodated children who live away from their parents, to allow them by virtue of their status to be treated as children with additional support needs. Amendment 1, in the name of the minister, includes looked-after children who remain at home. Rightly, the minister said that the evidence shows that those children tend to have the worst educational attainment. I am therefore happy to accept the extension of the provision to include all looked-after and accommodated children.

The minister’s amendment 3 deals with the possibility that some looked-after children will not require any additional support. If we do not amend amendment 3, however, it could create a loophole whereby councils could make decisions without proper assessment or investigation of the individual child.

It was always my intention that there should be assessment of needs, and that councils should retain discretion over the additional support that is delivered following assessment. In response to ministerial concerns, I was pleased to lodge amendments 3A and 3B, which I believe to be reasonable amendments that would make the situation clear.

Amendment 2, in the name of the minister, is crucial. It is fair to say that Ken Macintosh’s stage 2 amendment, which added lines to the bill in this regard, reflected real concerns about the implementation of the 2004 act. Those concerns were shared by us all on the Education, Lifelong Learning and Culture Committee, by parents and by many of the organisations that gave us written and oral evidence. Judging from the evidence that we heard, thousands of children and young people whom we would expect to have co-ordinated support plans do not have them. Her Majesty’s Inspectorate of Education identified particularly looked-after children, carers and young people with mental disorders as missing out in that regard. The National Deaf Children’s Society identified deaf, partially deaf, blind and partially sighted children as being similarly overlooked.

There are two strong arguments before us: they are arguments between the philosophical and the pragmatic. On one hand is the principled position of universality and the inherent dangers of setting up a hierarchy. Supporters of that position will point to what they say is the visionary aspect of the 2004 act, and they will highlight the point of that act as being to extend new rights to all children with additional needs. There is a real strength to that argument.

On the other hand, it is clear—five years on from the 2004 act—that there are particular problems with its implementation. There is widespread variation in how the act has been put into practice and I am sure that all of us in the chamber are aware of those problems.

At stage 2, the minister provided details about a range of work that was being undertaken with the groups of children and young people who are covered in section 5C, lines 7 to 14, of the bill as amended at stage 2—namely: young carers, those with mental disorders, children who are deaf, who are blind and so on. That is laudable, but I do not believe that it goes far enough, which is why I have called on the minister to go further and to set up a working group to consider, particularly and specifically, how the needs of those children and young people whose cases have been raised before us are being dealt with. I hope that the group’s work will lead to real improvements for many of our most vulnerable children. I am pleased that the minister feels able to accept that request on our behalf and I welcome the assurances that he has given about setting up a working party specifically to consider the groups that have been identified.

The 2004 act has clearly failed to deliver for many children, so we owe it to them to address that now. The minister said that amendments in this respect are contrary to the inspirational backdrop of the 2004 act but, for the past five years, many local authorities have acted in a way that is totally and utterly counter to the inspirational backdrop that we all supported.

Margo MacDonald (Lothians) (Ind): Could the member explain why local authorities have taken that action? Is it purely financial, or is there another reason?

Margaret Smith: Most of the evidence that the committee took suggested that financial imperatives play a large part in many decisions. Five years on from the passage of the 2004 act, we are about 11,000 young people adrift from the
number of co-ordinated support plans that we would expect to be in place, and many other effects of the act have not happened as expected.

There comes a point at which Parliament must underline the circumstances in which we think action needs to be taken. As I said previously, this is a struggle between the philosophical and the pragmatic. By instinct, I am a pragmatist. I have sought and received assurances from the minister that a fresh look at the matter will be taken through the setting up of a working party on the particular groups that I have mentioned. That allows me to accept the minister’s amendment 2.

I accept that amendment 17 might lead to confusion, so I will be happy not to move it.

Ken Macintosh: I ask members to vote against the minister’s amendment 2. At stage 2, the Education, Lifelong Learning and Culture Committee was able to agree on a range of measures, establishing the rights of looked-after and accommodated children, young carers, children with mental disorders and children with sensory impairments to an assessment of their needs—just an assessment.

I should say in passing that it is—to put it mildly—frustrating to have amendments that were agreed in committee being removed by massed whipped votes in the chamber at stage 3.

15:00

David McLetchie (Edinburgh Pentlands) (Con): That is a new thing—[Laughter.]

The Presiding Officer: Order.

Ken Macintosh: I seem to have hit a raw nerve—[Interruption.]

Mr Frank McAveety (Glasgow Shettleston) (Lab): I hear guilty voices.

Ken Macintosh: Absolutely.

The minister suggested that by identifying a vulnerable group of youngsters we will somehow undermine the principle of the 2004 act, but he went on to agree that accommodated children require to be so identified. Indeed, he went further and proposed that we add to the list children who are looked after at home. The minister has undermined his whole argument. It is difficult not to conclude that his calculations have less to do with principle than with the fact that the Conservatives, Lib Dems and Labour all voted for the inclusion of those groups at stage 2—

The Minister for Parliamentary Business (Bruce Crawford): Shame.

Ken Macintosh: Shame on the Government for trying to remove groups from the list.

As I argued at stage 2, I accept that in an ideal world we would not have such a list. That was our approach in the 2004 act. However, five years later, we are trying to amend the 2004 act with the benefit of experience, and experience tells us that looked-after and accommodated children, young carers and children with mental disorders are not benefiting from the legislation as fully as they might.

Margo MacDonald: I have an open mind on the matter and came to the debate to learn about it, so I hope that members will indulge me. If local authorities have been excluding the groups of children and young people that Ken Macintosh mentioned, why does he think that those groups’ inclusion in the bill will make local authorities more likely to include them in the future?

Ken Macintosh: That is because local authorities will be under a statutory obligation to do so—they will have to assess the needs of those groups. Currently, many children are not even being assessed. It is not that they do not get a CSP; they are not even assessed.

I refer Margo MacDonald to the helpful briefing from Govan Law Centre, the National Deaf Children’s Society, the Scottish Association for Mental Health, the Royal National Institute for the Blind Scotland and others, which highlights the evidence. For example, in 2007 HMIE reported that only

“A few education authorities were beginning to address mental health issues in children ... A few authorities had also recognised the need to look at the effectiveness of provision for young carers and the provision of local young carer support. However, this process was at an early stage of development.”

I do not want to repeat evidence from the National Deaf Children’s Society that I have quoted at length, on the underachievement of deaf children and children who have sensory impairments. I will at least refer members to the evidence in the report that was published this week by the University of Edinburgh, which found that no form of support plan is in place for 26 per cent—more than a quarter—of identified severely to profoundly deaf pupils.

Christina McKelvie (Central Scotland) (SNP): What will happen to kids who are not on the list, such as kids who are suffering from grief or family breakdown?

Ken Macintosh: As Christina McKelvie knows, the bill reaffirms the right of every child to have an assessment. We identified a range of particularly vulnerable groups. It is absolutely wrong to assert, as Ms McKelvie seemed to do, that by highlighting the needs of some children we are somehow demoting others. If that is the case, why is the minister highlighting the needs of looked-after and
accommodated children? How can he pick out the needs of looked-after and accommodated children and ignore the needs of young carers and children who have mental disorders, even though the Government's inspectorate found that such children have particular needs, which should be identified?

It is simply absurd to argue, as the minister tried to do, that we are forcing local authorities to provide support to children who do not need it. The suggestion that that will happen as a result of the bill is laughable.

I look forward to hearing more from the minister about the working group that Margaret Smith mentioned. I am sure that all members will welcome the group. The bill will not be the last word on the implementation of the legislation.

A parent said, “A vote for amendment 2 is a vote for the status quo.” I urge all members to reject amendment 2 and to support the other amendments in the group.

Elizabeth Smith (Mid Scotland and Fife) (Con): As was the case with the 2004 act, the ethos of the bill is to provide adequate and relevant support to children with additional support needs. It is not the intention to provide that support where no such need exists or to introduce legislation the consequence of which would be to leave out certain categories of children who have additional support needs but whose disability is not covered by a specific legislative definition.

Since stage 2, various legal issues have arisen in that connection. Amendment 2 addresses those issues and the possibility of unintended discrimination, and seeks to preserve one of the fundamental principles of the 2004 act, which is why the Scottish Conservatives will support it.

Adam Ingram: I will clarify some points. The stage 2 amendment arrived in the bill although there was no majority on the committee; rather, it was approved by the convener's casting vote. In those circumstances, I am perfectly entitled to bring the issue back to Parliament.

I will summarise the effect of the amendments in the group. They will have the combined effect of deeming all looked-after children to have additional support needs, but will relieve education authorities of the requirement to meet needs that do not exist, the fact of their existence having been established only after appropriate assessment. It is important to recognise that looked-after children are in a unique position because it is perceived that local authorities have a conflict of interests as corporate parents on the one hand and as providers of services on the other. That defines the uniqueness of looked-after children and why they deserve to be covered in the bill.

Ken Macintosh: Why will the minister not, therefore, address the needs of young carers, who often look after their own parents?

Adam Ingram: I have already indicated that we will address the needs of young carers in the working group that I have agreed with Margaret Smith to set up. Young carers are already covered by the 2004 act, as are all other groups of children who have additional support needs.

Amendment 2 will remove the additional categories of children that Mr Macintosh placed in the bill at stage 2. We do not want to establish a hierarchy of needs, in which some groups of children with additional support needs are prioritised over others, which is what will happen if local authorities have statutory obligations in respect of specific groups of children. That would undermine the inclusive ethos of the 2004 act.

Robert Brown (Glasgow) (LD): Does the minister accept that the committee received substantial evidence of recalcitrance—I cannot describe it any less strongly—in some local authorities on that point? The issue is enforcement rather than legislative change. Will he undertake to deal with enforcement against those councils and improvement of the service as central issues for the working group that is to be set up?

Adam Ingram: I certainly undertake to do that. After the bill is passed—as, I hope, it will be—we will return to the code of practice and guidance to local authorities on implementing the bill’s provisions. We can, in those, certainly address the issues that Robert Brown has raised and we can cover them in the working group that I have undertaken to set up.

Amendment 1 agreed to.

Amendment 2 moved—[Adam Ingram].

The Presiding Officer: The question is, that amendment 2 be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

FOR
Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Allan, Alasdair (Western Isles) (SNP)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Keith (Ochil) (SNP)
Brown, Robert (Glasgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Campbell, Aileen (South of Scotland) (SNP)
Carlaw, Jackson (West of Scotland) (Con)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)

AGAINST
Aitken, Bill (Glasgow) (Con)
Allan, Alasdair (Western Isles) (SNP)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Keith (Ochil) (SNP)
Brown, Robert (Glasgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Campbell, Aileen (South of Scotland) (SNP)
Carlaw, Jackson (West of Scotland) (Con)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Finnie, Ross (West of Scotland) (LD)
FitzPatrick, Joe (Dundee West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Goldie, Annabel (West of Scotland) (Con)
Grahame, Christine (South of Scotland) (SNP)
Harper, Robin (Lothians) (Green)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Hepburn, Jamie (Central Scotland) (SNP)
Hume, Jim (South of Scotland) (LD)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Kidd, Bill (Glasgow) (SNP)
Lamont, John (Roxburgh and Berwickshire) (Con)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
MacDonald, Margo (Lothians) (Ind)
Marwick, Tricia (Central Fife) (SNP)
Mathieson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McArthur, Liam (Orkney) (LD)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McLetchie, David (Edinburgh Pentlands) (Con)
McMillan, Stuart (West of Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Morgan, Alasdair (South of Scotland) (SNP)
Neil, Alex (Central Scotland) (SNP)
O'Donnell, Hugh (Central Scotland) (LD)
Paterson, Gil (West of Scotland) (SNP)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Etrick and Lauderdale) (LD)
Robison, Shona (Dundee East) (SNP)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Somerville, Shirley-Anne (Lothians) (SNP)
Stephen, Nicola (Aberdeen South) (LD)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Tolson, Jim (Dunfermline West) (LD)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

AGAINST

Alexander, Ms Wendy (Paisley North) (Lab)
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)

Butler, Bill (Glasgow Anniesland) (Lab)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glasgow Baillieston) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Foulkes, George (Lothians) (Lab)
Gillies, Karen (Clydesdale) (Lab)
Glen, Marilyn (North East Scotland) (Lab)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Paisley South) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mulligan, Mary (Linthgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Oldfather, Irene (Cunninghame South) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Stewart, David (Highlands and Islands) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)

The Presiding Officer: The result of the division is: For 79, Against 42, Abstentions 0.

Amendment 2 agreed to.

Amendment 3 moved—[Adam Ingram].

Amendments 3A and 3B moved—[Margaret Smith]—and agreed to.

Amendment 3, as amended, agreed to.

Amendment 17 not moved.

After section 5D

The Presiding Officer: Amendment 18, in the name of Claire Baker, is in a group on its own.

Claire Baker (Mid Scotland and Fife) (Lab): I am delighted to speak to amendment 18, on the provision of advocacy services during a tribunal. I would have preferred to lodge an amendment on the provision of support services and advocacy, because it is clear that action needs to be taken in both those areas. If there was greater availability and uptake of support services, there would be less need for advocacy services at tribunal. However, I have been limited by the bill’s financial restrictions, so amendment 18 focuses solely on the provision of advocacy services.
Amendment 18 is a simple amendment that would place a duty on ministers to secure provision of an advocacy service that would be available free and on request for tribunal proceedings. It addresses the anomaly that although the 2004 act created the right to advocacy, it did not create an accompanying duty on anyone to ensure the delivery of, or access to, advocacy services. Amendment 18 is supported by a range of bodies, including Independent Special Education Advice (Scotland) and Children in Scotland.

During stage 1, the committee heard evidence of the increasingly adversarial nature of some tribunals and of the need for parents and young people to be properly supported during the process. Amendment 18 would begin to level the playing field, particularly for those without the financial resources to hire an advocate. Ensuring the provision of an advocacy service that is available on request and free of charge to all parents is an important right that should be introduced to the bill. The provision of mediation and dispute resolution is in the 2004 act, and the opportunity should be taken with this bill to include the provision of advocacy services. At stage 1, the minister recognised the importance of advocacy services, saying:

“...I want to ensure that parents have access to advocacy.”—[Official Report, Education Lifelong Learning and Culture Committee, 21 January 2009; c 1905.]

During discussions at stage 2, the minister explained how the Government would achieve that:

“...I am committed to establishing a representative advocacy service at tribunals for all parents and young people throughout Scotland. I propose the allocation of £100,000 per annum for a service to represent and/or support parents and young people effectively at tribunals.”—[Official Report, Education, Lifelong Learning and Culture Committee, 22 April 2009; c 2194.]

Amendment 18 will deliver a service to which the minister has already committed in principle and financially. I believe that it is important that that commitment be secured within the bill to give certainty and security to parents and young people who require advocacy services.

I move amendment 18.

The Presiding Officer: The amendment will be moved later.

Margaret Smith: I very much welcome amendment 18 and its focus on the need for advocacy support for parents and young people at tribunals. A case can be made for the need for advocacy services prior to that stage, so that parents can be supported earlier in the process and, indeed, so that disputes might not make it through to the level of a tribunal. However, all of us at committee, whether we liked it or not, were acutely aware of the costs involved in various amendments to the bill. I believe that amendment 18 strikes the correct balance.

The committee sought to achieve a greater balance of arms for tribunals between parents on the one hand and local authorities on the other, many of which employ lawyers and some of which employ Queen’s counsels to argue their cases at tribunal. Amendment 18 and its projected funding requirement of £100,000 mirror a commitment that the minister made at stage 2 to invest that amount in tribunal advocacy services. I believe that it will represent valuable support to parents at what can be an incredibly stressful time. I thank Claire Baker for bringing the issue back before us at stage 3. She has been tenacious in her quest.

15:15

Adam Ingram: Frankly, I am surprised that amendment 18 has been lodged, given my discussion with the committee at its evidence-gathering session on 22 April. It appears that commitments given by me as a Scottish Government minister have been discounted. That causes me some concern. The undertaking that I have given is to establish a representative advocacy service at tribunals for all parents and young people throughout Scotland. I also advised that I expected that the service would help parents and young people with independent adjudication and with other remedies that are open to them to resolve disputes with education authorities. Amendment 18 is somewhat narrower, as it would exclude any help with other dispute resolution mechanisms.

Furthermore, I have concerns about the definition of “advocacy service” that is contained in amendment 18. The definition makes no mention of empowering parents or young people to speak up for themselves to secure their rights. I know that a number of advocacy providers share my concern about that.

Therefore, I ask Ms Baker to withdraw amendment 18 and to rely instead on the undertaking that I have given.

The Presiding Officer: I apologise to Ms Baker, who was quite right to move amendment 18 when she did. I ask her to wind up the debate.

Claire Baker: As I said in my earlier comments, amendment 18 is supported by Children in Scotland, ISEA and a range of other organisations.

I accept that the minister supports the provision of advocacy services for the tribunal process and that he is committed to delivering such services, but I believe that the best way to secure that commitment and to provide the service with the
certainty that it deserves is to translate that commitment into the bill.

I am afraid to say that we have seen too many organisations lose political support and funding when priorities change. I believe that advocacy services for parents and young people at tribunals should not be left vulnerable to that possibility.

I will press amendment 18.

The Presiding Officer: The question is, that amendment 18 be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

**For**

Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, John (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brand, Karon (Midlothian) (Lab)
Brookbank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Robert (Glasgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Carlaw, Jackson (West of Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glasgow Baillieston) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
Foukes, George (Lothians) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gillan, Karen (Clydesdale) (Lab)
Glen, Marilyn (North East Scotland) (Lab)
Goldie, Annabel (West of Scotland) (Con)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Harper, Robin (Lothians) (Green)
Henry, Hugh (Paisley South) (Lab)
Hume, Jim (South of Scotland) (LD)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Johnstone, Alex (North East Scotland) (Con)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Roxburgh and Berwickshire) (Con)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springfield) (Lab)
McArthur, Liam (Orkney) (LD)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McInnes, Alison (North East Scotland) (LD)
McLetchie, David (Edinburgh Pentlands) (Con)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeil, Pauline (Glasgow Kelvin) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Mulligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
O'Donnell, Hugh (Central Scotland) (LD)
Oldfather, Irene (Cunninghame South) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peatle, Cathy (Falkirk East) (Lab)
Purvis, Jeremy ( Tweeddale, Ettrick and Lauderdale) (LD)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nicol (Aberdeen South) (LD)
Stewart, David (Highlands and Islands) (Lab)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Tolson, Jim (Dunfermline West) (LD)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)

**Against**

Adam, Brian (Aberdeen North) (SNP)
Allan, Alasdair (Western Isles) (SNP)
Brown, Keith (Ochil) (SNP)
Campbell, Alieen (South of Scotland) (SNP)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabian, Linda (Central Scotland) (SNP)
FitzPatrick, Joe (Dundee West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Graham, Christine (Inverclyde) (SNP)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Hepburn, Jamie (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Kidd, Bill (Glasgow) (SNP)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
MacDonald, Margo (Lothians) (Ind)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McMillan, Stuart (West of Scotland) (SNP)
Morgan, Alasdair (South of Scotland) (SNP)
Neil, Alex (Central Scotland) (SNP)
Paterson, Gil (West of Scotland) (SNP)
Robison, Shona (Dundee East) (SNP)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Somerville, Shirley-Anne (Lothians) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thomson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)
The Presiding Officer: The result of the division is: For 71, Against 48, Abstentions 0.

Amendment 18 agreed to.

The Presiding Officer: Amendment 19, in the name of Karen Whitefield, is in a group on its own.

Karen Whitefield (Airdrie and Shotts) (Lab): The purpose of amendment 19 is to ensure the provision of independent mediation at local authority level. Although there are some excellent examples of the provision of mediation in some local authorities, evidence suggests that the fact that some councils provide mediation services internally has led to poor take-up because of concerns about how independent such services are. Parents often need mediation when a dispute arises between them and the local authority. Concerns have also been raised with the committee that some local authorities have made little or no provision for mediation.

Kenny Gibson lodged a similar amendment at stage 2 but chose to withdraw it because of a technical drafting issue. The committee agreed to his withdrawing it, but it was believed that it would be resubmitted at stage 3. Amendment 19 is a redrafted version of Kenny Gibson’s stage 2 amendment. Account has been taken of the drafting problem that the minister highlighted at stage 2. As Mr Gibson said at the time, we need to ensure that there is no postcode lottery for mediation services.

There is no evidence whatever to suggest that some councils provide mediation services free of charge to parents and young people, as the 2004 act provides.

Accordingly, I ask Karen Whitefield to withdraw amendment 19.

Karen Whitefield: I listened carefully to the minister’s comments. Although he suggests that there is no evidence that there is a problem with the mediation services that Scotland’s 32 local authorities provide, the Education, Lifelong Learning and Culture Committee heard from a number of organisations that expressed particular concerns about the impartiality and independence of mediation services.

No one doubts the commitment of those people who work in the mediation services that local authorities offer internally, but the point is about independence. It is essential that parents who seek mediation services have confidence in the system. Given that such parents are often in dispute with their local authority, they can have confidence in the system only if those mediation services are delivered independently. Therefore, I have no intention of withdrawing amendment 19.

The Presiding Officer: The question is, that amendment 19 be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Bailie, Jackie (Dunbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Robert (Glasgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Carlaw, Jackson (West of Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glasgow Baillieston) (Lab)
Eddie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
Foulkes, George (Lothians) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gillon, Karen (Clydesdale) (Lab)

Against
Adam Ingram: Amendment 19 would prevent a mediation service from being provided by anyone who had any involvement in the exercise by a local authority of any of its functions, regardless of whether or not those functions related to education, by redefining the circumstances in which mediation services are to be regarded as independent. Ms Whitefield has confirmed that the aim of amendment 19, as with the amendment that Kenneth Gibson lodged at stage 2, is to prevent authorities from using in-house mediators and to require those authorities that currently provide an in-house mediation service to employ an independent mediation service provider. We understand that at least two authorities deliver in-house mediation services.

There is no evidence whatever to suggest that in-house mediation services are in any way less effective or of a lower standard than mediation that is provided by an independent mediation service provider. To prohibit those authorities that have taken steps to put such a service in place from maintaining that service without any evidence that such a step would improve provision appears to me to be illogical and a rather negative development. I firmly believe that the mediation services for which the 2004 act provided are well regarded by all parents and that, in this instance, we in the Scottish Parliament should leave it to each education authority to decide the precise details of how it provides such services. Our role is to ensure that mediation services are provided free of charge to parents and young people, as the 2004 act provides.

Accordingly, I ask Karen Whitefield to withdraw amendment 19.
I believe that all members want a reduction in conflict between parents and local authorities, and for cases to be settled long before they reach the conflict between parents and local authorities, and should hold on.

Ken Macintosh: Amendment 20 was suggested by ISEA. It deals with the problems that parents have encountered when trying to access dispute resolution. As members will know, at the moment when a parent or a young person wishes to refer their case to dispute resolution, they direct their recourse then for families is to take out what is called a section 70 complaint, which, as we are all aware, takes months. Even worse, if parents do not know about section 70, the complaint goes nowhere.

ISEA estimates that, in the five years since the passage of the 2004 act, between 20 and 25 parents have managed to access dispute resolution. However, on the upside, in the cases in which ISEA has been involved, there have been successful outcomes. That is something that we should hold on to.
tribunal stage. Amendment 20 will enable parents to lodge their complaint directly with Scottish ministers. That will not only address the problem of one party to the dispute being the gatekeeper to the resolution process but allow the process to be more widely publicised. If the amendment is accepted, there will be one central point and one address to write to—information easy to distribute to parents.

As Mr Gibson argued at stage 2, what is proposed will make it easier to obtain an independent adjudication, and will therefore enhance the rights of parents and young people. It will also provide a more accurate picture of how many such references are made and received. Most important, it will remove the delays and problems that many parents experience, and it will increase parental confidence.

When dealing with a similar amendment from Mr Gibson at stage 2, the minister queried the use of the phrase “in the first instance”. Those words have been removed, which I hope makes the amendment more acceptable to all and more palatable to the minister.

At stage 2, the minister welcomed the advantages that the amendment then being considered would bring in that the Scottish Government would be alerted to any applications for dispute resolution and to any breach of timescales by a local authority. The minister then suggested that he would consider how to take the matter forward. I would welcome his thoughts on the problems that ISEA has identified with dispute resolution and, in particular, on the proposal before us in amendment 20.

I move amendment 20.

Adam Ingram: Amendment 20 provides that regulations as to dispute resolution may require that, where a parent or young person makes an application for dispute resolution, that application must be made to the Scottish ministers instead of—as at present—the local education authority.

As I made clear at stage 2, I appreciate that authorities can sometimes be tardy when it comes to contacting the Scottish ministers to nominate an independent adjudicator. That is simply unacceptable. To address that, I said that I would issue a direction under section 27(9) of the 2004 act to direct authorities to comply with the relevant timescales that are laid down in the regulations.

I recognise that it may be beneficial for the Scottish ministers to be alerted to the fact that a parent has submitted an application for dispute resolution, as that would enable Scottish ministers to contact authorities directly on a case-by-case basis where it is thought that an authority may be in breach of the relevant timescales. However, it is vital that any new process that we introduce is as easy as possible for parents. Most parents, particularly those located in the more remote areas of the country, would prefer to be able simply to visit or to send a reference to their local council offices rather than to have to write to the Scottish ministers in Edinburgh with all the details of their case.

The Government does not claim that we have no role in the process. We have a role, but it is not the one that is proposed in amendment 20. Surely, the issue is about what individual parents want and the access that they have to their local providers. Our role is to support the process without getting in the way of it. Accordingly, I do not consider amendment 20 to be a good solution to the issue, so I ask Ken Macintosh to seek to withdraw it.

15:30

Ken Macintosh: The minister has approached the issue in a serious manner and has offered an alternative way of dealing with it. The issue is a moot point. The trouble is that, in the five years for which we have had the dispute resolution process, it has not worked very well. We are not talking about a huge number of cases. The minister argues that it is easier and simpler for parents to go to the local authority. He also talked about what parents want. I suggest that it is probably easier and simpler for parents to go straight to the minister, and we know that that is what they want, because they have told us that through organisations such as ISEA. Although I acknowledge fully that the minister means well and has suggested an alternative, the simple question is whether we want parents to go to local authorities or through the minister. I think that they should apply to the minister. On that basis, I will press the amendment.

The Presiding Officer: The question is, that amendment 20 be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

FOR

Allan, Bill (Glasgow) (Con)
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Robert (Glasgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Carlaw, Jackson (West of Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glasgow Baillieston) (Lab)
Eddie, Helen (Dunfermline East) (Lab)
Amendments 5 and 6 will focus the range of information on subjects that are of relevance to children and young people with additional support needs. That will allow parents to request further information on subjects that are of relevance to their child. The amendment also provides that information on how to access all of the section 26 information that they publish under section 5 to 12 and 21. The Presiding Officer: The result of the division is: For 72, Against 47, Abstentions 0.

Amendment 20 agreed to.

Section 5E—Provision of published information to certain persons

The Presiding Officer: Amendment 4, in the name of the minister, is grouped with amendments 5 to 12 and 21.

Adam Ingram: Amendment 4 will place authorities under a duty to ensure that a summary of the information that they publish under section 26 of the 2004 act is provided to parents of children and young people with additional support needs. That will allow parents to request further information on subjects that are of relevance to their child. The amendment also provides that information on how to access all of the section 26 information should be sent to parents of children and young people with additional support needs. I emphasise that that will not allow authorities simply to provide a signpost to information in isolation, as the signpost will have to be accompanied by the summary.

Amendments 5 and 6 will focus the range of parents and young persons to whom authorities are required to send the information that is published under section 26 of the 2004 act by
linking it to those children and young persons with additional support needs

“for whose school education the authority are responsible”.

Amendment 7 is a technical amendment that will tidy up a drafting ambiguity in section 5E. The amendment makes it clear that the test that authorities are to use in establishing whether a young person lacks capacity relates solely to the young person’s ability to understand the information that is published under proposed new section 26(1)(d) in the 2004 act.

Amendments 4 to 7 will strike a better balance. They will enable parents and young people to access the information that they require in an environmentally friendly way and, in so doing, will remedy a totally disproportionate obligation on authorities that would result in a lot of wasted time, money and paper.

Amendments 8 to 10 are technical amendments to put the bill in a better order. Incidentally, amendments 4 and 8 are in no way related.

Amendment 11 focuses the places in which the summary of information that is published under section 26 of the 2004 act should be available by linking that to schools under the management of the authority.

Amendment 12 focuses the schools that must include the summary in their handbooks, publications or websites by linking that to schools under the management of the authority.

Amendments 8 to 12 will create a more practical and proportionate section 5F.

Amendment 21 enables the Scottish ministers to make an order specifying certain persons from whom parents and young people can obtain further advice, information and support in relation to additional support needs, including support and advocacy services under section 14 of the 2004 act. It places local authorities under a duty to publish information on those persons. I very much welcome the amendment and will ensure that we consult on the persons who are to be listed in orders.

I ask Parliament to support amendments 4 to 12 and I also offer my support for amendment 21, in the name of Margaret Smith. I move amendment 4.

Margaret Smith: Amendment 21 builds on an amendment that I brought to the committee at stage 2. It seeks to add to the information that councils give to parents about local advice, support and advocacy services by including other nationally specified bodies from which people can get information and support, and it ensures that those bodies should be specified by ministers. The intention is to name national bodies that are specified by the Government, from time to time, as organisations that will provide information nationally. It is clear that we cannot, at any given time, put the names of such organisations into legislation or regulations. The amendment is a way of ensuring that, when a national body gives information that is supported by the Government, that information is made available to people. I have redrafted the amendment to make it clear that that will sit alongside the information that is already given out by councils and will not supplant it.

I will comment on amendments 11 and 12, picking up on some difficulties for Scotland’s disabled children. Parents, children and young people should have access to ASN summary information in more places than just schools, given the importance of partnership nurseries, learning centres and family centres.

Margo MacDonald: Will the member give way?

Margaret Smith: No.

Information should be provided in the widest range of settings so that it has the widest possible reach to affected children and their families. There is a concern that amendment 11 would limit the provision of information on ASN simply to schools that are run by local authorities.

Moreover, as some local authorities place children with ASN in independent special schools but retain a responsibility for their education, it follows that families with children at such schools should be able to access information about ASN. To deny them such access would be a disproportionate disbenefit arising from the attempt to prevent private schools from benefiting from local authority information. Accordingly, amendment 12 is also unhelpful if we are seeking to ensure that all children with ASN and their parents are provided with the appropriate information regardless of where they access that information.

Ken Macintosh: I echo Margaret Smith’s concerns on the amendments. We have debated the provision of information at length in committee and it troubles me slightly that we are returning to the same arguments today. It was agreed by majority view in the committee that we do not want parents to be signposted to where the information is on display. We do not want them to be pointed in the direction of the local library. We want the information—even if it is only a summary of the information—to be given to parents in person. The issue is far too important to leave it to parents to find their way through the morass of information that is already available.

Margo MacDonald: I hate to throw a spanner in the works—[Laughter.]
David McLetchie: You love it.

Margo MacDonald: We are discussing how information on legislation is distributed to parents. Are we creating a precedent that would apply to all departmental information?

Ken Macintosh: First, I congratulate Margo MacDonald on delivering what I think was an Edinburgh kiss to the members on the Conservative benches—I certainly saw a nod of her head in that direction.

I do not believe that we are creating a precedent. We want to create a duty under this particular legislation to provide parents with information on additional support for learning. It would not apply to other statutes or cases.

I am disappointed that we are revisiting this issue again. The committee made its view absolutely clear at stage 2, and because the bill has no financial resolution, we worked hard and made a lot of compromises to ensure that our amendments came within the terms of the bill. We have already compromised our initial position to an extent, and I am concerned that the minister is trying to pull back some of the ground.

The key concern involves the proposed section 5E(a)(ii) that would be introduced by amendment 4. I recommend that members vote against that amendment. Amendment 8 specifically refers to that section, so I think that it is linked, even though the minister says that it is not.

We will support amendments 5 and 6 on the ground that it is unfair to ask local authorities to provide information for pupils for whom they might not have any addresses, but I am aware that many pupils who are either at private schools or are home educated have additional support needs. I would like to hear the minister say that the local authority will still have the power—if not a duty—to supply the parents of those pupils with information, as it would be unfair to discriminate against them.

Amendments 11 and 12 seek to rewind the clock on the committee’s deliberations, and I urge members to vote against them.

Elizabeth Smith: Throughout the evidence sessions in the committee and during the passage of the bill, it has been abundantly clear that, although some local authorities are exceptionally good at providing relevant support to children with additional support needs, some are not. Sadly, in some parts of Scotland, children’s support services fall woefully short of the expected standard—or, in some cases, are non-existent. In those areas, parents have little assistance with regard to what support services are available or what procedures they should follow when things go wrong. In those cases, it is all too easy for a local authority to make a token reference to what is available and hope that parents and families have the good sense to know automatically where to look for help. There is a clear need to provide a level playing field in that respect and to ensure that we are doing everything possible to identify all the cases in which there are additional support needs, to correctly diagnose the problem, and to ensure that the relevant support is provided.

It has been my intention—and, I believe, that of Margaret Smith and the Labour members—to ensure that parents are physically given the necessary and relevant information so that they are better informed and, therefore, better able to supply the appropriate support to their child. That should be a statutory obligation on local authorities. The Scottish Government has argued that that is the case under section 26 of the 2004 act, and that by lodging amendment 4 it is seeking to ensure that only a summary of the necessary information is provided, because the placing of the word “any” before “information” would mean families being provided with all the information that was relevant to any form of additional support needs, which inevitably would mean them ending up with far too much information.

I do not accept that argument, but I made it clear that I was willing to consider a Scottish Government alternative, which we see in proposed paragraph (i) of amendment 4. Sadly, that has come at the price of accepting proposed paragraph (ii) of amendment 4, which would oblige local authorities only to flag up where information is available rather than ensure that families are given it. For me, giving families information is a crucial part of the bill, as it provides them with greater assurances about and knowledge of their child’s needs, rather than leaving them to navigate their own way around the rather daunting current system.

Despite section 26 of the 2004 act, giving families information clearly has not happened. For that reason, the Scottish Conservatives will be opposing the Scottish Government’s amendments 4 and 8.

Finally, given that this matter is so important, it is disturbing to note that lobbying is still going on in the middle of the debate.

15:45

Adam Ingram: I re-emphasise to Elizabeth Smith that, with amendment 4, we seek not simply to signpost for parents or young people where they can find information but to provide a summary of information. The alternative, which is included in the bill as it stands, is to require all the information that the authority publishes under section 26 to be sent to parents of children with additional support needs and young persons with such needs. That
could be a substantial volume of information on paper or in other formats, so it could cost a substantial sum of money. We do not believe that placing duties on local authorities to act in such a wasteful manner is an appropriate way to conduct ourselves. Amendment 4 was lodged to address those issues.

On Ken Macintosh’s point about what will happen if an education authority places a child in an independent school, of course the authority will be required to provide information to the child’s parents.

I am disappointed that we have not reached a consensus on this matter. Additional burdens will be placed on local authorities as a result.

Karen Gillon (Clydesdale) (Lab): The Parliament is in this position because the Government failed to provide a financial memorandum to the bill that promised local authorities additional resources if the Parliament deemed them necessary.

Adam Ingram: Frankly, I urge the Parliament to give little credence to that argument. The bill was accompanied by a financial memorandum, as is normal. No member raised at stage 1 the question of the bill’s lacking a financial resolution and the Parliament unanimously supported the bill at stage 1 in the full knowledge that no financial resolution was attached to it. I therefore reject the member’s criticism out of hand.

I am sorry that the Parliament has been unable to reach an agreed position on this matter. An unnecessary burden will be placed on local authorities to no effect. Members might reflect on that when the debate is over.

The Presiding Officer: The question is, that amendment 4 be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For
Adam, Brian (Aberdeen North) (SNP)
Allan, Alasdair (Western Isles) (SNP)
Brown, Keith (Ochil) (SNP)
Campbell, Aileen (South of Scotland) (SNP)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Ewing, Ferguson (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
FitzPatrick, Joe (Dundee West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Grahame, Christine (South of Scotland) (SNP)
Harper, Robin (Lothians) (Green)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Hepburn, Jamie (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Kidd, Bill (Glasgow) (SNP)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McMillan, Stuart (West of Scotland) (SNP)
Morgan, Alasdair (South of Scotland) (SNP)
Neil, Alex (Central Scotland) (SNP)
O’Donnell, Hugh (Central Scotland) (LD)
Paterson, Gil (West of Scotland) (SNP)
Robison, Shona (Dundee East) (SNP)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Somerville, Shirley-Anne (Lothians) (SNP)
Stevenson, Stewart (Barrhead and Broomloan) (SNP)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

Against
Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Ballie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Robert (Glasgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Carlaw, Jackson (West of Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glasgow Baillieston) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
Foulkes, George (Lothians) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marilyn (North East Scotland) (Lab)
Goldie, Annabel (West of Scotland) (Con)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Paisley South) (Lab)
Hume, Jim (South of Scotland) (LD)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Johnstone, Alex (North East Scotland) (Con)
Kelly, James (Glasgow Ruchill) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Roxburgh and Berwickshire) (Con)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Macdonald, Lewis (Aberdeen Central) (Lab)
MacDonald, Margo (Lothians) (Ind)
Macintosh, Ken (Eastwood) (Lab)
Amendment 8 be agreed to. Are we agreed?

The Presiding Officer: The result of the division is: For 49 Against 72 Abstentions 0.

Amendment 4 disagreed to.

Amendments 5 to 12 moved—[Adam Ingram].

The Presiding Officer: Does any member object to a single question being put on amendments 5 to 12?

Members: Yes.

The Presiding Officer: As a result the questions will be put one at a time.

Amendments 5 to 7 agreed to.

Amendments 5 to 12 moved—[Adam Ingram].

The Presiding Officer: I invite the minister to move amendments 5 to 12 en bloc.

The Presiding Officer: The question is, that amendments 5 to 12 be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

FOR

Adam, Brian (Aberdeen North) (SNP)
Brown, Keith (Ochil) (SNP)
Campbell, Aileen (South of Scotland) (SNP)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Crawford, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
FitzPatrick, Joe (Dundee West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Grahame, Christine (South of Scotland) (SNP)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Hepburn, Jamie (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Kidd, Bill (Glasgow) (SNP)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McMillan, Stuart (West of Scotland) (SNP)
Morgan, Alasdair (South of Scotland) (SNP)
Neil, Alex (Central Scotland) (SNP)
Paterson, Gil (West of Scotland) (SNP)
Robison, Shona (Dundee East) (SNP)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Angus) (SNP)
Somerville, Shirley-Anne (Lothians) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

AGAINST

Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Allan, Alasdair (Western Isles) (SNP)
Balile, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Robert (Glasgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Carlaw, Jackson (West of Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glasgow Balclutha) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
Foulkes, George (Lothians) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marilyn (North East Scotland) (Lab)
Goldie, Annabel (West of Scotland) (Con)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Paisley South) (Lab)
Hume, Jim (South of Scotland) (LD)

Availability of published information

Section 5F—Availability of published information

The Presiding Officer: The question is, that amendment 8 be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.
Amendment 11 be agreed to. Are we agreed?

The result of the division is: For 46, Against 73, Abstentions 2.

The Presiding Officer: The result of the division is: For 46, Against 73, Abstentions 2.

Amendment 8 disagreed to.

Amendments 9 and 10 agreed to.

The Presiding Officer: The question is, that amendment 11 be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

FOR

Adam, Brian (Aberdeen North) (SNP)
Allan, Alasdair (Western Isles) (SNP)
Brown, Keith (Ochil) (SNP)
Campbell, Alieen (South of Scotland) (SNP)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)

AGAINST

Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Fitzpatrick, Joe (Dundee West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Grahame, Christine (South of Scotland) (SNP)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Hepburn, Jamie (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Kidd, Bill (Glasgow) (SNP)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McMillan, Stuart (West of Scotland) (SNP)
Morgan, Alasdair (South of Scotland) (SNP)
Neil, Alex (Central Scotland) (SNP)
Paterson, Gil (West of Scotland) (SNP)
Robison, Shona (Dundee East) (SNP)
Russell, Michael (South of Scotland) (SNP)
Salmont, Alex (Gordon) (SNP)
Somerville, Shirley-Anne (Lothians) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

ABSTENTIONS

Harper, Robin (Lothians) (Green)
MacDonald, Margo (Lothians) (Ind)

The Presiding Officer: The result of the division is: For 46, Against 73, Abstentions 2.

Amendment 8 disagreed to.

Amendments 9 and 10 agreed to.

The Presiding Officer: The question is, that amendment 11 be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

FOR

Adam, Brian (Aberdeen North) (SNP)
Allan, Alasdair (Western Isles) (SNP)
Brown, Keith (Ochil) (SNP)
Campbell, Alieen (South of Scotland) (SNP)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
The Presiding Officer: The result of the division is: For 47, Against 71, Abstentions 1.

Amendment 11 disagreed to.

The Presiding Officer: The question is, that amendment 12 be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

FOR

Adam, Brian (Aberdeen North) (SNP)
Allan, Alasdair (Western Isles) (SNP)
Campbell, Alleen (South of Scotland) (SNP)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabian, Linda (Central Scotland) (SNP)
FitzPatrick, Joe (Dundee West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Grahame, Christine (South of Scotland) (SNP)
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Hepburn, Jamie (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Kidd, Bill (Glasgow) (SNP)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenney (Edinburgh East and Musselburgh) (SNP)
Marwick, Tricia (Central Fife) (SNP)
Mathew, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McMillan, Stuart (West of Scotland) (SNP)
Morgan, Alasdair (South of Scotland) (SNP)
Neil, Alex (Central Scotland) (SNP)
Paterson, Gil (West of Scotland) (SNP)
Robison, Shona (Dundee East) (SNP)
Russell, Michael (South of Scotland) (SNP)
Saindon, Alex (Gordon) (SNP)
Somerville, Shirley-Anne (Lothians) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

AGAINST

Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Robert (Glasgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Carlaw, Jackson (West of Scotland) (Con)
Chisholm, Malcolm (Edinburgh East and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glasgow Baillieston) (Lab)
Eddie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Cynghordy) (Lab)
Finnie, Ross (West of Scotland) (LD)
Foulkes, George (Lothians) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gillon, Karen (Claydesdale) (Lab)
Glen, Marilyn (North East Scotland) (Lab)
Goldie, Annabel (West of Scotland) (Con)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Paisley South) (Lab)
Hume, Jim (South of Scotland) (LD)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Johnstone, Alex (North East Scotland) (Con)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Roxburgh and Berwickshire) (Con)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Macdonald, Lewis (Aberdeen Central) (Lab)
Amendment 13 has been lodged as a result of on-going discussions with Scotland’s Commissioner for Children and Young People on how we can strengthen children’s rights. As a result of the commissioner’s concerns that the 2004 act does not give children a voice in decisions about their personal information, I am pleased to have lodged amendment 13, which will ensure that authorities are under a duty to “seek and take account of the views of the child” in relation to the provision of information to agencies. In practice, that will mean that authorities will have to seek and take account of the child’s views before they share any information with an appropriate agency or agencies. I am sure that members agree that amendment 13 will strengthen the rights of children and is a positive step in the right direction.

I move amendment 13.

Ken Macintosh: The minister will be relieved to hear that I rise merely to give him my whole-hearted support, in the spirit of consensus for which he has called this afternoon. Transition is an important issue; it was raised as a concern at the committee and acknowledged by the minister. The evidence from Scotland’s Commissioner for Children and Young People was persuasive. It is important that we reflect the views of the child, as we have always done in our legislation in this Parliament. I am happy to support amendment 13.

Amendment 13 agreed to.

Section 6—References to Tribunal in relation to co-ordinated support plan

The Deputy Presiding Officer (Alasdair Morgan): Amendment 22, in the name of Ken Macintosh, is grouped with amendment 23.

Ken Macintosh: Amendments 22 and 23 come from the organisation ISEA and deal with one of the weaknesses in the dispute resolution procedure. Currently, when a local authority fails to comply with or uphold the terms of a co-ordinated support plan, parents have to turn to the tribunal to deal with the failure to uphold the contents of a co-ordinated support plan.

ISEA spent three full days with parents at a tribunal hearing on the contents of their severely disabled young son’s CSP. The tribunal upheld the reference and the content of the CSP was changed dramatically, to ensure that input from education, health, social work and the college were all specified and quantified, and that the
We need information, so that we know what additional support needs remain weak in places. That the data on children and young people with amendments 24 and 25 is the on-going concern amendment 25.

in the name of Margaret Smith, is grouped with agreed to.

therefore support amendments 22 and 23. I

However, I can see the logic in enabling all CSP -ministers in the form of a section 70 complaint. I

referable to dispute resolution and/or the Scottish legislation, a failure of that type is already such action must be taken. Under the current enable the tribunal to specify a time within which be taken to rectify such a failure. It would also achieve their educational objective.

is necessary for the child or young person to contained in a co-ordinated support plan and that the provision of, the additional support that is authority to provide, or to make arrangements for tribunal to include a failure by the education

I know that the committee supported a number of amendments at stage 2 that dealt constructively with similar concerns. I hope that members and the minister will feel similarly inclined to support amendments 22 and 23.

I move amendment 22.

Adam Ingram: Amendment 22 would extend the types of references that may be made to the tribunal to include a failure by the education authority to provide, or to make arrangements for the provision of, the additional support that is contained in a co-ordinated support plan and that is necessary for the child or young person to achieve their educational objective.

Amendment 23 would extend the power of the tribunal to enable it to specify the action that is to be taken to rectify such a failure. It would also enable the tribunal to specify a time within which such action must be taken. Under the current legislation, a failure of that type is already referable to dispute resolution and/or the Scottish ministers in the form of a section 70 complaint. However, I can see the logic in enabling all CSP-related matters to be dealt with by the tribunal. I therefore support amendments 22 and 23.

Amendment 22 agreed to.

Amendment 22 moved—[Ken Macintosh]—and agreed to.

After section 7A

The Deputy Presiding Officer: Amendment 24, in the name of Margaret Smith, is grouped with amendment 25.

Margaret Smith: The provenance of amendments 24 and 25 is the on-going concern that the data on children and young people with additional support needs remain weak in places. We need information, so that we know what services we need to provide and plan for. As MSPs are aware, the for Scotland’s disabled children campaign, and others, wrote to them to urge them to support the amendments and said that no one knows how many children have ASN.

Like others, people who are involved in that campaign are keen to have more detailed and accurate information, to allow effective planning, resourcing and delivery of services. Amendment 24 would require the Scottish ministers to report to Parliament in the five years following commencement on what progress had been made to ensure that enough information was available to allow effective monitoring of the 2004 act’s implementation. That would make a positive difference to the legislation.

16:00

Amendment 25 picks up on gaps in the information that is currently gathered. I understand that the statistics define a child with ASN as one who has a co-ordinated support plan, a record of needs or an individualised educational programme. That measures those with ASN for whom a plan has been put in place, which is not the same as identifying everyone who has ASN. Data on the main reason for support for pre-school pupils are not collected, either.

I appreciate that the minister is attempting to address the matter. My amendments would complement and not contradict his efforts. The Scottish ministers acknowledge the need to address the lack of data collection and publication on the number of children and young people with ASN. The voluntary sector continues to work with ministers to develop that further. However, the for Scotland’s disabled children campaign says that “Without a statutory duty to collect and publish data as laid out in” my “amendment 25, there is a risk that with a change in priorities and/or resources, such data collection and publication could be discontinued. This baseline evidence is essential to the future planning and resourcing of the ASN framework: we currently do not know if the level of resources and investment in different types of support is the right level because we do not know the extent of need. Given the current pressures on resources such an evidence based approach to service design, planning and delivery is surely essential.”

Amendment 24 would enable the Scottish Parliament to continue to play a role in monitoring progress by the Scottish Government to address data needs. Accordingly, it would complement amendment 25 and would allow broader evidence to be presented, particularly on implementation issues. For example, if a duty to report had existed from the 2004 act’s inception, the slow progress in transferring children with records of needs to the
new ASN framework—more than 5,000 still have records of needs, 18 months after the transition period ended—could have been discussed, explored and remedied.

I hope that the minister will support amendments 24 and 25, which are in my name, and I urge all members to support them.

I move amendment 24.

Ken Macintosh: I support Margaret Smith’s amendments. At stage 1, several members spoke about the need to improve data collection and the dissemination of information. Almost every organisation that lobbied the Education, Lifelong Learning and Culture Committee flagged up the lack of standardisation and agreed data, which would form the basis for any policy making. Given that, we should unite around both the amendments that Margaret Smith has lodged.

Adam Ingram: Amendment 24 would perhaps have been more accurately entitled, “Availability of statistical information on additional support needs”. As a Scottish Government minister, I gave the clear commitment at stage 2 that my officials would discuss with voluntary organisations and any other interested stakeholders how to improve the data collection system for all children with additional support needs. I acknowledge that ways might exist to improve the additional support needs data that are collected through ScotXed.

Amendment 25 outlines matters, including the costs of providing support, on which information would have to be published. All parties agree on the importance of reducing the burdens of monitoring and reporting on local authorities, yet the amendment would introduce a new bureaucratic requirement on councils that would be of extremely limited use. The amendment is so broadly drawn that it is difficult to envisage a system that would result in consistent information being provided by local authorities. Even if collecting the information consistently were possible, the purpose that it would serve is unclear. The key issue must be meeting the needs of children and young people, not how much has been spent on doing so.

I ask Parliament to allow collective discussion to take place between me and all the stakeholders. We as a Government would commit to that before deciding on the best way forward. Accordingly, I ask Margaret Smith to withdraw amendment 24 and not to move amendment 25.

Margaret Smith: As Ken Macintosh said, almost every group that gave evidence to the committee highlighted data and information as a problem to one extent or another.

Costs are an issue that has weighed heavily on the minds and workload of Education, Lifelong Learning and Culture Committee members over the past couple of months. In my 10 years in the Parliament, I have never spent so much time investigating and researching the costings of amendments.

In fact, amendment 24 made it through yet another part of the tortuous process: the Presiding Officer’s office considered it over the course of the past week. Costings have been looked at. The Presiding Officer accepts that the amendment has de minimis costs.

I am not about to second-guess or challenge a decision of the Presiding Officer—

The Minister for Schools and Skills (Keith Brown): When it suits you.

Margaret Smith: I say to Mr Brown that, many times in the past few weeks, I have been on the receiving end of judgments that I have had concerns about. I did not query them any more than I will query this one.

We have gone through hoops in the most tortuous process that any of us have ever gone through. For the Government to say now that the amendment would have costs, when the process that we have all been expected to go through to reach this point has deemed that not to be the case, is unacceptable. I will press both amendments in the group.

The Deputy Presiding Officer: The question is, that amendment 24 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Robert (Glasgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Carlaw, Jackson (West of Scotland) (Con)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glasgow Baillieston) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
Foulkes, George (Lothians) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marilyn (North East Scotland) (Lab)
Goldie, Annabel (West of Scotland) (Con)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)

Against
Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Robert (Glasgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Carlaw, Jackson (West of Scotland) (Con)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glasgow Baillieston) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
Foulkes, George (Lothians) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marilyn (North East Scotland) (Lab)
Goldie, Annabel (West of Scotland) (Con)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
The Deputy Presiding Officer: The question is, that amendment 25 be agreed to. Are we agreed?

Amendment 25 moved—[Margaret Smith].

The Deputy Presiding Officer: The question is, that amendment 25 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Robert (Glasgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Cartlaw, Jackson (West of Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Margaret (Glasgow Baillieston) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
Foulkes, George (Lothians) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marilyn (North East Scotland) (Lab)
Goldie, Annabel (West of Scotland) (Con)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Harper, Robin (Lothians) (Green)
Henry, Hugh (Paisley South) (Lab)
Hume, Jim (South of Scotland) (LD)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)

Against

Adam, Brian (Aberdeen North) (SNP)
Allan, Alasdair (Western Isles) (SNP)
Brown, Keith (Ochil) (SNP)
Campbell, Aileen (South of Scotland) (SNP)
Coffey, Willie (Kilnamock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glascow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
FitzPatrick, Joe (Dundee West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Grahame, Christine (South of Scotland) (SNP)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Hepburn, Jamie (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Kidd, Bill (Glasgow) (SNP)
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The Deputy Presiding Officer: The result of the division is: For 74, Against 46, Abstentions 0.

Amendment 25 agreed to.

Section 7B—Provision by education authority for education of pupils belonging to areas of other authorities: recovery of costs where pupil has additional support needs

The Deputy Presiding Officer: Amendment 14, in the name of the minister, is in a group on its own.

Adam Ingram: Section 7B inserts a new section 27A into the 2004 act to attempt to ensure a right of recovery where an authority has provided additional support for any pupil who belongs to the area of another authority. If the aim of the section is to ensure a right of recovery between authorities, I ask members to be assured that the right exists already in the 1980 act, as has been confirmed by the courts and Glasgow City Council’s decision to settle its dispute with East Renfrewshire Council.

The 2004 act amended section 23(2) of the 1980 act specifically to cover children with additional support needs. Any attempt in the bill to restate that right merely confuses the position. In the recent Court of Session case of East Renfrewshire Council v Glasgow City Council, Lord Penrose put the matter beyond doubt, stating that

"the plain language of the" 1980 act

"entitles"

East Renfrewshire

to recover from

Glasgow

"appropriate sums reflecting the cost of additional support services provided by"
East Renfrewshire

“to children belonging to”

Glasgow’s

“area notwithstanding that the children were placed in response to parental choice.”

Section 23(2) states clearly that an authority may recover an agreed amount from another authority, but the same clarity does not exist in the bill as amended at stage 2. Section 7B provides that, if a claim to recover reasonable costs is made,

“that other education authority must make payment.”

Who is to decide what a reasonable amount is? Is it the host authority? If so, home authorities may consider that section 7B is tantamount to writing a blank cheque.

The existing law is clear; section 7B is unnecessary and creates legal uncertainty. I therefore urge Mr Macintosh and the Parliament to support amendment 14, which would remove that pointless and confusing section from the bill.

I move amendment 14.

Ken Macintosh: I hesitate to reopen this discussion. Most members are aware of the background to the issue. One dispute—between Glasgow City Council and East Renfrewshire Council—has been mentioned, but we are dealing with a matter of principle that could apply to many other authorities, wherever children are on placement requests to authorities other than their own.

One of the key purposes of the bill is to change the way in which parents’ rights affect the relationship between home and host authorities. I am concerned that the bill will be interpreted by some local authorities in a way that enables them not to meet in full their obligations to children from their area. I am not suggesting that that will definitely happen, but the amendment that inserted section 7B in the bill—to which the Education, Lifelong Learning and Culture Committee has already agreed—will ensure that it does not.

The relationship between home and host authorities is complex. I will not go through all that complexity, but the minister seems to think that Lord Penrose’s judgment in the Court of Session put the matter beyond doubt. If that were the case, I would not have lodged the amendment that inserted section 7B in the bill.

There has been a series of cases. The minister says that all have now been settled, which is true, but it is interesting to note that they were settled in the past few weeks, as the bill progressed through the Parliament. The original cases that Lord Penrose settled were early cases—some predated the 2004 act and referred to the old record of needs legislation. Lord Penrose’s judgment can be interpreted as establishing a principle, but many other cases were taken under the 2004 act and have never gone to court. They have now been settled between the local authorities concerned, but there has been no test case—no principle has been affirmed by Lord Penrose or anyone else, so there is still a doubt in my mind. I am concerned that, yet again, we may end up in a Court of Session battle over additional support for learning needs, at huge expense. All of us agree that that money would be far better spent on parents.

The minister suggested that section 7B is tantamount to writing a blank cheque. I absolutely assure members—especially all my Glasgow MSP colleagues—that that is not the case. The home authority still has to write the cheque. In other words, it will have to make a reasonable contribution. The authority would have to be taken to court were attempts to be made to get unreasonable amounts of money out of it.

16:15

Johann Lamont (Glasgow Pollok) (Lab): Will the member comment on concerns from the families of children with disabilities who wish to exercise their right to make a placing request, perhaps because of family circumstances, but whose children end up in a place where they are discriminated against because of their additional needs? Those parents are concerned that choices are made around placing requests on the basis of the burden. Perhaps the local authority where the child comes from—Glasgow City, for instance—might say that it could make the provision elsewhere. I have constituents who feel that there has been discrimination against their child on the basis of their additional needs. That must run counter to the legislation.

Ken Macintosh: As ever, Johann Lamont makes a very good point. One of the reasons why I lodged my stage 2 amendment was because of the many implicit assumptions and things that can go unsaid when difficult cases between local authorities and families who have children with additional support needs are discussed. There is a fear that funding decisions underpin some of the choices that are made. We all know that that is not supposed to be the case, but we all suspect that it sometimes happens—it is the elephant in the room.

I have concerns about situations in which local authorities wish to make a placing request. If the child is deemed to have additional support needs, that could seriously affect the way in which they are treated, and that would be totally unfair. The situation has been unfair on both Glasgow City Council and East Renfrewshire Council—it would
be unfair on any authority, whether or not it maintains special schools, and whether it favours mainstream support or whatever else.

The matter needs to be spelled out, and that is what we have done. The committee came to a measured view. We decided that, on balance, it was better to have the provision in legislation. The amendment that we agreed to at stage 2 merely repeats the wording that is already contained in the 1980 act. I urge the minister, even at this stage, to rethink the matter and to accept that that stage 2 amendment was very sensible, and that section 7B will see off at the pass any potential future problems in this area.

Elizabeth Smith: The Scottish Government has confirmed since stage 2 that the existing legislation provides clarity about the right of recovery of costs when one local authority provides support to a child who is resident in another local authority area. It has also confirmed that section 23(2) of the 1980 act allows for the authorities in question to agree the appropriate costs, rather than have an imprecise definition of reasonable costs imposed upon them.

I fully acknowledge some of the difficulties that have been experienced between the two local authorities that Mr Macintosh has referred to, but I do not consider them to be of a particularly legislative nature. The Scottish Conservatives will therefore support amendment 14.

Margaret Smith: I have a great deal of sympathy with what Ken Macintosh was trying to achieve with his stage 2 amendment. Over the years, certain local authorities have had, as we have heard, continuing disputes about the recovery of costs. Ken Macintosh sought to ensure a right of recovery when an education authority provides additional support for any pupil who belongs to the area of another authority.

During the last session of stage 2 consideration, Ken Macintosh indicated that the advent of the 2004 act had disturbed the operation of section 23 of the 1980 act. Having heard what the minister said on the matter, and having discussed the issue with him, I believe that section 23(2) of the 1980 act clearly states that an authority may recover an agreed amount from another authority.

Section 7B states that if

“a claim to recover reasonable costs”

is made, the

“other education authority must make payment.”

There is obviously an inconsistency there. There are issues around how that could be worked out, and there are concerns among councils that host authorities might incur significant costs that they would seek to recover with no input from the home authority.

As I have mentioned before, a number of disputes have arisen, particularly involving Glasgow City Council and East Renfrewshire Council. Having sought further information on what action the minister might take on the issue, I am pleased that he has advised us that, since the last stage 2 session, Glasgow City Council has paid for all the cases between it and East Renfrewshire and not just the cases that went to the Court of Session. Keeping the matter to the fore throughout the parliamentary process seems to have delivered some much-needed clarity regarding the existing law and the Court of Session’s ruling as far as Glasgow City Council is concerned, as well as a welcome settlement for East Renfrewshire.

The onus is on councils to act towards one another in a reasonable manner and on the minister to take whatever action is necessary when they do not do so. I am sure that all members will support the minister in that regard.

Although I have sympathy with the predicament in which East Renfrewshire Council and other councils found themselves and with Ken Macintosh’s position, I accept the minister’s assurance that the law is clear on the matter. I support amendment 14, which would leave out section 7B.

Robert Brown: I have some acquaintance with the issue, because I convened the Parliament’s Education Committee some time ago and subsequently became Deputy Minister for Education and Young People. I am therefore well aware of Ken Macintosh’s concerns, which he was right to raise.

However, the points that the minister and other opponents of section 7B made are correct. The amendment of the bill at stage 2 to include that section made the situation more confused. The difficulty is the vagueness of the arrangements that are set out in section 7B, which would allow all decisions about a child’s needs to be taken without the home authority ever being consulted or included in the decision-making process, even though it would have to use its budget to pay for whatever was decided on.

Issues between local authorities to do with the extent of what must be paid for and the appropriateness of passing on costs to the home authority have, for the most part, been sorted out in the past. That is the best way of tackling the matter and it is unfortunate that the system has not worked well in some instances, in particular in the cases that involved Glasgow City Council and East Renfrewshire Council. Will the minister have a close look at the background to the matter, to ascertain whether greater clarity can be given to
councils? The issue is important and it is entirely unsatisfactory that there should be court actions between local authorities, which waste public funds and sometimes put parents and children in the middle of a dispute. The Parliament should not countenance such situations. Ken Macintosh has a point, as do Glasgow City Council and East Renfrewshire Council, and there might be potential to provide more clarity, so that we can prevent such disputes from arising as often as they have done.

Adam Ingram: I do not have much to add to the debate. I will certainly follow up Robert Brown’s suggestion and perhaps write to him on the issue.

I understand that section 23 disputes have primarily been between two local authority areas. I understand that all issues have been settled under the current legislation, and the last thing that I want to do is to disturb that process. Although Mr Macintosh might have no doubts in that regard, there are considerable doubts in the minds of the legal fraternity. I ask members to bear that in mind when they decide how to vote on amendment 14.

The Deputy Presiding Officer: The question is, that amendment 14 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Allan, Alasdair (Western Isles) (SNP)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Keith (Ochil) (SNP)
Brown, Robert (Glasgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Campbell, Aileen (South of Scotland) (SNP)
Carlaw, Jackson (West of Scotland) (Con)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Finnie, Ross (West of Scotland) (LD)
FitzPatrick, Joe (Dundee West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Goldie, Annabel (West of Scotland) (Con)
Grahame, Christine (South of Scotland) (SNP)
Harper, Robin (Lothians) (Green)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Hepburn, Jamie (Central Scotland) (SNP)
Hume, Jim (South of Scotland) (LD)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Kidd, Bill (Glasgow) (SNP)
Lamont, John (Roxburgh and Berwickshire) (Con)

Against
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
MacDonald, Margo (Lothians) (Ind)
Martin, Paul (Glasgow Springburn) (Lab)
Marwick, Tricia (Central Fife) (SNP)
Mather, Jim (Argyll and Bute) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Steward (West of Scotland) (SNP)
McArthur, Liam (Orkney) (LD)
McGirr, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McLetchie, David (Edinburgh Pentlands) (Con)
McMillan, Stuart (West of Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Neil, Alex (Central Scotland) (SNP)
O'Donnell, Hugh (Central Scotland) (LD)
Paterson, Gil (West of Scotland) (SNP)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Robison, Shona (Dundee East) (SNP)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Somerville, Shirley-Anne (Lothians) (SNP)
Stephen, Nicol (Aberdeen South) (LD)
Stevenson, Stewart (Banff and Buchan) (SNP)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Deve (Highlands and Islands) (SNP)
Tolson, Jim (Dunfermline West) (LD)
Watt, Maureen (North East Scotland) (SNP)
Wells, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)
The result of the division is: For 77, Against 41, Abstentions 0.

Amendment 14 agreed to.

The Deputy Presiding Officer: That ends consideration of amendments.

The Minister for Children and Early Years (Adam Ingram): I am delighted to have the opportunity to move that Parliament pass the Education (Additional Support for Learning) (Scotland) Bill.

I thank my parliamentary colleagues—particularly those who sit on the Education, Lifelong Learning and Culture Committee—for their input during the passage of the bill. I record my thanks, too, to the groups and individuals who provided oral and written evidence to the committee, briefings for MSPs and information and opinions to the Government. The bill deals with complex matters, and I am sure that all members acknowledge the contribution of those individuals and groups.

As I have said several times, it was never my intention for the bill to alter the ethos or fundamental building blocks of the Education (Additional Support for Learning) (Scotland) Act 2004, which is aimed at a broad group of children and young people with additional support needs. The bill amends the 2004 act in light of reports by Her Majesty’s Inspectorate of Education, rulings by the Court of Session, annual reports from the president of the Additional Support Needs Tribunals for Scotland, stakeholders’ views and informed observations in light of practice. Most important, the proposals in the bill will strengthen the rights of children with additional support needs and those of their parents.

Rhona Brankin (Midlothian) (Lab): Does the minister acknowledge that one reason why the Government has been comprehensively defeated on many issues this afternoon is that it simply failed to talk to the organisations and parents who wanted a much more fundamental review of the legislation?

Adam Ingram: I take issue with Rhona Brankin’s description of what happened at stage 3: relatively few amendments were debated this afternoon. Through stages 1 and 2, during which we were in dispute over some issues, a consensus was arrived at across the parties. I suggest that Rhona Brankin examine carefully the...
outcome of the bill. The Government certainly took a number of positions that were voted against this afternoon, but the Parliament properly addressed the core issues.

Karen Whitefield (Airdrie and Shotts) (Lab): Will the minister give way?

Adam Ingram: No, I will not.

During stage 1, I warmly welcomed the committee’s broad support for the amendments to the 2004 act. Indeed, I am grateful for its support for the general principles of the bill and its recommendation to the Parliament that they be approved.

Also during stage 1, stakeholders and committee members suggested a number of additional amendments. I considered those suggestions carefully and, in light of my considerations, lodged at stage 2 a number of Government amendments that further strengthened the 2004 act. Again, I extend my thanks to the committee members for supporting me and agreeing to them—and, indeed, to a good number of the Government amendments that were debated this afternoon. I was also more than happy to lend my support to amendments lodged by Elizabeth Smith and Ken Macintosh at stage 2 and, indeed, by Margaret Smith and Ken Macintosh at stage 3.

I have made it clear from the outset that we did not intend to make any significant differences to the overall ethos of the legislation, the scope of the bill or the resource envelope. We wanted to fix some of the deficiencies in how the legislation had been implemented over the past three or four years.

During stage 2, I was disappointed to be accused of being anti-democratic, when members were, or ought to have been, well aware of the situation with regards to the status of financial resolutions and how amendments are dealt with. I appreciate that it was perhaps the first time that such a situation had happened and that we were perhaps taken a little unawares, but there was no attempt to subvert debate. I think that we have all learned lessons during the bill’s passage.

I highlight, too, that, in addition to all the amendments in the bill, the code of practice will be amended in due course, having been consulted on and laid before the Parliament.

The Deputy Presiding Officer: I am afraid that the minister must sum up now.

Adam Ingram: Okay. As members will know, the purpose of this debate is to seek parliamentary approval that the Education (Additional Support for Learning) (Scotland) Bill be passed. I hope that everyone in the chamber has had the opportunity to debate the bill fully and that they will support it at the end of the day.

I move,

That the Parliament agrees that the Education (Additional Support for Learning) (Scotland) Bill be passed.

16:31

Karen Whitefield (Airdrie and Shotts) (Lab): I thank those who were involved in consideration of the bill, as surreal as it was at times. On behalf of the Education, Lifelong Learning and Culture Committee, I thank the committee clerks, who worked hard to assist committee members in what were often stressful circumstances. I thank, too, members of the Scottish Parliament information centre, who provided committee members with a high standard of background material and assistance during efforts to cost amendments. I thank members of the bill team and the minister for the evidence that they provided. Finally, I thank those who gave evidence to the committee, particularly those groups who advocated strongly on behalf of children, young people and parents.

Having spoken as the committee convener, I now intend to speak about my personal reflections on the process of considering the bill. Although there is much in the bill to be welcomed, I must mention the unique position in which we, as members of the Education, Lifelong Learning and Culture Committee, found ourselves during stage 2. In concluding my stage 1 contribution in the chamber only two months ago, I was pleased to be able to say that issues occasionally come before Parliament in which party politics play little part and that this bill was one such issue. That should have remained the case. It is hard to fathom how we reached the position whereby the good will shown by all committee members during stage 1 was fractured to such an extent that some members felt obliged to ask for the process to be referred to the Standards, Procedures and Public Appointments Committee.

The effective exclusion of amendments as a result of the Government’s failure to introduce a financial resolution created a feeling that debate was being closed down rather than opened up. In the current political climate, which affects us all, members of the public need to be assured that their concerns are being listened to and acted on. What they do not want is any sense that parliamentary rules are being used to stifle debate and prevent proper scrutiny of legislation.

Christina McKelvie (Central Scotland) (SNP): Can the member explain why we all agreed at stage 1 to the principles of the bill even though it did not have a financial resolution at the time?

Karen Whitefield: Perhaps the member would like to reflect on her comments at stage 2, when
she kept questioning amendments and the bill’s scope. She seemed much more intent on stopping the democratic discussion of amendments than on engaging in it.

Concerns were raised by all committee members, with the exception of the Scottish National Party members, who were happy to defend the exclusion of amendments. What were those highly controversial amendments, which were so outlandish and expensive that they had to be thwarted? The minister said today that they did not count and were not important. In fact, they were perfectly reasonable amendments that organisations sought in order to increase access to the provisions of the 2004 act, provide a right to support and advocacy, and introduce a duty to provide information. That is hardly earth-shattering stuff, but they are exactly the kind of measures that parents and advocacy groups have been calling for.

In seeking to exclude those amendments through the technical process of not introducing a financial resolution, the Government and SNP members showed a willingness to circumvent the spirit of parliamentary democracy. I do not believe that the public, in particular those with an interest in the bill—

The Deputy Presiding Officer: The member must wind up.

Karen Whitefield: I do not believe that the public will have been impressed by this Government’s shenanigans. Although the bill is worthy of support, it could have been so much better.

16:35

Elizabeth Smith (Mid Scotland and Fife) (Con): Let me say at the outset that the Scottish Conservatives fully support the principles of the Education (Additional Support for Learning) (Scotland) Bill, not least because its ethos is designed to ensure that adequate and relevant support is provided to all children, no matter what their specific learning needs are. It is vital that we get the process right and take every step possible to address some of the loopholes that exist in the Education (Additional Support for Learning) (Scotland) Act 2004.

There has been no disagreement that we need to ensure that each child with ASN receives the appropriate help in an efficient and timely manner and that that support must extend to the home and local community as well as to the teaching environment. It was good to hear the assurance that the Minister for Children and Early Years gave on that when he expressed his desire to ensure that support is both holistic and fully co-ordinated across social, health and education services.

Specialist care means the provision of specialist services, which in turn means that we must recognise the importance of the out-of-area placing requests that are made when, for one reason or another, a local authority is unable to deliver the appropriate support. The bill will be important in improving access to such services, extending equality of opportunity and of treatment before the law, and recognising the respective responsibilities of parents, of the host and home local authorities and of support carers.

Throughout the parliamentary process, we on the Conservative benches have fully supported the Government and other parties in their intentions behind the bill: to reduce the complexity of the legislation; to speed up the decision-making process; to ensure that the various parties are fully aware of their rights and responsibilities; to provide better mediation and advocacy; to provide better transition after school; and to do much more to support the vulnerable and most excluded children.

I believe that we needed to focus on two things. First, we needed to make the legislation as watertight as possible by reducing the loopholes in the existing act. Secondly, we needed to ensure that the bill could be complemented by reducing the wide variation in local authority interpretation of the code of practice. That second obligation was just as important as the first, in particular because we needed to reduce the scope for buck passing and to address the perverse financial incentives that sometimes lead to the wrong decisions.

Having listened carefully to the extensive range of evidence that the Education, Lifelong Learning and Culture Committee considered, I am in no doubt that professionals and experts in the field felt a considerable degree of frustration. They felt let down because the existing legislation does not provide them with the necessary support to deliver the best services to families whose children have additional support needs.

In particular, I am mindful of the need to identify additional support needs at the earliest opportunity and to ensure that the relevant support is given from day one. As well as the educational, health and social benefits of doing so, huge costs could be saved in the long run through a reduction in the number of cases in which families find themselves in difficult and adversarial circumstances. That was one of our principal concerns in dealing with the bill.

We have worked hard to improve the provisions on representation and advocacy and on the workings of the tribunal process. We have also worked hard to clarify the responsibilities and duties of local authority education departments because we wanted to reduce the scope for buck
passing that has enabled some local authorities to hide behind the complexities of the existing legislation.

If there is a proper, graduated response to the needs of the child in the first instance, if there are proper relationships between parents, school and partnership officer and if there is much greater clarity surrounding the process of what should legally be provided in a support package, the best interests of the child will be promoted through an holistic support mechanism that gives people the best possible chance in the future.

As the convener of the Education, Lifelong Learning and Culture Committee has just said, the bill should not have become a party-political issue. It could have been better. Indeed, it is deeply regrettable that, during its passage, debates sometimes became so highly charged that they even raised questions about parliamentary procedures.

That aside, the bill is about our commitment to the future of children with additional support needs and the families and carers who support them. That is why the Scottish Conservatives will support the Government in agreeing to the bill.

16:39

Margaret Smith (Edinburgh West) (LD): The Liberal Democrats will support the Education (Additional Support for Learning) (Scotland) Bill. Throughout the process, people have constantly highlighted the need to ensure that the systems that we put in place actually work throughout the country for children with additional support needs and for their families. All too often, we have heard from parents and others who, time and again, have had to fight, hassle and harry local authorities and health services for the necessary support to ensure that children with additional support needs can enjoy what quality of life they can.

There was an obvious need to strengthen and clarify the ability of the Education (Additional Support for Learning) (Scotland) Act 2004 to deliver on the original policy intention of providing any additional support necessary to help a child or young person to learn. It was needed in the wake of Court of Session judgments and the experience of five years of implementation. It was necessary, too, to simplify the process for the parents who are caught up in it and who, because of all the other stresses and strains on them, need legislation that is understandable and systems that deliver.

I am pleased that, at points along the way, I have managed to lodge amendments on looked-after children, information and data that have secured the support of members of other parties, for which I thank them whole-heartedly.

Although the bill’s necessity has never been queried or contested, at times during the consideration process procedures were used to try to divide consensus when such division was unnecessary. I am deeply saddened and frustrated by the process that we all had to encounter. I have had the privilege to be a member of this Parliament for 10 years. As someone who, as convener of the Health and Community Care Committee, presided over consideration of the Mental Health (Scotland) Bill, to which I believe that 1,500 amendments were lodged, I consider myself to be fairly experienced in the ways of legislation. I thought that that was the most tortuous passage of a bill that I would ever have the privilege to be involved in, but I was wrong.

The lack of a financial resolution and the Government’s refusal to lodge an appropriate motion—unlike the previous Government—have meant that the arguments surrounding the important issues that have been raised with us during the committee stages and through our work as MSPs might not have been put to the test. They have certainly not been put to the vote.

Adam Ingram: With regard to the member’s complaint about the lack of a financial resolution, does she not agree that the bill’s purpose is not to extend the scope of the 2004 act or to increase the resources that are applied to address problems in the provision of support for additional needs at school level? Given that we are trying to fix the problems with the implementation of the 2004 act, why would the bill require a financial resolution?

Margaret Smith: On the bill’s policy objectives, the policy memorandum states:

“The Bill is an important step in the work of the Scottish Government to strengthen, as well as clarifying, the ability of the Education (Additional Support for Learning) (Scotland) Act 2004 … to deliver its original policy intention, that intention being to provide for any need that requires additional support for the child or young person to learn.”

That is an overarching requirement. Once they had listened to evidence, committee members sought to respond by following the practices to which the Parliament has adhered for the past decade. It is normal in the Parliament for members to take on board concerns that have been raised with us, to lodge amendments and to seek assurances from the relevant minister.

I am pleased that the minister said that we had “all learned lessons” from the process. I have learned several lessons, but there is one big lesson that the minister and the Government must stand ready to learn, which is that the onus is on a minority Government to persuade the majority of MSPs through the strength of its arguments, not to bully them or to push them by resorting to a
tactical measure that prevents issues that have been raised with members from being brought before the Parliament.

The Deputy Presiding Officer: The member should conclude.

Margaret Smith: It has been an extremely depressing experience for many of us. Any sense of achievement that we might feel at improvements that we have made as a result of the amendment process is tinged with a deep sense of regret at the manner in which the Government has conducted itself during the passage of the bill.

Aileen Campbell (South of Scotland) (SNP): As we reach the final stage of the bill’s consideration, it is fair to say that it has been through the legislative wringer to a greater extent than some of us might have expected at the outset. That is not necessarily a bad thing, as the Parliament was designed to ensure rigorous scrutiny and debate. In a Parliament of minorities, it is important that all sides of the argument are heard. However, now that we have reached the final stage of the bill’s consideration, I hope that the Parliament can come to a consensus about the best way to ensure that some of Scotland’s most vulnerable children and families get the support and advice that they need.

As a member of the Education, Lifelong Learning and Culture Committee—the lead committee for scrutiny of the bill—I had a degree of sympathy with the policy direction of some of my committee colleagues. We might not all have agreed about how best to use the bill to travel in that direction, but it was clear to me that we had to be sure that its implementation would focus on ending the many problems that were raised in the evidence that we took, which was highly compelling.

As I said in my speech in the stage 1 debate—a debate that was notable for the degree of cross-party consensus—witnesses told us that the 2004 act does not always meet the needs of the parents, families and children who are in desperate need of support. I was aware from my constituency casework of the difficulties that parents faced when trying to do the best for their child with additional needs. Unfortunately, much of the evidence we heard did nothing other than to confirm what many of us have experienced in our casework. The committee heard about parents struggling to get the help that they needed, about cases dragging on for long periods, and about parents being pitted against teams of lawyers representing the council.

Those examples were of children lucky enough to have parents to care for them. We heard about the plight of looked-after children, Gypsy Traveller children and children with parents in the forces. It was clear that, despite the good intentions of the 2004 act, changes needed to be made.

In response, the Government was clear that it was committed to improving the quality of life and support available to those with additional support needs and those who care for them. It was also clear about the financial implications of the bill. Parents of children with additional support needs would be given extra protections when making placing requests, the tribunal system would be extended, and mediation and dispute resolution responsibilities would move to the authority responsible for education rather than the home authority.

Through the course of the committee’s deliberations, the minister made it clear that he was committed to a suite of initiatives that would complement the bill. The Government wants to ensure that adequate levels of information are provided for parents and that looked-after children are not hindered or held back. The minister told us that he was actively working with the parents of disabled children to listen to their views and experiences at first hand and that he was committed to looking to help young carers, among a plethora of other measures. That clearly illustrated the SNP Administration’s desire literally to get it right for every child.

We all have the opportunity now to ensure that we, too, do our best to get it right for every child and get the best possible piece of legislation, which is tailored to suit the needs of some of the most vulnerable families and children in Scotland. For that to be achieved, we need to have level heads and to put party politics to the side. It has been regrettable that some members, in their contributions, have sought to change the tone of today’s debate.

Now that we have come through the legislative process, the debates and the scrutiny, I am confident that Parliament can unite behind the bill. Once again, I express our commitment to providing the best possible support for Scotland’s children with additional needs and their families. I thank the minister for his contribution to the committee’s deliberations on the bill.

Ken Macintosh (Eastwood) (Lab): I thank all those who have contributed to the bill, including, if I may say so, the minister and his team. I thank the clerks to the Education, Lifelong Learning and Culture Committee, the members of the committee and, in particular, the voluntary organisations and
parents who gave evidence, including the National Deaf Children’s Society, Lorraine Dilworth of Independent Special Education Advice (Scotland) and Iain Nisbet of Govan Law Centre, who put an incredible amount of work into making the bill happen.

I say on their behalf that I am pleased but a little frustrated and disappointed in the outcome—disappointed because I feel that, in the end, the minister took what I would describe as a mean-spirited approach to the bill. Instead of revisiting one of the most important acts of the Scottish Parliament of the past decade, with a view to identifying possible deficiencies or areas that need attention and improvement, we had a bit of a cursory review, and then a bill that is based on the premise that it should impose no additional costs or new obligations on our local authorities. The political imperative not to disturb the concordat appears to have come before the need to agree the committee’s reasoned conclusions or to address the needs of families.

All of us know from our constituency casework not only that it is a struggle for parents to ensure that their children’s needs are addressed, but that such a struggle often results in an unhealthy dispute between local authorities and families. When we passed the 2004 act, we were fighting to support families’ needs, while sympathising with local authorities, given the finite resources with which they operate. However, the minister appears to have taken sides with the local authorities against the families. That is not healthy.

Adam Ingram: Will the member take an intervention?

Ken Macintosh: I will not, if the minister does not mind. He will get to wind up in a second.

Many of the briefings that the committee received referred to the visionary and aspirational act passed by the Parliament in 2004. Five years on, we should be talking not about aspiration but about the practical and the immediate.

At stage 1, we started off constructively—a novel but welcome experience for the committee. Following the volte-face by ministers, I believe that most of us are left ruing a missed opportunity. I have no doubt whatever that the Parliament will have to return to the issue yet again, although I hope that that will be part of a broader review of additional support for learning.

Margo MacDonald (Lothians) (Ind): Has the aspiration behind the 2004 act been compromised by the local authorities’ lack of money?

Ken Macintosh: In a word, yes. I believe that, with more money, local authorities could certainly deliver more. The bill will tidy up other matters, although more could have been done.

On the financial resolution and the Presiding Officer’s role, I am absolutely convinced that the Presiding Officer had no desire to be caught up in the dispute over the assessment of the costs of particular amendments. In the interests of transparency alone, that potentially recurring problem must be addressed.

I urge the minister and his team to rethink their approach to minority government. We all want minority government to work—although we perhaps do not all want the present Administration to work. After such a promising start to the bill, the way in which relations broke down was not disastrous, but it was pretty bad news. The lack of trust between the minister and the committee was thoroughly unedifying and impractical. I feel slightly sorry for Mr Ingram, because his personal commitment on the issue is well known, so I can imagine only that he was told from above that he would have no money.

On a positive note, the 2004 act has made a difference to many lives, although we can do much more. I hope that the bill makes families’ lives and their struggle a little easier and that it makes the decisions that are based on their experience a little fairer.

16:51

Murdo Fraser (Mid Scotland and Fife) (Con): As my colleague Elizabeth Smith said, the Scottish Conservatives support the principles of the bill and look forward to its being passed at decision time. We recognise that the 2004 act, although important, contains several failings that the Parliament had to address. We must ensure that every child who is in need receives appropriate help. A concern arose about loopholes in the legislation that meant that that was not happening at all times. I hope that the amended legislation will lead to substantial improvements for some of our most vulnerable young people.

I raised several concerns when I spoke in the stage 1 debate on 4 March, so I am pleased that they have largely been addressed during the bill’s parliamentary progress. I raised the issue of the adversarial nature of the tribunal process and mentioned that many local authorities employ solicitors and advocates to represent them at tribunals, which puts them at a major advantage over parents, who simply cannot afford that level of representation. I am pleased that amendments have been agreed to that will help to deal with that problem and to level the playing field by ensuring that parents receive more help with advocacy.

The provision of information is another issue on which the bill has been amended. Local authorities will be required to provide parents and young people with the information that they must publish.
under the 2004 act. The authorities will also have
to ensure that a summary of that information is
available from schools in the school handbook and
on the school or local authority website. Local
authorities will be obliged to publish information on
dispute resolution procedures. We have had
representation on that from local authorities and
the Convention of Scottish Local Authorities, which
are extremely concerned about the cost of
implementing some of those plans. I must say that
they are overstating the case. Costs might well be
attached to making that information available more
widely, but it is hard to believe that they will be
substantial. The point of making the information
available is that it should reduce costs down the
line by avoiding a more adversarial approach,
which must make sense. I hope that, on reflection,
local authorities will come to understand that.

Several other changes have been made to the
bill, in relation to how tribunals will deal with
placing requests, the definition of additional
support and the right for parents to request an
assessment at any time from local authorities.
Those are all important issues and ones on which
the bill has been improved.

I am not a member of the Education, Lifelong
Learning and Culture Committee, but I am aware
of the difficulties that the bill had during its
passage through the committee, and I listened
with interest to what the committee convener had
to say. I hope that the Government will learn a
lesson from the experience when it deals with
future bills.

I hope that the new legislation goes a long way
towards making life better for young people with
additional support needs, who are a group in
society for whom we should all have a concern.
We will be pleased to support the bill at decision
time.

16:54

Adam Ingram: I thank my parliamentary
colleagues for what has been, by and large, a
constructive debate. This afternoon, we have
come to the end of a legislative process that
began with a commitment from the First Minister to
ensure that the parents of children with additional
support needs would be able to make placing
requests to schools outwith their local authority
areas. The bill puts firmly in place a range of
measures to strengthen the rights of the parents of
children with additional support needs and of
young people with additional support needs.

I thank the members who spoke in the debate.
In nature and tone, the debate occasionally
became rancorous but, by and large, it was
thoughtful and constructive. There has been a
degree of consensus in our deliberations. I am
glad that, from the beginning, there was
widespread support across the parties and across
the chamber for the general principles of the bill.
Indeed, the bill has moved on considerably since
its introduction to Parliament and a good number
of amendments have been agreed to throughout
its parliamentary journey. Some amendments
were lodged by the Government at the behest of
the Education, Lifelong Learning and Culture
Committee, and some that were lodged by
individual committee members got the agreement
of the Government. That puts the narrative of the
debate in perspective.

As might have been expected, there have been
disagreements. However, I hope that it is accepted
that there has been a genuine effort to address
many of the concerns that have been raised both
today and at stage 2 through the amendments that
I lodged and the Opposition amendments that I
supported. Nevertheless, I appreciate that some
issues remain that it was either not possible or not
appropriate to deal with through primary
legislation. Many of those issues will be dealt with
through secondary legislation or through revision
of the code of practice. A dialogue with
stakeholders has already begun that will be
essential in informing that process.

The debate has been about seeking
parliamentary agreement to the motion that the
Education (Additional Support for Learning)
(Scotland) Bill be passed. The Scottish
Government is committed to improving the lives of
children with additional support needs. Support for
vulnerable children is at the heart of a smarter
Scotland. Providing help when it is needed is both
the right thing to do and an investment in our
future. I believe that the bill provides essential
elements that will ensure that our children and
young people with additional support needs have
the support that they require to enable them to
take full advantage of the benefits of school
education.

I thank the Parliament and my colleagues on
the Education, Lifelong Learning and Culture
Committee for their invaluable support, input and
stimulation during the bill's passage. I also extend
my thanks to the wide range of organisations and
representative bodies that contributed so
constructively to the bill's provisions. We look
forward to continued dialogue with those
stakeholders when we revise the code of practice
and secondary legislation. Last but not least, I put
on record my thanks to my bill team, who, more
often than not, rose beyond the call of duty in
responding to the needs of committee members
and myself.

I ask members to endorse the bill this afternoon.
CONTENTS

Section

Placing requests etc.
1 Placing requests
2 Mediation services
3 Dispute resolution
4 Contributions not recoverable in respect of certain services
5 Arrangements between education authorities

Additional support needs
5A Additional support
5B Assessments and examination
5C Additional support needs etc.: specified children and young people

Pre-school children
5D Functions of education authority in relation to certain pre-school children with additional support needs

Advocacy services
5DA Provision of advocacy service: Tribunal

Mediation services
5DB Mediation services

Dispute resolution
5DC Dispute resolution

Publication of information by education authority
5E Provision of published information to certain persons
5F Availability of published information
5G Publication of information on dispute resolution
5GA Power to specify additional sources of information

Provision of information by education authority on occurrence of certain events
5GB Provision of information by education authority on occurrence of certain events

Additional Support Needs Tribunals for Scotland
6 References to Tribunal in relation to co-ordinated support plan
6A References to Tribunal in relation to duties under section 12(6) and 13
7 Power to make rules in respect of Tribunal practice and procedure
7A Power to monitor implementation of Tribunal decisions

Availability of information on additional support needs
7AA Availability of information on additional support needs

Collection of data on additional support needs
7AB Collection of data on additional support needs

General

8 Ancillary provision
9 Orders
10 Short title and commencement
Amendments to the Bill since the previous version are indicated by sidelining in the right margin. Wherever possible, provisions that were in the Bill as introduced retain the original numbering.

Education (Additional Support for Learning) (Scotland) Bill

[AS PASSED]

An Act of the Scottish Parliament to amend the law in respect of placing requests in relation to the school education of children and young persons having additional support needs and in respect of arrangements between education authorities in relation to such school education; to make minor provision in relation to additional support needs; to make further provision in relation to the practice and procedure of the Additional Support Needs Tribunals for Scotland; and for connected purposes.

Placing requests etc.

1 Placing requests

(1) The Education (Additional Support for Learning) (Scotland) Act 2004 (asp 4) ("the 2004 Act") is amended in accordance with this section.

(2) In section 1(3)(a) (additional support needs), after “authority” insert “responsible for the school education of the child or young person, or in the case where there is no such authority, the education authority”.

(3) In section 7(1)(b) (other children and young persons), for “the” substitute “an”.

(4) In section 10 (reviews of co-ordinated support plans)—

(a) in subsection (1), for “belonging to their area” substitute “for whose school education they are responsible”,

(b) after subsection (5) insert—

“(5A) Where any such co-ordinated support plan as is mentioned in subsection (1) is transferred to the education authority by virtue of regulations made in pursuance of section 11(8), the authority must carry out a review of the plan as soon as practicable after the date of transfer.”.

(5) In section 11(8) (co-ordinated support plans: further provision), in paragraph (e) the words from “when” to the end of the paragraph are repealed.

(5A) In section 12 (duties to seek and take account of views, advice and information), after subsection (3) insert—
“(3A) Where any such co-ordinated support plan as is mentioned in section 10(1) is transferred to the education authority by virtue of regulations made in pursuance of section 11(8), the authority’s duty under subsection (2)(a) includes a duty to seek and take account of information and advice (within such period as will enable the authority to comply with their duty under section 10(5A)) from the education authority from which the plan was transferred and any agencies or persons involved in providing support under the plan prior to its transfer.”.

(6) In section 18 (references to Tribunal in relation to co-ordinated support plan)—

(za) after paragraph (d) of subsection (3) insert—

“(da) a decision of an education authority refusing a placing request made in respect of a child or young person (including such a decision in respect of a child or young person for whose school education the authority refusing the request are not responsible)—

(i) made under sub-paragraph (1) of paragraph 2 of schedule 2 in relation to a special school, or

(ii) made under sub-paragraph (2) of paragraph 2 of schedule 2 in relation to a school mentioned in paragraph (a) or (b) of that sub-paragraph.”,

(a) in paragraph (e) of subsection (3)—

(i) for “the”, where it occurs for the first time, substitute “an”,

(ia) after “request” insert “, other than a placing request mentioned in paragraph (da),”,

(ii) for “the”, where it occurs for the second time, substitute “a”,

(iii) at the end add “(including such a decision in respect of a child or young person for whose school education the authority refusing the request are not responsible),”.

(b) after that paragraph insert—

“(f) a decision of an appeal committee on a reference made to them under paragraph 5 of schedule 2 but only where the things mentioned in any of paragraphs (a), (b), (ba) and (c) of subsection (4) occur—

(i) after the decision of the appeal committee, but

(ii) before the time by which any appeal must be lodged in accordance with paragraph 7(3) of schedule 2.”,

(c) in subsection (4)—

(i) the words “, at the time the placing request is refused” are repealed,

(ii) after paragraph (b) insert—

“(ba) no such plan has been prepared, but under subsection (2)(a) of section 11 the education authority have informed the persons mentioned in subsection (3) of that section of their proposal to establish whether the child or young person requires, or would require, such a plan,”,

(d) in subsection (7), for “(3)(e)” substitute “(3)(da) or (e)”.

(7) In section 19 (powers of Tribunal in relation to reference)—
(za) after subsection (4) insert—

“(4A) Where the reference relates to a decision referred to in subsection (3)(da) of that section the Tribunal may—

(a) confirm the decision if satisfied that—

(i) one or more grounds of refusal specified in paragraph 3(1) or (3) of schedule 2 exists or exist, and

(ii) in all the circumstances it is appropriate to do so,

(b) overturn the decision and require the education authority to—

(i) place the child or young person in the school specified in the placing request to which the decision related by such time as the Tribunal may require, and

(ii) make such amendments to any co-ordinated support plan prepared for the child or young person as the Tribunal considers appropriate by such time as the Tribunal may require.”,

(a) in subsection (5)—

(zi) in paragraph (b), at the end of sub-paragraph (i) insert “by such time as the Tribunal may require”,

(i) after paragraph (b) insert—

“(ba) where—

(i) the decision was referred to the Tribunal by virtue of the application of subsection (4)(ba) of that section, and

(ii) the education authority have decided the child or young person does not require a co-ordinated support plan and that decision has not been referred to the Tribunal under subsection (1) of that section by the time within which such references are to be made,

refer the decision to an appeal committee set up under section 28D of the 1980 Act.”,

(ii) after paragraph (c) add—

“(d) where—

(i) the decision was transferred from an appeal committee to the Tribunal by virtue of paragraph 6(4) and (5) of schedule 2 because the thing described in subsection (4)(ba) of that section occurred, and

(ii) the education authority have decided the child or young person does not require a co-ordinated support plan and that decision has not been referred to the Tribunal under subsection (1) of that section by the time within which such references are to be made,

refer the decision back to the appeal committee,

(e) where—

(i) the decision was transferred from an appeal committee to the Tribunal by virtue of paragraph 6(4) and (5) of schedule 2 because the things described in subsection (4)(c) of that section occurred, and
(ii) the Tribunal has confirmed the decision of the education authority that the child or young person does not require a co-ordinated support plan,

refer the decision back to the appeal committee,

(f) where—

(i) the decision was transferred from the sheriff to the Tribunal by virtue of paragraph 7(8) and (9) of schedule 2 because the thing described in subsection (4)(ba) of that section occurred, and

(ii) the education authority have decided the child or young person does not require a co-ordinated support plan and that decision has not been referred to the Tribunal under subsection (1) of that section by the time within which such references are to be made,

refer the decision back to the sheriff,

(g) where—

(i) the decision was transferred from the sheriff to the Tribunal by virtue of paragraph 7(8) and (9) of schedule 2 because the things described in subsection (4)(c) of that section occurred, and

(ii) the Tribunal has confirmed the decision of the education authority that the child or young person does not require a co-ordinated support plan,

refer the decision back to the sheriff.

(5A) Where the reference relates to a decision referred to in subsection (3)(f) of that section the Tribunal has the powers as mentioned in paragraphs (a) and (b) of subsection (5) of this section.”,

(b) in subsection (6), for the words “subsection (5)(c)” substitute “paragraph (ba) or (c) of subsection (5)”.

(8) In schedule 2 (placing requests)—

(a) after paragraph 2(4) add—

“(5) In sub-paragraph (1), the reference to an education authority includes an education authority which are not responsible for the school education of the child.”,

(b) after paragraph 4(2) insert—

“(2A) Sub-paragraph (2) does not apply where the placing request was made to an education authority which, at the time of the request, were not responsible for the school education of the child.”,

(c) in paragraph 6—

(i) in sub-paragraph (1), after “paragraph 5” insert “(including such a reference relating to a decision which has been referred back under section 19(5)(d) or (e))”,

(ii) in sub-paragraph (4), for the words from “there” to the end of the sub-paragraph substitute—

“the things mentioned in any of paragraphs (a), (b), (ba) and (c) of section 18(4) occur.”,
(d) in paragraph 7—

(i) in sub-paragraph (1), after “paragraph 5” insert “(including such a reference relating to a decision which has been referred back under section 19(5)(d) or (e))”,

(ii) after that sub-paragraph insert—

“(1A) Sub-paragraph (1) does not apply where the decision of the appeal committee may be referred to a Tribunal under section 18(1).”,

(iii) in sub-paragraph (8), for the words from “there” to the end of the sub-paragraph substitute—

“the things mentioned in any of paragraphs (a), (b), (ba) and (c) of section 18(4) occur.”,

(iv) after sub-paragraph (11), add—

“(12) Any references to an appeal under this paragraph (however expressed), except such references in sub-paragraphs (3)(a) and (b) and (5), include references to an appeal relating to a decision which has been referred back under section 19(5)(f) or (g).”.

2 Mediation services

In section 15(1) of the 2004 Act (mediation services)—

(a) for paragraph (a) substitute—

“(a) the parents of any children,”,

(b) for paragraph (b) substitute—

“(b) any young persons,”,

(c) in paragraph (c), the word “such” is repealed,

(d) after the word “of”, where it occurs for the fifth time, insert “any of”,

(e) for the word “such”, where it occurs for the third time, substitute “the”.

3 Dispute resolution

In section 16(1) of the 2004 Act (dispute resolution), the following are repealed—

(a) in paragraph (a), the words “belonging to the area of the authority”,

(b) in paragraph (b), the words “belonging to that area”,

(c) in paragraph (c), the word “such” where it occurs for the first time.

4 Contributions not recoverable in respect of certain services

In section 23 of the Education (Scotland) Act 1980 (c.44) (provision by education authority for education of pupils belonging to areas of other authorities), after subsection (2) insert—

“(2A) Subsection (2) does not permit an education authority to recover contributions in respect of—

(a) mediation services provided under arrangements made in pursuance of section 15(1) of the 2004 Act (mediation services), or
(b) services provided by the authority forming part of any procedure provided for in regulations under section 16(1) of that Act (dispute resolution).”.

5 Arrangements between education authorities

In section 29 of the 2004 Act (interpretation)—

(a) in subsection (3), after the word “Act” insert “and subject to subsection (3A),”;

(b) after that subsection insert—

“(3A) For the purposes of this Act, where arrangements are made or entered into by an education authority in respect of the school education of a child or young person with another education authority, the authority responsible for that school education is the authority for the area to which the child or young person belongs despite the education being, or about to be, provided in a school under the management of another authority.”.

Additional support needs

5A Additional support

In section 1(3) of the 2004 Act (additional support needs)—

(a) in paragraph (a), after “provision”, where it occurs for the first time, insert “(whether or not educational provision),”;

(b) in paragraph (b), for “educational provision” substitute “provision (whether or not educational provision)”.

5B Assessments and examination

After section 8 of the 2004 Act insert—

“8A Assessments and examinations: further provision

(1) A person specified in subsection (3) may request that the education authority arrange for a child or young person to whom section 4(1)(a) applies to undergo, for the purpose of considering the additional support needs of the child or young person, a process of assessment or examination.

(2) The education authority must comply with the request unless it is unreasonable.

(3) The persons referred to in subsection (1) are—

(a) where the request relates to a child, the child’s parent,

(b) where the request relates to a young person, the young person or, where the authority are satisfied the young person lacks capacity to make the request, the young person’s parent.

(4) The education authority must, in accordance with the arrangements made by them under section 4(1)(b), take into account the results of any assessment or examination undertaken by virtue of this section.

(5) A process of assessment or examination undertaken by virtue of this section is to be carried out by such person as the education authority consider appropriate.
In this section the reference to assessment or examination includes educational, psychological or medical assessment or examination.”.

5C Additional support needs etc.: specified children and young people

(1) In section 1 (additional support needs) of the 2004 Act, after subsection (1) insert—

“(1A) Without prejudice to the generality of subsection (1), a child or young person has additional support needs if the child or young person is looked after by a local authority (within the meaning of section 17(6) of the Children (Scotland) Act 1995 (c.36)).

(1B) But where, in the course of identifying (in accordance with the arrangements made by them under section 6(1)(b)) the particular additional support needs of a child or young person who is looked after by a local authority (within the meaning of section 17(6) of the Children (Scotland) Act 1995 (c.36)), an education authority form the view that the child or young person is, or is likely to be, able without the provision of additional support to benefit from school education provided to or to be provided for the child or young person, subsection (1A) ceases to apply.”.

(2) In section 6 (children and young persons for whom education authority are responsible) after subsection (1) insert—

“(1A) Without prejudice to the generality of subsection (1), every education authority must in particular consider whether each child or young person falling within section 1(1A) for whose school education they are responsible requires a co-ordinated support plan.”.

Pre-school children

5D Functions of education authority in relation to certain pre-school children with additional support needs

In section 5 of the 2004 Act (general functions of education authority in relation to additional support needs), for subsections (2) and (3) substitute—

“(2) Where a child falling within subsection (3) has been brought to the education authority’s attention as appearing to have needs of the type mentioned in subsection (3)(c), the authority must (unless the child’s parent does not consent)—

(a) in accordance with the arrangements made by them under section 6(1), establish whether the child does have such needs, and
(b) provide such additional support as is appropriate for the child.

(3) A child falls within this subsection if the child—

(a) is under school age (unless the child is a prescribed pre-school child),
(b) belongs to the authority’s area, and
(c) appears to have additional support needs arising from a disability (within the meaning of the Disability Discrimination Act 1995 (c.50)) which the child has.”.
Advocacy services

**5DA Provision of advocacy service: Tribunal**

After section 14 of the 2004 Act (supporters and advocacy), insert—

“14A Provision of advocacy service: Tribunal

(1) The Scottish Ministers must, in respect of Tribunal proceedings, secure the provision of an advocacy service to be available on request and free of charge to the persons mentioned in subsection (2).

(2) The persons are—

(a) in the case of a child, the child’s parent,

(b) in the case of a young person—

(i) the young person, or

(ii) where the young person lacks capacity to participate in discussions or make representations of the type referred to in subsection (3),

the young person’s parent.

(3) In subsection (1) “advocacy service” means a service whereby another person conducts discussions with or makes representations to the Tribunal or any other person involved in the proceedings on behalf of a person mentioned in subsection (2).”.

Mediation services

**5DB Mediation services**

In section 15(2) (independence of mediation services) of the 2004 Act, for the words “under this Act” substitute “relating to education or any of their other functions”.

Dispute resolution

**5DC Dispute resolution**

In section 16(2) (dispute resolution) of the 2004 Act, before paragraph (a), insert—

“(za) requiring any application by a person mentioned in subsection (1)(a) to

(c) for referral to dispute resolution to be made to the Scottish Ministers,”.

Publication of information by education authority

**5E Provision of published information to certain persons**

In section 26 of the 2004 Act—

(a) in subsection (1)—

(i) the word “and” immediately following paragraph (b) is omitted, and

(ii) after paragraph (c), insert “, and

(d) provide the persons mentioned in subsection (2A) with any information published under paragraph (a) or (c).”,

(b) after subsection (2), insert—
“(2A) The persons referred to in subsection (1)(d) are—

(a) in the case of a child with additional support needs for whose school education the authority are responsible, the child’s parent,

(b) in the case of a young person with additional support needs for whose school education the authority are responsible—

(i) the young person, or

(ii) if the authority are satisfied that the young person lacks capacity to understand the information published under this subsection by the authority, the young person’s parent.”.

5F Availability of published information

In section 26(1) of the 2004 Act (publication of information by education authority), after paragraph (a) insert—

“(c) ensure that a summary of the information published by the authority under this subsection is available—

(i) on request, from each place in the authority’s area where school education is provided,

(ii) in any handbook or other publications provided by any school in the authority’s area or by the authority for the purposes of providing general information about the school or, as the case may be, the services provided by the authority, and

(iii) on any website maintained by any such school or the authority for that purpose (whether or not the website is also maintained for any other reason),”.

5G Publication of information on dispute resolution

In section 26(2) of the 2004 Act (publication of information by education authority), after paragraph (e) insert—

“(ea) any dispute resolution procedures established by the authority in pursuance of section 16,”.

5GA Power to specify additional sources of information

In section 26(2) of the 2004 Act (publication of information by education authority), after paragraph (h) insert “, and

(i) any other persons specified by the Scottish Ministers by order as persons from which the persons referred to in subsection (2)(f)(i) and (ii) can obtain advice, further information and support in relation to the provision for such needs, including such support and advocacy as is referred to in section 14”.

599
Provision of information by education authority on occurrence of certain events

5GB Provision of information by education authority on occurrence of certain events

In section 13 of the 2004 Act (provision of information etc. on occurrence of certain events), after subsection (4) insert—

“(4A) In relation to the provision of any information under subsection (2)(a) or (4) in the case of a child, the education authority must seek and take account of the views of the child (unless the authority are satisfied that the child lacks capacity to express a view).”.

Additional Support Needs Tribunals for Scotland

6 References to Tribunal in relation to co-ordinated support plan

(1) In section 18 of the 2004 Act (references to Tribunal in relation to co-ordinated support plan)—

(a) after subsection (3)(d)(i) insert—

“(ia) failure by the education authority to provide, or make arrangements for the provision of, the additional support (whether relating to education or not) identified by virtue of section 9(2)(a)(iii),”,

(b) after subsection (5) insert—

“(5A) Where an education authority fail, in response to a request referred to in section 6(2)(b)—

(a) to inform under subsection (2)(a) of section 11 the persons mentioned in subsection (3) of that section of their proposal to establish whether a child or young person requires, or would require, a co-ordinated support plan by the time required by regulations made in pursuance of subsection (8) of that section, or

(b) to inform those persons of any decision not to comply with the request by the time required by such regulations,

that failure is to be treated for the purposes of this section as a decision of the authority that the child or young person does not require a co-ordinated support plan.

(5B) Where under subsection (2)(a) of section 11 the education authority have informed the persons mentioned in subsection (3) of that section of their proposal to establish whether the child or young person requires, or would require, a co-ordinated support plan, failure by the authority so to establish by the time required by regulations made in pursuance of subsection (8) of that section is to be treated for the purposes of this section as a decision of the authority that the child or young person does not require a co-ordinated support plan.”.

(2) In section 19(3) of the 2004 Act (powers of Tribunal in relation to reference) for “(d)(ii)” substitute “(d)(ia), (ii)”.

6A References to Tribunal in relation to duties under section 12(6) and 13

(1) In section 18 of the 2004 Act—
(a) in the title, omit “in relation to co-ordinated support plan”, and

(b) in subsection (3), after paragraph (f) (as inserted by section 1(6)(b) of this Act), insert—

“(g) failure by the education authority to comply with their duties under section 12(6) and 13 in respect of the child or young person (except where consent for information to be provided under section 13(2)(a) or (4) has not been given under section 13(5)) .”.

(2) In section 19(3) of the 2004 Act, for “or (d)(ii) or (iii)”, substitute “, (d)(ii) or (iii) or (g)”.

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

In paragraph 11(2) of schedule 1 to the 2004 Act (Additional Support Needs Tribunals for Scotland)—

(a) after paragraph (k) insert—

“(ka) enabling specified matters relating to the failure by an education authority to comply with time limits required by virtue of this Act to be determined by the convener of a Tribunal alone, “,

(b) after paragraph (t) add—

“(u) enabling a Tribunal, in specified circumstances, to—

(i) review,

(ii) vary or revoke,

any of its decisions, orders or awards,

(v) enabling a Tribunal, in specified circumstances, to review the decisions, orders or awards of another Tribunal and take such action (including variation and revocation) in respect of those decisions, orders or awards as it thinks fit.”.

7A Power to monitor implementation of Tribunal decisions

In schedule 1 of the 2004 Act (Additional Support Needs Tribunals for Scotland) after paragraph 11, insert—

“Power to monitor implementation of Tribunal decisions

11A The President may, in any case where a decision of a Tribunal required an education authority to do anything, keep under review the authority’s compliance with the decision and, in particular, may—

(a) require the authority to provide information about the authority’s implementation of the Tribunal decision,

(b) where the President is not satisfied that the authority is complying with the decision, refer the matter to the Scottish Ministers.”.

Availability of information on additional support needs

7AA Availability of information on additional support needs

After section 26 of the 2004 Act insert—
“26A Availability of information on additional support needs

The Scottish Ministers must report to the Scottish Parliament in each of the five years following the commencement of this section on what progress has been made in each of those years in ensuring that sufficient information relating to children and young persons with additional support needs is available to effectively monitor the implementation of this Act.”.

Collection of data on additional support needs

7AB Collection of data on additional support needs

After section 27 of the 2004 Act insert—

“27A Collection of data on additional support needs

(1) The Scottish Ministers must each year collect from each education authority information on—

(a) the number of children and young persons for whose school education the authority are responsible having additional support needs,

(b) the principal factors giving rise to the additional support needs of those children and young persons,

(c) the types of support provided to those children and young persons, and

(d) the cost of providing that support.

(2) The Scottish Ministers must publish the information collected each year under subsection (1).

(3) The Scottish Ministers may (after consulting such persons as they consider appropriate) by regulations specify the format in and method by which the information mentioned in subsection (1) is to be—

(a) provided to, and

(b) published by,

them.”.

General

8 Ancillary provision

(1) The Scottish Ministers may by order make such transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, or in consequence of, or for the purposes of giving full effect to, any provision of this Act.

(2) An order under this section may modify any enactment, instrument or document.

9 Orders

(1) Any power conferred by this Act on the Scottish Ministers to make an order—

(a) must be exercised by statutory instrument,

(b) may be exercised so as to make different provision for different purposes.

(2) A statutory instrument containing an order under section 8 is, subject to subsection (3), subject to annulment in pursuance of a resolution of the Scottish Parliament.
(3) An order containing provisions which add to, replace or omit any part of the text of an Act is not to be made unless a draft of the statutory instrument containing the order has been laid before, and approved by resolution of, the Parliament.

10 Short title and commencement

(1) This Act may be cited as the Education (Additional Support for Learning) (Scotland) Act 2009.

(2) This section and sections 8 and 9 come into force on Royal Assent.

(3) The remaining provisions of this Act come into force on such day as the Scottish Ministers may by order appoint.
Education (Additional Support for Learning) (Scotland) 

Bill

[AS PASSED]

An Act of the Scottish Parliament to amend the law in respect of placing requests in relation to the school education of children and young persons having additional support needs and in respect of arrangements between education authorities in relation to such school education; to make minor provision in relation to additional support needs; to make further provision in relation to the practice and procedure of the Additional Support Needs Tribunals for Scotland; and for connected purposes.

Introduced by: Fiona Hyslop
On: 6 October 2008
Bill type: Executive Bill