Education, Lifelong Learning and Culture Committee

2nd Report, 2009 (Session 3)

Stage 1 Report on the Education (Additional Support for Learning) (Scotland) Bill
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Education, Lifelong Learning and Culture Committee

2nd Report, 2009 (Session 3)

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

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Education, Lifelong Learning and Culture Committee

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
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.

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\(^3\) 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.\textsuperscript{7}

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."\textsuperscript{8}

\textit{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. \textbf{The Committee notes these concerns and draws them to the attention of the Scottish Government.}

\textbf{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...
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


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

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• 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.

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

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\(^ {13}\) 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

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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.

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 where 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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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." 

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." 

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." 

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." 

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

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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

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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.”

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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—

“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

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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.”\textsuperscript{42}

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."

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.”

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.”

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

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

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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.

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

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 Annex 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 […].”

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”. He also stated that “[…] we have not yet started to draft the secondary legislation that will flow from the bill.”

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.”

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.

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.”67

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..."
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."\(^{72}\)

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."\(^{73}\)

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.\(^\text{74}\)

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.

\(^{74}\) 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 that 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.
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 whatever 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 leader; 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 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 their 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.

11:00

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 Dorrrian'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 ponging 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. Technically, it should not do that, because the request should go to an education appeal committee and a sheriff. However, in those circumstances, if the tribunal with its expert hat on believed that the request was well intentioned and if, although the co-ordinated support plan had not been agreed to, it was close but no coconut, the tribunal would have the power to decide on the placing request. If the claim was vexatious—if it was clear to everybody that there never had been any likelihood of a co-ordinated support plan being prepared and that the request was just a chance to get to a tribunal rather than a sheriff—the tribunal would have the power to transfer it back.

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, but that is what the tribunal rules state.

We must consider what people are saying about the tribunal. If education authorities and senior speech and language therapists are saying that they would not wish to repeat the experience, and if ISEA is telling us that parents are saying that they do not want to go through the situation again, something needs to be done about the tribunal.

There is a limit to what we can do in the bill. We can do something about the tribunal procedures, but we have not yet started to draft the secondary legislation that will flow from the bill. When we discussed the tribunal at the consultation events, we had to hold people back and say that we were not discussing the tribunal rules and procedures. We will consult on those. Everyone is aware of the issue about the tribunal, and there is an expectation that we will address it.

11:15

We have talked to the Govan Law Centre and ISEA, which are the principal proponents of parents at the tribunal, about how we can make the process simpler for all concerned, not just parents. For example, we have discussed 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 between 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.

Robin McKendrick: I am sorry, I did not catch what you said.

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 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 placing 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 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 pre dates 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 additional cost 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.
Robin McKendrick: Obviously, it would not be proper for us 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 protocol by publishing part of a code of practice if it should not be published before we have gone through a certain stage in the bill’s consideration.

Ken Macintosh: Perhaps you can report back to the committee on that matter. We might even ask the Minister for Children and Early Years whether he will give us 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 ‘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 his gain and I wish him well in his work with that committee.

Members: Hear, hear.

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 for 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, in 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 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
case that you mentioned is probably of the sort in which the child did not have a co-ordinated support plan and the issue of the placing request went to an education appeal committee, from which it was appealed on 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
We will give you a written 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 it cost? Was the suggestion made to the Government when it was drawing up the bill or the proposal cost? Was the suggestion made 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.

Ken Macintosh: Not at the moment, but would that be the case under your proposal?

Jessica M Burns: Yes. Under the bill, that would not be the case.

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 special school would come to you. Is that correct? You said—

Jessica M Burns: At the moment, a CSP has to be involved for a case to come to you.

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: 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: 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: At the moment, but would that be the case under your proposal?

Ken Macintosh: Not at the moment.

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?

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 (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:** 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?

Lorraine Dilworth: Are you talking about children with special needs?

Elizabeth Smith: If a child was referred to a private school that had a specialist dyslexia unit, for example, would there be problems? Such a situation would be unusual, but it might happen.

Iain Nisbet: The bill would not change the situation on placing requests to independent or grant-aided special schools, whether a school is in Scotland or England, Wales and Northern Ireland. Parents of pupils who have additional support needs are currently able to make placing requests to independent special schools, but the law does not allow such parents to make placing requests to mainstream independent schools, even if the school has a special unit, because of the way in which “special school” is defined. Such placing requests have never been an option for parents and I do not think that there are proposals to allow such an approach. The issue might be worth considering, although I do not know how common such a situation would be in the independent sector.

The process will remain relatively straightforward. A parent will make their placing request to the local authority that is responsible for their child’s school education, and that local authority will determine the issue.

Elizabeth Smith: Are you saying that you do not rule out giving the matter further consideration? Some independent schools have specialist teachers and extra resources, which could help to solve a child’s problems.

Iain Nisbet: I think that currently a parent would have to persuade their local authority that a placement in such a unit would be a good idea, and it would be open to the authority to make a placement to the unit. However, further amendment to the law would be required if parents were to be allowed to make direct placing requests, given rights of appeal and so on.

Elizabeth Smith: Mrs Dilworth rightly mentioned financial constraints on local authorities. Private-sector means to help children would be worth considering.

Iain Nisbet: Currently, if a child is placed in such a unit or in an independent specialist school, the local authority is obliged to meet the cost, so local authorities tend not to make such placements so that they save money. I am, however, speaking generally; there are particular specialist placements that are cheaper than similar provision in-house would be, where there would not be the required numbers of pupils with special needs.

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 with 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?

12:15

**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 grassroots 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 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.

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Kenneth Gibson: Access is important. It is also important that we tighten up the code of practice to ensure that the legislation is implemented effectively. We have talked about tribunals and the fact that, on occasion, their decisions can be ignored. Would it be appropriate to give tribunals more teeth and to allow them to give financial penalties?

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
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

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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 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 contiguos 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 Vallely (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 untrammelled 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 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,
“Go directly to the Court of Session.” Many education officials and parents are extremely concerned about this—and, as a lawyer, I would 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 Vallely, 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 not 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 him 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 there is a distinction to be drawn between cases in which a parent says that they want their child to go to a particular school that 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 day job, as there are several points to which I would like to alert the committee. I defend my 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.

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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.
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 that 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, gooey, 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
corporate parent and the degree to which the council is almost mediating with itself. We need to address that in a way that affords people some independence of view and support. I appreciate that the Parliament is looking at the regulations on looked-after children, but the matter is of concern to my council.

Christina McKelvie (Central Scotland) (SNP): I want to turn the witnesses’ minds to tribunal rules and procedures. The bill contains two new grounds for referral to the tribunal, about which different local authorities have expressed different opinions. What is your view on those two new proposals? Do you know the ones that I am talking about?

Cameron Munro: Yes—they are in section 6.

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 for a parent to have 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.
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 conveners are 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. Cost is never not an issue.

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 Valley 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 Valley: 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: Overturning 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. Disputes will always arise. The system needs to be kept under review.

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 tripwire and then the janny, 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.

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.

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
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, 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 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 2004 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 improvements to the tribunal to make it less 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 Tribunals 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: I was trying to make the point that every local authority is under a statutory duty to provide a care plan for every child who is looked after, which should address the educational needs of the child. That is the stage at which additional support needs ought to be identified. If assessments are required, it is the local authority’s duty, as the corporate parent, to ensure that they are carried out. As I indicated, we are making significant progress on policy development and implementation in the area. We have designated managers in schools and educational and residential establishments to take the agenda forward. I detailed all the other steps that we are taking. Can you remind me of your second question?

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 inappropriately 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 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
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