EDUCATION COMMITTEE

Wednesday 10 December 2003
(*Morning*)

Session 2

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EDUCATION COMMITTEE

13th Meeting 2003, Session 2

CONVENER

*Robert Brown (Glasgow) (LD)

DEPUTY CONVENER

*Lord James Douglas-Hamilton (Lothians) (Con)

COMMITTEE MEMBERS

*Ms Wendy Alexander (Paisley North) (Lab)
*Rhona Brankin (Midlothian) (Lab)
*Ms Rosemary Byrne (South of Scotland) (SSP)
*Fiona Hyslop (Lothians) (SNP)
Mr Adam Ingram (South of Scotland) (SNP)
*Mr Kenneth Macintosh (Eastwood) (Lab)
*Dr Elaine Murray (Dumfries) (Lab)

COMMITTEE SUBSTITUTES

*Brian Adam (Aberdeen North) (SNP)
Mr Richard Baker (North East Scotland) (Lab)
Rosie Kane (Glasgow) (SSP)
Bill Aitken (Glasgow) (Con)
Mr Jamie Stone (Caithness, Sutherland and Easter Ross) (LD)

*attended

THE FOLLOWING GAVE EVIDENCE:

Dinah Aitken (Enquire)
R John Elliot WS (Scottish Committee of the Council on Tribunals)
Adam Gaines (Disability Rights Commission)
Dr Gwynedd Lloyd (University of Edinburgh)
Kate McGuiness
Ewan Malcolm (Scottish Mediation Network)
Stephanie Taylor (Advocacy Safeguards Agency)

CLERK TO THE COMMITTEE

Martin Verity

SENIOR ASSISTANT CLERK

Irene Fleming

ASSISTANT CLERK

Ian Cowan

LOCATION

Committee Room 1

Scottish Parliament

Education Committee

Wednesday 10 December 2003

(*Morning*)

[THE CONVENER *opened the meeting at 09:48*]

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

The Convener (Robert Brown): Good morning. It sounds unlucky to say this, but welcome to the 13th meeting of the Education Committee this session. Today we continue to hear evidence on the Education (Additional Support for Learning) (Scotland) Bill. Will people please ensure that their mobile phones, pagers and so on are switched off so that they do not bleep during the meeting.

We have a number of different panels of witnesses this morning. I welcome panel number 1, which comprises Ewan Malcolm, the mediation development officer of the Scottish Mediation Network, R John Elliot, chairman of the Scottish committee of the Council on Tribunals and Stephanie Taylor, the policy research officer of the Advocacy Safeguards Agency.

I begin by declaring my membership of the Law Society of Scotland and my consultancy with Ross Harper Solicitors, because legal aid issues might come up in this morning's evidence. I invite the witnesses to make their opening statements.

R John Elliot WS (Scottish Committee of the Council on Tribunals): Good morning, ladies and gentlemen. The Scottish committee of the Council on Tribunals is a statutory body that was set up many years ago to oversee the constitution and working of what are loosely termed tribunals. In Scotland, the numbers range from children's hearings at approximately 68,000 hearings a year, through appeals service tribunals at 38,000, down through employment, immigration and General Commissioners of Income Tax tribunals down to such matters as the police appeals tribunal, which has approximately two hearings a year.

Apart from going to see the hearings, or at least a number of them, we comment on the rules, regulations and proposals regarding tribunal systems or proposed tribunal systems. My body is concerned solely with appeals mechanisms. As I mentioned, we are involved with numerous tribunals—in fact, more people appear before tribunals than they do before the courts.

My particular role this morning is to set out a number of comments and views that the Scottish committee of the Council on Tribunals made on the draft bill and to tell the committee briefly about our areas of concern. The first concern relates to section 14, which deals with jurisdiction. Members might wish to ask me about that. Secondly, we have comments to make about training of panel members—they are not entirely adverse but they are criticisms nonetheless. Our third concern relates to emphasis on efficient and effective performance of the tribunal. Fourthly, we are concerned about the provision that hearings are to be held in private. Our final concern relates to the administration of oaths.

We also have some positive comments on the bill. It is not always popular to make positive comments, but we do have some. I would be happy to develop any of the points should the committee wish me to do so.

Ewan Malcolm (Scottish Mediation Network): Although I work with the Scottish Mediation Network, funding arrangements mean that the Scottish Mediation Network is also managed by Mediation UK. I hope to be able to assist the committee with sections 16 and 17, which make specific mention of the provision of mediation services.

The purpose of the Scottish Mediation Network is to promote mediation in all its forms. Our concern is that mediation services should meet the needs of the different strands of mediation. I also happen to be a mediation practitioner. I hope that I can also share that perspective with the committee.

Stephanie Taylor (Advocacy Safeguards Agency): The Advocacy Safeguards Agency is a national agency in Scotland that is concerned with the development and improvement of advocacy provision. Our concerns relate to the support that is set out in the bill for parents, families and children. At the moment, as the committee knows, it is proposed that mediation will be used in cases where there is a dispute. We advocate that parents should have representation and support at formal and informal stages because that would foster better relations between children, their parents and schools. We see that provision as being consistent with the other provisions in the bill for mediation and tribunals.

The Convener: Thank you. I should also have welcomed Brian Adam to the meeting. He is at the committee this morning as the substitute member for Adam Ingram.

Rhona Brankin (Midlothian) (Lab): Various witnesses have told us of their concerns about the lack of equity at tribunals. They said that some parents might be able to afford legal representation, but others might not. Given that legal aid is not available at tribunals, Children in Scotland suggested that advocacy support should be available at tribunals to support appellants. The committee would be interested to hear the panel's views on that issue.

R John Elliot: The general view of the Scottish committee of the Council on Tribunals, which is backed up by evidence, is that advice and representation are helpful to appellants, so we strongly support such provision at any hearing. We find that advice's being available before any hearing is particularly important. The emphasis is often on representation rather than on the pre-hearing advice.

The Convener: By "representation", do you mean legal representation specifically?

R John Elliot: No, we mean representation.

Stephanie Taylor: As you would expect, the Advocacy Safeguards Agency also supports the provision of advocacy support to families who go through the procedures. In the early informal stages, before disputes arise, during which a parent might feel unsure about how to communicate with a school or—as is indicated in the policy memorandum—might feel mistrust of schools or education authorities, advocacy is useful in enabling parents to communicate more effectively and to make known their views. Support in the early stages can mean that disputes do not arise. We support the provision of such support at a much earlier stage than is being proposed.

Ewan Malcolm: From the point of view of mediation, which is in effect a rigorous process of structured negotiation, people who are supported by effective and well-prepared advocates can use that process very well. In that context, advocacy can be a useful support to the collaborative—rather than adversarial—approach of mediation.

Rhona Brankin: Will you comment on the evidence that some bodies have given us, which suggests that there is inequity in the way in which the tribunals are set up, whereby some parents can afford legal representation while others cannot?

R John Elliot: It is difficult to comment on evidence that we have not seen.

Rhona Brankin: I suppose that I am driving at the question of how we can arrive at a situation in which some parents do not perceive themselves to be disadvantaged when the local authority has legal representation but they are not entitled to legal aid for legal representation.

R John Elliot: The view of the Scottish committee of the Council on Tribunals is that legal aid is desirable in circumstances in which it will promote a fair hearing. When we talk about the provision of legal aid, the general suggestion is that representation must come from a lawyer but, as I have said, our view is that good-quality representation is what matters. In employment tribunals, for example, there is much good-quality representation that does not come from lawyers, but it is funded by someone.

Lord James Douglas-Hamilton (Lothians) (Con): In the Executive's report on the consultation, it stated that there was broad support for advocacy and conciliation instead of, or in addition to, mediation. Last week, the committee heard from parents' groups, which suggested that advocacy would be a better way of resolving disagreements than would mediation. What are your views on the suggestion on advocacy services?

Stephanie Taylor: As I have said, I feel that representation is important. Although, in my particular role, I support advocacy representation, if other forms of representation were proposed for parents—when I say "parents", I mean parents and children—I feel that that would be sufficient to support them through what can be a difficult and traumatic process.

The mediation process can work but, as Ewan Malcolm pointed out, it can be difficult for parents to go into that situation if they feel mistrustful—perhaps because they have had bad experiences—or if they do not have all the information that they need beforehand. That is why, in the consultation, many parents and a number of other organisations felt that mediation alone was not enough.

As I said, it is a shame that support is not provided to parents—although it cannot really be called support, because the mediator is neutral—until a dispute arises.

10:00

Ewan Malcolm: It is inevitable that people who go to mediation will have a huge amount of distrust. That is likely to be what drives the comments. The consultation report also said that it was felt that mediation would come into play only when relationships had broken down. In fact, my experience as a mediator is that mediation can be hugely helpful when a breakdown in a relationship is expected. The essence of mediation is structured negotiation with the assistance of an external person.

R John Elliot: We view mediation as a helpful part of any dispute resolution process. The suggestion that tribunals should try not to allow an adversarial situation to develop runs throughout the process. The involvement of advocacy suggests some adversarial proceedings, which are, after all, in our legal tradition. However, we observe that a tribunal that tries to have an inquisitorial role has difficulty in doing that and in running a fair hearing.

The Convener: Should tribunals have a power such as that which the Advisory, Conciliation and Arbitration Service has in employment disputes to refer matters to mediation or to encourage mediation as best practice that is to be preferred to going straight to a tribunal hearing?

R John Elliot: Breathing space for mediation is often a good idea. Various views are expressed about whether mediation can be truly voluntary if it is forced on parties. I am not an expert on that, but mediation is a good option.

Ewan Malcolm: We suggest that the model that is used in family law, which gives sheriffs the option under a rule of court to ask parties to consider mediation without forcing them to participate in it, should be considered.

Lord James Douglas-Hamilton: The jurisdiction of tribunals is limited to education authorities, which the submission from the Scottish committee of the Council on Tribunals says is an anomaly, because

> "the Tribunal might make an order that a child receives services from … a Health Board".

Section 19 of the bill will allow education authorities to request the help of other agencies in fulfilling their functions and says:

> "An appropriate agency must comply with a request … unless it … is incompatible with its own … duties".

What are the panel's views on the jurisdiction of tribunals?

R John Elliot: As my committee made the comment, I should speak first. Our response to the consultation and our submission to the committee commented on that issue. The danger is that decisions will become meaningless. We also believe that what we call a joined-up service will not be provided. One notes the inherent contradiction in section 19 between subsection (1), which says:

> "request the help of that agency",

and subsection (3), which says:

> "An appropriate agency must comply".

One can see the many gaps into which efforts might fall.

Our work in relation to children's hearings in particular shows that when a tribunal cannot require other agencies to do certain things, children sometimes return to a hearing after an agency has failed to do what the panel thought was necessary. That does not happen frequently, but it happens often enough to make us concerned. We have commented on the matter in several of our annual reports.

The Convener: I understand that in England, the tribunal system for matters that concern aids and adaptations under the Disability Discrimination Act 1995 and the equivalent tribunal to that which the bill proposes have been unified. Are you aware of that? To make the system more effective, can the division be overcome here between services that additional support needs tribunals deal with and the linked issue of aids and adaptations that people might require? Those two tribunals have slightly different jurisdictions and deal with roughly the same subject.

R John Elliot: I am aware of that issue, but I am afraid that I cannot give any detail on it. However, I could certainly find out about it and supply the committee with the information, if you would like me to do so.

The Convener: I would. What are your views on whether having those two tribunals is likely to be a problem? Do you have any views on how we could get round the difficulty of the two tribunals' operating in a reserved-devolved split in Scotland, and on how we could bring their jurisdictions together, as appears to have been done in England?

R John Elliot: I would prefer to address that matter in writing.

The Convener: That would be helpful.

Ms Rosemary Byrne (South of Scotland) (SSP): Independent additional support needs tribunals are to be established to hear appeals on matters relating to co-ordinated support plans. Those matters include an education authority's decision to prepare or not to prepare a CSP, the information that is contained within a CSP and an authority's failure to carry out certain actions within the time limits that are prescribed by regulations. What are your views on the establishment of the additional support needs tribunals?

R John Elliot: The Scottish committee of the Council on Tribunals views the establishment of the additional support needs tribunal as a positive move, because it will provide the right kind of forum for dispute resolution. Tribunals are introduced when relatively speedy decisions are desired, where informality is desired and, in particular, where expertise is required on the panel. Those seem to me to be the three distinguishing marks of a tribunal.

Ewan Malcolm: The Scottish Mediation Network envisages that the availability of mediation would run parallel to the existence of a tribunal, not as a panacea, but simply as an additional option at any stage when people decide to take a consensual, rather than adversarial, approach.

Stephanie Taylor: Likewise, the Advocacy Safeguards Agency views advocacy support as being support for children and families at any stage in the process, particularly the informal stage, whether they are in mediation with the schools or education authorities or at a tribunal.

Ms Byrne: Is the system too adversarial at the outset, rather than being one in which parents feel that their needs will be met without having to go through tribunals and mediation? A number of comments have been made to the effect that we are setting off from the beginning with a confrontational element in the system rather than with a system that assures people that we would go to tribunals or mediation only in extreme cases. Do you have any views on that?

Ewan Malcolm: Our view is that this rejigging of how things are done will provide an opportunity. There is no doubt that the words “mediation” and “conciliation” are being used a lot, particularly by local authorities. The bill provides a great opportunity for awareness raising, training in skills and consensus building.

R John Elliot: Ultimately, some form of dispute resolution is needed and, in such circumstances, one wants a method that is informal so that parents feel that they can deal with it and it becomes something with which they can cope. That means that parents need to have certain support services to rely upon; however, we must ultimately have a means of resolving disputes. The question is where that is best done.

Ms Byrne: Do you think that the tribunal will be the best way to do that?

R John Elliot: It can be. We have only to watch children’s hearings and education authority appeal committees to see that. I have observed education authority appeal committees at which the professional who is representing the council has been beaten into the ground by the parents because the parents have a story to tell. We are dealing with children, and nothing gets parents going more than children do. The tribunals could run well.

Stephanie Taylor: The Advocacy Safeguards Agency also feels that it is important that parents have a forum to which they can go if they are unable to resolve their dispute reasonably without formal resolution. Unfortunately, there have been disputes, and many parents—as the committee will know from the responses to its call for evidence—have felt that they have had to fight for provision.

We hope that the bill will mean that there will be a more collaborative approach to meeting children’s needs, but it is important that there is a fall-back position of an independent forum at which matters can be resolved.

The Convener: I understand that the Scottish committee of the Council on Tribunals has recently done a report on children’s hearings that holds them up as an exemplar of good practice in a number of areas. Are there lessons to be learned from the experience of the children’s panels that we can take on board in the context of the bill?

R John Elliot: There is no doubt that there are such lessons to learn. One of our comments on the bill relates to the necessity of training for panel members. We think that members of children’s panels are extremely well trained and we have observed hearings at which that has been evident. For example, chairing a hearing is not an easy task, but one sees children’s hearings at which there are three members on a panel, each of whom chairs a different hearing during a particular session.

Children’s panel members demonstrate considerable skills and commitment to the process. They run an inquisitorial process in which they try to avoid confrontation as much as possible—their training leads them in that direction. Most tribunal systems can learn an enormous amount from the children’s hearings. Although not everything in that system is good, it contains a great deal that is good.

Fiona Hyslop (Lothians) (SNP): Have you been consulted by the Executive on the number of tribunals it is anticipated that the bill will give rise to?

R John Elliot: As far as I am aware, we have not been consulted on that. I do not know whether the Executive has made any such statement, but I do not think that it has asked us how many tribunals it is expected that there will be; we would probably not know that.

Fiona Hyslop: I know that that is difficult to anticipate; we are trying to get a feel for the scale of the bill’s implications.

The Executive has indicated to us that it anticipates that only half of those who have a record of needs will get a CSP. Parents have told us that that could mean—particularly during the transition from the old system to the new system—that many parents who have children who have a record of needs will automatically want to use the tribunal system to ensure that they get a CSP, because they see the CSP as being a better passport to services. That could block the system, particularly in the early years of the bill’s implementation. Do you anticipate that that will be a problem?

R John Elliot: As you rightly said, that will depend on the numbers. Any new system always has growing pains in areas such as administration and inexperienced panel members can require training.

If one considers immigration, there have been times when blocks of cases have come through. Such situations have proved extremely difficult to manage, although the present situation is being managed very well. In past years, there have been significant backlogs of cases, which have caused enormous problems. To some extent, the issue will depend on resources, but I do not imagine that the Executive would want to provide resources for the initial block that were not required later on, as that might be a misuse of resources.

Fiona Hyslop: I want to ask about equity in the system. We keep coming back to the fact that not everyone will have access to a tribunal, because of problems about access to legal aid and the fact that so much hinges on the CSP. We have received a lot of evidence in which concern has been expressed about that and it has been suggested that, rather than have separate systems, whereby some people have a CSP, some have an individualised educational programme and some have a personal learning plan, there should be a single system for everyone and everyone should have the same treatment. That would mean that everyone who had concerns about whether they were receiving adequate support from education or health resources would have access to a tribunal.

I have mentioned the issue of the volume of tribunals. If Parliament decided that a single system was more appropriate than a fragmented system involving CSPs, IEPs and PLPs, would Scotland be able cope with such a system, which would allow any parent to go to a tribunal if they were not getting adequate resources, or do we need an element of rationing in the system, whereby only a percentage of parents could have access to a tribunal?

R John Elliot: You asked whether Scotland could cope: the answer is yes, but someone must know how many cases there could be and how many cases there are. They must also be able to assess what the resource implications would be if all such situations were dealt with in a tribunal. One has only to look at other tribunal systems to understand what resources might be required. The resource implications of listing cases and so on are significant—their administration is quite difficult. I cannot possibly tell you whether that would be right or whether it would be possible. I think that Scotland could probably cope, but it would have to devote considerable resources to that.

10:15

Fiona Hyslop: What type of people do you expect will sit on tribunals and provide mediation and advocacy services?

Stephanie Taylor: Going back to the point that I made earlier, I think that the parents whom you have spoken to have expressed concern that fewer people will have a CSP. It is important that, where there is concern, parents should have support and information to enable them to make choices that are based on fact rather than on perception. Representation—whether it be advocacy or another form of representation—should be available to parents at a formal and an informal stage. The people involved need to have an understanding of the system as it will operate. Currently, no one has an understanding of the new system, so there will need to be training, especially because, as was said earlier, there are likely to be hiccups in the system. It will be important to parents in particular that the people who provide support or mediation do not work for the education authority.

Ewan Malcolm: I echo that point, although with some amplification. As the committee may know, there are already several pilot schemes, principally the Govan law centre education service and Children in Scotland's Enquire mediation service. On the question about volume and resources, the interesting thing is that, although mediation services have been relatively little used, parents and children have made quite a lot of inquiries about them.

The anecdotal perception is that people in local authorities feel that mediation should be part of their responsibilities and duties. I do not for a second diminish what those people are doing—they are using mediation-type skills—but they cannot have the essential independence that leads to the credibility and trust that is required of a mediator. Our ideal would be for services to be separate from local authorities. I am aware that the bill indicates that if those services are to be provided by the local authority, they have to be outwith the decision-making process. I acknowledge that in community mediation—neighbour mediation—some local authorities use that model: council mediation services are provided for council tenants and, in some instances, ratepayers.

The sort of people whom we would be looking for are independent, extremely skilled and trained as mediators. They would have an understanding of the geography of the subject matter. There is a pool of people out there. In the consultation, there was concern that not enough mediators would be available. I have lists of people who are available and trained and I am certain that the standards are sufficient to merit an excellent service.

Ms Wendy Alexander (Paisley North) (Lab): The dilemma that others have pointed to and with which the committee is struggling is how we bring speed to the process but balance that with fairness. On the speed side, there have been many representations for quick intervention, so that resources are not consumed in the dispute resolution process but are left for front-line services. However, although the fairness of the system could be secured or enhanced in a number of ways, the ways that have been suggested seem to risk introducing significant delay into the system. Therefore, I ask you to comment on three things.

First, if we addressed your concerns by going for independent mediators who were not linked to local authorities, might it not take longer to acquire those services in parts of Scotland? Secondly, if legal representation were provided as of right, would not the need to have lawyers available typically introduce delay into the mediation, arbitration or tribunal process? Thirdly, if we are concerned with the total education experience of children with learning support needs, might not some liabilities fall on organisations other than the education authority that contribute to the child's education experience? Would that not introduce delay into the mediation process because of the need to have a variety of actors at the table?

Our desire to bring speed to the process to allow for early intervention means that we must strike a balance between ensuring that resources are not consumed in dispute resolution and ensuring that there is fairness. Are there any risks associated with requiring independent mediation at every stage, legal representation and involvement from all organisations that might have a responsibility or role in providing the child's education experience? I would be interested in the panel's comments on how we achieve that balance.

Ewan Malcolm: Achieving the balance so that there is speed in the selection of independent mediation is about service levels. There are models elsewhere showing how quickly independent services can be provided. The model that springs to mind is the disability conciliation service, a mediation service that is provided under the DDA. Clear time scales are set down for that, so I do not think that that is an issue.

Ms Alexander: We would be interested to see more information on those time limits.

Ewan Malcolm: The disability conciliation service is managed by Mediation UK and is UK-wide.

I will skip the second issue, which was about legal representation—although, as I have a legal background, I have some thoughts about it.

Convening the appropriate parties is a diary exercise. It is not necessary to have a formal timetable to get the right people in the right room. That comment may give rise to some scepticism but, if all parties are committed to a mediation process and think that it is a good thing to build consensus, a date can be set and people can come together. It is as simple as that.

Mediation does not exclude other processes and can often run in parallel with them. As John Elliot mentioned, a breathing space is sometimes required so that dates do not push the process forward. However, if the tribunal is not to be held for three or four months, mediation can be tried while people are waiting.

Stephanie Taylor: I agree that striking a balance between speed and fairness is difficult. I reiterate the point that it is essential that support is given to parents, whatever that support or representation might be, from an early, informal stage onwards. That would be a way of reducing the number of cases that come later to mediation or tribunal.

There is already advocacy provision across Scotland. I could provide further information on that. There are specific children's and carers' advocacy services that provide support to parents and children who are going through the systems that are currently in operation. In Wales, children's advocacy is particularly well developed and there is support in most local authority areas.

Advocacy services are being developed under the Mental Health (Care and Treatment) (Scotland) Act 2003. Because those services need to be age appropriate, they are being developed for children and people of every age group with a mental disorder, which includes learning disabilities. As the committee will be aware, there will be some overlap between children with additional support needs and children with mental disorders. That means that there will be opportunities for joint funding—for education authorities to put some funding into the development of advocacy that is also being funded under the Mental Health (Care and Treatment) (Scotland) Act 2003—so that the support is in place for children and families if they wish to use it.

R John Elliot: We have drawn attention to paragraph 8(2) of schedule 1 to the bill, which says:

> "The President must ensure that Tribunal functions are exercised by those Tribunals efficiently and effectively."

We have said that that seems to place a lot of emphasis on cost, whereas the emphasis should be on fairness and justice.

I have five suggestions for helping with the speed of tribunal decisions. I agree with Ewan

Malcolm on time limits, which, when reasonable, are essential for any appeal process. The time limits of the various tribunals differ—one only has to see how fast immigration adjudicators and appeal tribunals must work to realise how far that can be stretched.

I take the point about legal representation, but I, too, am a member of the Law Society of Scotland and you have heard me say that legal representation per se is not essential, but that advice is. If good-quality advice is given, that helps to speed up the process enormously and reduces the number of cases that go to a tribunal, which is a good thing.

Good panel members must be available—the quality of panel members is important. Training of panel members is also important to ensure that whatever decision is taken is a good one and therefore less likely to go to appeal. There must also be good administration, which does not necessarily need to cost a lot, but is essential for listing cases, for example, which is often important for parents, because they want their case to come up quickly.

The Convener: That is helpful. I think that we will be able to get information on the mediation procedure under the DDA from the horse's mouth: the next witnesses are sitting at the back of the public gallery, so perhaps we can ask them about it.

Dr Elaine Murray (Dumfries) (Lab): We have already touched on concerns about the independence of in-house mediation services. Do you have any concerns about whether, if we have such in-house services, we will achieve uniformity of mediation service throughout the country?

Ewan Malcolm: Whether the mediation service is in house or out of house, uniformity is essential. It would be important to avoid some sort of postcode quality mark. The Scottish Mediation Network is working on a minimum standard of practice for mediators in all fields, well beyond the additional support needs sphere, and we are building consensus on a process—I think that I have provided the committee with a copy of that work.

Mediation is a young profession. Family mediation in Scotland is celebrating its 20th anniversary this year, so we do not have a great deal of background to draw on and we must acknowledge that we have to work on and develop what has been learned.

R John Elliot: I have no view that I can express.

Dr Murray: The bill is not prescriptive on mediation services. It suggests two possible models—a national service and an in-house service—for which the financial memorandum gives ranges of possible costs: from £800,000 to £1.8 million for the national service and from £1.2 million to £2.5 million for the in-house service. All of you have stressed the importance of training in producing good mediation. Are the estimates for setting up the mediation services—the figures are supposed to cover training—sufficient to train the number of mediators who might be required, given that there might be a fairly large number of disputes during the transition from records of needs to CSPs? Are the estimates sufficient to cover the costs of setting up the services?

R John Elliot: I can honestly say that I do not have a clue.

10:30

Ewan Malcolm: I am glad that John Elliot is so honest, as I, too, do not know the answer to the question. The issue is relevant and needs to be further researched. Perhaps the disability conciliation service is a good analogy. It operates UK-wide with only around 30 to 35 mediators. The Govan law centre and Enquire already have bodies of mediators who have trained specifically in the area in question. Therefore, there would not be a standing start.

The Convener: As a matter of interest, how important is knowledge of the subject for mediators? I think that you touched on that issue earlier. I am conscious that there are not many experts in education law and related issues. Do you foresee any difficulties in that respect?

Ewan Malcolm: The people with specific training whom I mentioned have usually undergone a five-day training course that involves specific training and—more important—experiential learning. Most mediators train by using scenarios and role playing. There are principles and ways of working as a mediator, but working people through the sort of disputes that might occur and having them play the sort of people who might be involved in such conflicts is useful. Such training is necessary.

Awareness training for the people who will refer cases to mediation is also essential. As I suggested earlier, people at local authority level who handle such disputes using mediation skills and who are perhaps then a little reluctant to give up disputes to independents, as they might see things, would be useful. Their skills can be used appropriately and strategically.

The Convener: Before I lose track, I want to return to training tribunal members, which was touched on earlier. What time scales would be involved in getting through the process before the whistle can be blown and things can kick off? Based on your experience of other tribunals, how long would it take for tribunal members to be sufficiently equipped and in place so that a tribunal can be set up?

R John Elliot: Of course, that depends on the resources that are thrown at the training. Lawyers and other people who have certain skills will be involved in the process. To deal with the matter seriously, three months might be a reasonable time scale if sufficient resources are made available. Potential members of the children’s hearings system have a rigorous training programme that extends over a number of months, but the training is part time—it takes place in the evenings and occasionally at weekends. The time scale also depends on where potential panel members are drawn from, but I reckon that people should be properly trained within three months.

The Convener: Thank you. That is helpful.

Mr Kenneth Macintosh (Eastwood) (Lab): My question is really for Mr Elliot, although I would like to hear any comments that Ewan Malcolm or Stephanie Taylor wants to make. Is it the case that legal aid is not available for representation at most tribunals?

R John Elliot: Yes.

Mr Macintosh: Are there any examples of families or others appearing before such tribunals with representation such as a solicitor paid for through legal aid?

R John Elliot: Legal aid is available for immigration tribunals, for example, so there is some experience of what you are talking about. However, broadly speaking, legal aid is not available for tribunals.

Mr Macintosh: We are concerned that the tribunal should be fair to both sides. It has been drawn to our attention that, south of the border, the local authorities’ solicitors tend to appear before the tribunals. I believe that that is true in more than 50 per cent of cases. That seems to give the authorities an unfair advantage. Is there any way of tackling that? One suggestion, which has been made in discussions with members as opposed to in formal evidence, is that local authorities could be banned from having legal representation. Would that be possible?

R John Elliot: That could be done, certainly. The national appeal panel for the entry to the pharmaceutical list, for example, bans representation for the people appearing before it. Slightly absurd situations arise, with people sitting at the panel, listening to someone beside them whispering to them and then mouthing the words that they have just been given. Perhaps you think that that would be an absurd way of proceeding, but I could not comment.

Mr Macintosh: It is like ministers giving evidence.

R John Elliot: We have made comments on all these issues publicly. You lay stress on legal representation. Good representation is not necessarily legal representation. I have seen absolutely first-class non-legal representatives appearing before employment tribunals. I have also seen legal representatives who are not good at all. Indeed, I have seen legal representation that is, in my view, not adequate to the circumstances. I am sure that local authority lawyers will generally be of a uniform good standard.

However, I have seen tribunals, especially education appeal committees dealing with special educational needs—I am thinking of one case in particular—where the panel was leaning over backwards. Tribunals are not daft. They see a lawyer and sometimes, unconsciously and automatically, they go in the opposite direction. Surprisingly, perhaps, the view that people take of lawyers is not universally one of love. Sometimes tribunals are unfairly critical or hard on the lawyer. That can actually have an effect other than the one that you suggest.

Mr Macintosh: I appreciate that. There is support for advocacy in general, although I would welcome any comments from Ms Taylor about whether the bill should specifically cover advocacy. I am trying to work out whether we could do something to build into the bill a mechanism to ensure equity and fairness so that, for example, when a local authority is represented by a lawyer, the families have equal rights or are assisted in some way in presenting their case. I cannot think of a mechanism that would do that.

R John Elliot: To return to some of the points that I made earlier, I think that it is essential for people to obtain good-quality advice before they get to a hearing. We find that people who have had advice focus on what they have to do before a tribunal. Many people who come before a tribunal unrepresented want to tell their story, but they do not appreciate the fact that they must relate their story to the law. The panel therefore has to struggle and sometimes needs to draw the matter out. It can sometimes fall into the trap of doing the appellant’s job for them. Good-quality advice and representation are essential and we think that there ought to be equality of arms in that respect.

Mr Macintosh: You have given an example of how the sympathies of a tribunal may be engaged by the parent, rather than by the lawyer. Looking back on how tribunals have operated in general, and on any experience that you might have had of SEN tribunals south of the border—where one side has predominantly been represented by lawyers, to its advantage—would you say that there is any evidence, and have any studies been made, to show whether the outcomes of tribunals are unfairly influenced by such representation?

R John Elliot: I am not aware of any such evidence and I suspect that there is none. Our evidence that representation gives the appellant more of a chance is based on a wide variety of tribunals. I do not think that we have any specific evidence on special educational needs. I do not imagine that those tribunals are any different from any other. I am confident that representation is more likely to achieve the result that the appellant wants.

Mr Macintosh: My next question is on jurisdiction. You gave a good example concerning children's hearings where you have had limited or no control or jurisdiction over certain authorities that might be responsible for the outcome. Do you have other examples, perhaps involving SEN tribunals south of the border or anywhere else, where the fact that tribunals are trying to exercise decisions where they do not have any control or authority has or has not been a problem?

R John Elliot: At a recent education appeal committee hearing that one of our members attended, the lack of resources in the form of social workers was mentioned and acknowledged. That is another example that I can give you, but I do not have any examples from south of the border.

Mr Macintosh: Is it common for a tribunal to be concerned predominantly with one aspect of service delivery, when the case also involves other aspects of service delivery over which the tribunal has no direct control, with indirect duties being placed on the authority?

R John Elliot: Yes. You must remember that tribunals have been set up over many years, during which time agencies have developed. When the system was set up, nobody contemplated quite how things would work together. There is a lack of joined-up justice, if I may use that phrase.

Mr Macintosh: As Fiona Hyslop said, parents will have several different routes. They will be able to go to mediation, which is open to all, and then at different stages they will be able to go to a local authority dispute resolution process, the appeals tribunal, the sheriff court or possibly the DDA appeals tribunal. The worry is that each option will have a different outcome, which would create greater inequity. Is that a concern for you and can we do anything to address it in the bill?

R John Elliot: It is a concern. Where people have more than one option, confusion inevitably arises. To some extent, it is like grains of sand running through the hand—people will find their way to the mechanism that is most available or to the one that they have heard anecdotally gives them the best result. That is an important issue and the only way of tackling it is to ensure that people are funnelled into the correct dispute resolution mechanism, which, presumably, you could help to influence.

Mr Macintosh: Ewan Malcolm suggested that evidence that is given in mediation should be inadmissible in a tribunal, to respect confidentiality and to encourage people to use the mediation process. Does that happen in any other situation? Would it be a first? It seems to give special status to mediation and to protect it in a way that I am not sure is necessary.

Ewan Malcolm: The situation that I described mirrors what happens in Scotland in respect of family mediation. An act from the 1980s protects privileged information at mediation. I am simply suggesting that that confidentiality be transferred to this scenario. Ideally, it would be available in all mediation scenarios, so that people do not take the privileged mediation discussions outside, regardless of whether the outcome is acceptable and allows people to move forward. In particular, people should not put the mediator on the witness stand.

Mr Macintosh: Mr Elliot, do you have a view on the idea that evidence at mediation should not be admissible and that a mediator should not be asked to give evidence before a tribunal?

R John Elliot: Unless that was the case, the mediation would be significantly less effective, even to the point of being impossible.

Mr Macintosh: Should advocacy be referred to in the bill? Evidence to the committee has strongly supported that, but there is no mention of it in the bill. Is that a worry to you?

Stephanie Taylor: Yes, advocacy should be mentioned in the bill. When the Scottish Executive consulted on the bill there was a lot of support for advocacy. For reasons that are set out in the policy memorandum, the Executive has indicated that advocacy is inconsistent with the principle of collaboration that the bill is trying to promote. We feel that that is not the case and that advocacy is an effective way of supporting parents and of overcoming difficulties that parents may face. Advocacy makes parents feel more comfortable that they understand the process and supports them through it, which means that they may be less likely to need the formal resolution procedures that you outlined.

Your other point was that local authorities may have legal representation, while parents and children do not. Evidence that I have seen—not recently, but I would be happy to look it up—suggests that people who are legally represented in tribunals are more likely to achieve the outcome that they want. A parent who goes into such a situation without representation, legal or otherwise, may feel that the situation is inequitable. I was interested to hear that you are considering ways in which to overcome that imbalance.

10:45

Mr Macintosh: I must say that I am not aware of any such ways, although we would welcome hearing about some.

The Convener: It might be helpful if you sent the committee any evidence about the differential effects of having legal representation and having none.

Stephanie Taylor: Okay.

R John Elliot: Do you mean evidence about representation as opposed to non-representation?

The Convener: Yes. Evidence on that general issue would be useful because it is important that we get a proper feel for it.

Rhona Brankin: I am interested in evidence on how many cases end up at a tribunal in systems that have stages before the tribunal. Is there evidence to say that in a system where there is staged intervention, mediation and dispute resolution followed by a tribunal, more cases are resolved without going to a tribunal?

The Convener: I ask about a slightly more technical point. In your submission, you mention that the council has statutory supervision over the new tribunal according to the bill. What does that mean in practice?

R John Elliot: It means that we observe hearings as of right, including the determination stage, and then report on that. We report in our annual report, which is sent to all MSPs, together with 10,000 other bits of paper, and they have the opportunity to read our views on the tribunals that we see and how they work. We try to say what we think in the report rather than gloss over it. Occasionally, as you mentioned before, we do a special report on any particular system when we believe that that would be advantageous.

The Convener: Is that triggered by you or by a request from the Scottish Executive or whomever?

R John Elliot: It is triggered by our good selves.

The Convener: Thank you; that was useful and interesting and I am grateful for your contributions. We will come back to one or two matters, but if you have any thoughts after you have reviewed your evidence this morning, feel free to contact the clerk.

We move on to the second panel of witnesses. I am slightly bemused because we were expecting two representatives, yet we have three. I welcome Adam Gaines, head of policy and communication at the Disability Rights Commission, and Dinah Aitken, senior information advice manager of Enquire. May I inquire who else we have on the panel?

Kate McGuiness: I have just been told that I am on the next panel.

The Convener: Do the witnesses want to introduce themselves and say something about the points on which they want us to concentrate?

Adam Gaines (Disability Rights Commission): Good morning and thank you for the opportunity to appear before you this morning. As the committee will be aware, the perspective of the Disability Rights Commission is informed by a rights-based approach. Our remit means that we are concerned with the position of disabled children and students and the enhancement of their rights. As a consequence, there might be some questions on areas to do with additional support needs, which have a wider definition that might go beyond our remit, and I am sure that the committee will understand if we are unable to comment on those.

We feel that the Education (Additional Support for Learning) (Scotland) Bill is a significant development that has genuine potential to enhance the rights of disabled children and young people. We also welcome the many improvements that were made to the draft bill following consultation. I note that there has been some comment on the consultation process. I mention and declare an interest in that respect because we were invited by the Executive to assist in facilitation during the consultation process.

The decision to move to a wider and less prescriptive designation of additional support needs is welcome. The current record-of-needs system is in need of reform and the system should be based on need and entitlement. Our concerns about the record-of-needs system arise from the lack of consistency in its application throughout the country and from the absence of a right to appeal against the provision in the record. We also feel that the term “special educational needs” has a stigma attached to it and that “additional support needs” might be a better term to use. The new term is also less based on the deficit model of the child.

Beyond those welcome developments, there are a number of points in the bill that need to be clarified, enhanced or improved, particularly with regard to the tribunal system. We welcome the introduction of a tribunal system as something that we have long advocated. It will be helpful and an improvement on the current piecemeal and cumbersome system. We also hope that, in due course, the tribunal system could cover matters to do with the Disability Discrimination Act 1995 and education, as in England and Wales.

The tribunal would need to take into account the position of legal aid for parents and children in representation proceedings. It is also important that children who are aged 12 to 16 should be able to make an appeal to the tribunal.

Dinah Aitken (Enquire): I, too, thank the committee for the invitation to speak today. Enquire is a service that is funded by the Scottish Executive and it is managed by Children in Scotland. We have a remit to provide independent advice and information on special educational needs throughout Scotland. We do that in a number of ways. We produce written information, we provide training and outreach to parents and professional groups and we provide a telephone helpline.

The services are open to parents and carers, to children and young people and to the professionals who work with them. Most of the calls that we get to the helpline are from parents, although a growing number of professionals are also using the service. That gives us an understanding of the issues that are currently causing parents concern and giving difficulties to professionals who are involved in delivering services to children and young people with special educational needs.

We are aware that good practice is going on throughout the country, but the reason why we exist and have the knowledge that we do is that there is not a uniform experience for all families.

We welcome the bill as an opportunity to improve the existing system and to iron out some of the iniquities that exist. However, it is most important that children and young people who need support in order to have the same educational opportunities as their peers have received that support. It is also important that all children are served by any new legislation, not just those whose parents are able to promote actively their child’s rights or to make use of a service such as Enquire. The legislation should be clear so that people can understand easily their rights and obligations and it should provide appropriate forms of accountability and redress where necessary.

Given that our client group of parents comes from throughout Scotland, we receive inquiries about all manner of difficulties with the current system, and so we have an interest in all aspects of the bill. In our written submission, we touched on a number of areas that we noted. Those were the need for clarity in the bill about duties within and across authorities; the criteria for opening the proposed co-ordinated support plan and the potential loss of rights of children who are moving from the current system of records of needs; the independence of mediation; the need for clarity about dispute resolution services; and a simplification of the rights of redress. There is concern that transition arrangements, particularly for those moving on from education at age 16 or over, be sufficiently strong and there is concern about the introduction of the reasonable-cost test. We raised issues of jurisdiction, the powers of the tribunal, the absence of availability of legal aid and the unmet need for advocacy, of which we are well aware.

The Convener: That was a helpful introduction. You both said in various ways that you supported the main principles and approach of the bill. We have had evidence from a number of witnesses that, given that CSPs and additional support would, at one extreme, be stigmatising and would pick out children with special needs or additional support needs, there should be a single system that applies to all children, who are assessed by the same mechanism. Do you have a view on that? There is a resource and targeting issue there, but I have given you a summary of some of the views that we have heard.

Adam Gaines: It depends which way one approaches the bill. Section 3 sets out a requirement for education authorities to have regard to the additional support needs of children and, in certain cases, to provide CSPs, which provide access to a tribunal service. From our perspective, there is an issue regarding the potential for some disabled students with a single disability, which might not necessarily come under the CSP definition of “complex”, to access auxiliary aids and services. Entitlement to auxiliary aids and services does not come under the Disability Discrimination Act 1995, because it is reserved to the special educational needs framework. There might be a question as to whether the auxiliary aids and services entitlement of a few disabled students with a single disability that is not necessarily viewed as complex can be taken forward properly. That is an area where we hope that the code of practice can be more explicit.

Dinah Aitken: The CSP could be helpful for the people who have complex needs in bringing together all the professionals who are required to support the child. It would be unhelpful if people perceived that it was the only way to secure the necessary provision for their child. At the moment, some parents become interested in asking for a record of needs because they are desperate and they think that that is the only way that their child is going to receive the support that they need. Provided that the system is sufficiently strong and well-enough resourced, and provided that all children with additional support needs will be properly identified and will receive the support that they require, the CSP could be a very useful tool.

Lord James Douglas-Hamilton: The DRC has stated concerns about the interface between the bill and the Disability Discrimination Act 1995, to do with the lack of entitlement to auxiliary aids and services. Can you explain your concern a little further?

11:00

Adam Gaines: There is no entitlement under the Disability Discrimination Act 1995 to auxiliary aids and services in education. Those have always been seen as matters for the special educational needs framework. As a consequence, it is important that the bill makes it clear that, if there is a requirement for an auxiliary aid or service, the child or disabled student will be able to receive such an aid or service. That is why we have raised the point about the precise definition of "complex". The vast majority of disabled children will probably receive a co-ordinated support plan because they may well receive services from a number of agencies. However, we are concerned about the small number of people who may have a single disability but still require an auxiliary aid or service.

Lord James Douglas-Hamilton: In your representations, you have made it clear that you would welcome exploring

> "the scope of the Bill to place further duties on health boards and local authority social work departments."

Adam Gaines: We feel that that would be helpful—particularly in reference to the jurisdiction of the tribunal, an issue that arose earlier. By bringing in a range of agencies and co-ordinating their work, co-ordinated support plans can be very helpful indeed. However, in the event of an appeal to a tribunal, we would hope that the tribunal would also be able to give directions regarding the other agencies.

Lord James Douglas-Hamilton: In your submissions, both of you state concerns about the number of children who currently have records of needs but who may not be eligible for a CSP. You suggest changing the eligibility criteria. Can you say a little bit more about your views, given that there is a duty on education authorities to make provision for additional support needs whether or not there is a CSP?

Dinah Aitken: I am sorry—I am not sure that I quite understood the thrust of your question. Would you repeat it please?

Lord James Douglas-Hamilton: Yes. You have both stated concerns about the number of children who currently have a record of needs but who may not be eligible for a CSP. You suggest changing the eligibility criteria. Can you explain your views further, given that there is a duty on education authorities to make provision for additional support needs?

Dinah Aitken: Our view stems from the experience of listening to parents' concerns. As I have said, parents often feel that they have to push for a record of needs in order to secure the services that they feel that their child needs. Education authorities sometimes struggle to provide support for children who do not have a diagnosis or who have not been through an assessment process and had their special educational needs identified. If the test for the CSP is set very high, there is a concern that parents will try to meet that test in some way because they will see it as a way of accessing services.

Lord James Douglas-Hamilton: I think that you are arguing for a system in which the rights of parents should be strengthened.

Dinah Aitken: Yes.

Lord James Douglas-Hamilton: I want to ask about transition. Enquire's recommendations say:

> "there is no duty upon any agency receiving information about a young person due to leave school to take any action upon receiving the information."

You also state:

> "there is nothing concrete for the school-leaver in the form of any documentation, nor is there any requirement for follow-up."

Do you want much stronger duties to be imposed in that connection?

Dinah Aitken: Yes, I think so. Any transition is difficult and we find that it is when parents anticipate a transition that they come to us with their concerns. Such a transition may be when a young person is entering school or moving between schools, but it may also be when they are moving on from school.

While the child is in the education system, it is clearly the education department to whom all the parents' concerns are addressed, but once the child moves out of education, parents have to rely on a patchwork of services. It can be difficult to ensure that the appropriate services are in place and that people know whom to make requests of. The provisions for planning for young people who are leaving education could be strengthened.

Adam Gaines: The changes that have been made to the bill following consultation to ensure that there is a minimum of 12 months for the development of a future needs assessment are very helpful. However, the issue is that the responsibility will lie with the education authority and it will carry out that work. There needs to be consideration of how the information is used once it is gathered and how it is transmitted to the other agencies that the young person will go on to, whether that is in employment or in further education. We must ensure that that information is passed on and taken on board.

Fiona Hyslop: I want to follow up the central issue about whether you are satisfied that the duty that the bill places on education authorities to identify and address the additional support needs of all pupils is sufficient. It seems to me that if you thought that it was sufficient and were happy that the duty would ensure that all pupils who needed support would get it, you would not make the suggestions that you do in your submissions. Enquire states that CSPs should be extended to all children who receive any services that are not provided in the school and the Disability Rights Commission states that it is necessary to bridge the gap between IEPs, PLPs and CSPs so that there is no differentiation between those with and those without CSPs.

The issue is fairly fundamental to the bill. The argument put forward by the Executive is that the duty on education authorities means that all support needs for all children will be met, regardless of whether they have a CSP. You do not seem to be satisfied with that because you are pushing for a wider definition of CSPs. We must get to the heart of the issue. Is it wishful thinking that the duty is sufficient? Do you think that we have to strengthen the provisions because the CSP is in effect the tool that young people will need to ensure that they receive co-ordinated services?

Dinah Aitken: We have evidence from the parents who use our services that the existing system for identification and assessment is not working uniformly for all children. There is already a duty to provide adequate and efficient education—that includes making provision for special educational needs. Therefore, a similar system is currently in place and there are some difficulties with it. The difficulty is perhaps the regional variation that has been mentioned. Some local authorities are very good, but others do not have such good systems in place.

It seems that the duty in the bill is quite strong and clear, but it is how that duty is implemented that will make a difference. We must wait to see the code of practice in order to know whether it is sufficiently strong to support the duty that is in the bill.

Adam Gaines: Section 3 places a general duty on all education authorities to assess and take into account the needs of children with additional support needs. If PLPs are being introduced, it might be possible to link them with such an assessment. The detail of how the matter is taken forward depends on how the code of practice is developed, so clearly the code is important.

The Convener: In England, the tribunal to which appeals on the provision of aids and adaptations are made, which comes under Westminster legislation, deals with both special educational needs and disability. Would it be possible to widen the definitions in the bill slightly to allow what would otherwise go to the disability tribunal to be dealt with by the tribunal in Scotland, thus avoiding a division in this general area?

Adam Gaines: My understanding is that, under the bill, one would have to apply to the additional support needs tribunal and, in the case of education, under the DDA, the application would be either for conciliation or to the sheriff court. We have suggested that, in the long term, it might make sense, in the case of DDA applications, for there to be an application to a tribunal rather than to the sheriff court, and for that tribunal to be the same one as the tribunal for additional support needs, because that would simplify matters for children and parents.

The Convener: Would it need Westminster legislation to do that?

Adam Gaines: Yes, because the application to the sheriff court is part of the DDA, which is a reserved matter.

Fiona Hyslop: You say that the code of practice will be central to ensuring that the duty is exercised properly throughout Scotland. Would it be appropriate for members to see the code of practice before they make a final decision about whether to approve or amend the bill?

Adam Gaines: That is not what I said. I said that the code of practice could be very helpful in the context of implementing the duty and setting it out so that it would overcome some of the current difficulties of differences between authorities.

Rhona Brankin: I want to follow up something that Dinah Aitken said about the concern of parents who have a record of needs and who may not have a co-ordinated support plan. You talked about those parents losing rights. Will you specify which rights they will lose?

Dinah Aitken: It may be more of a perceived than an actual loss of rights. Parents often feel that they have to press for a record of needs because they are not being listened to, and their child’s needs are not being properly addressed. It is always difficult to take away a right from somebody. As things are presently framed, without the CSP they would not have access to the tribunal, which they might consider to mean that they have fewer rights.

Rhona Brankin: Can they go to a tribunal to appeal against not being awarded a CSP?

Dinah Aitken: Yes.

Rhona Brankin: You say in your evidence that you think that a significant number of young people will be denied the co-ordination of services because they do not technically meet the criteria for a CSP. Can you tell us a bit more about that?

Dinah Aitken: I do not have any numbers among the statistics that I have brought today, although I could let you have some. However, I think that I said in my submission that more than 30 per cent of the children with records of needs who have come to us have specific learning difficulties or autistic spectrum disorders. It is our guess that those are the ones who are most likely now not to meet the criteria for the CSP, because their needs can be met by an education authority.

Rhona Brankin: But you say in your evidence that you are concerned that those children might be denied the co-ordination of services that they require. Is it not automatic that if they require co-ordination of services, they should get a CSP?

Dinah Aitken: The way the bill is framed, they would get a CSP only if the services were coming from outwith an education authority. I understand that if a child has complex needs that are being met by several services from an education department, the bill will not give them a co-ordinated support plan.

Rhona Brankin: To what services do you refer?

Dinah Aitken: A child may have peripatetic teachers, and specialists such as behaviour management specialists might be involved. Some therapists work in education departments, too. A range of people might provide services under the formal umbrella of an education department.

11:15

Rhona Brankin: We understand that when therapists work for an education department, their services are bought in, so therapists do not fall within the scope of an education department.

Dinah Aitken: That may be right.

Rhona Brankin: Do you know of any examples in which that was not the case?

Dinah Aitken: I gave the examples that are within my understanding, but I have no more information.

Rhona Brankin: It would be useful to have any further information that you have.

You welcome the fact that children with emotional and behavioural difficulties will come within the scope of the legislation for the first time. You say that, in your work, a significant proportion of calls relate to pupils with emotional and behavioural difficulties. Can you put a figure on that proportion?

Dinah Aitken: I do not have precise figures, but about one third of all callers mention that behaviour is an issue for their child.

Rhona Brankin: Do you know what proportion of those cases involve outside agencies?

Dinah Aitken: I cannot give the figure without looking into the matter, but I am happy to try to provide that.

Rhona Brankin: That would be interesting, as we are trying to get a handle on how many more co-ordinated support plans will be needed for the groups that will become eligible for them and what pressures are likely to occur.

Mr Macintosh: Rhona Brankin covered the points that I planned to make. I will ask Adam Gaines about the number of cases that will go to tribunals, which Rhona Brankin asked the previous panel about. He suggests that rather than having two dispute resolution procedures, all disputes should go to the new tribunals. I do not know whether he knows the expected number of cases. Will tribunals be able to cope? On the face of it, the idea sounds good, but what would it involve?

Adam Gaines: We do not know how many cases are likely to go to tribunals. We welcome the move to create a dispute resolution service in relation to additional support needs as distinct from CSPs. We await the details, which is why we suggest that it might make sense to have one system in approaching the tribunal, rather than two, but that will depend partly on how the dispute resolution service is developed.

Mr Macintosh: Indeed. We probably need more numbers on that.

I had a question for Dinah Aitken about rights, but I think that she has answered it by saying that the matter is more one of perception. Last week, we heard clear evidence that parents have two fears. One fear is that they will lose rights, but we do not think that rights will be lost. One person has used the right to appeal against part IV of a record of needs in relation to matters that would normally be in part V of a record of needs, but that was a way of getting round the system. The new system does not seem to take rights away from most parents. New rights are being given, but rights are not being lost.

The other fear is that, in practice rather than in law, local authorities might use the CSP documentation as a rule of thumb for distributing resources. It could become a practical device. If there are limited resources and local authorities use the list of those who have been given a CSP as an easy mechanism for prioritising some children over others, that would not be fair. However, there is no legal right involved; it is just a practical, day-to-day thing. We are trying to evolve a more seamless way of operating, and rights should be applicable across the board rather than being entrenched in a CSP. Perhaps you would care to make other observations on that.

Dinah Aitken: For those who have really been struggling to get a local authority to put services in place, the current record-of-needs system does provide a framework and a regular review mechanism. At the moment, it gives enhanced placing-request rights, but the bill addresses that issue by broadening out those rights. Those things can be important in giving recognition to a child’s needs, which may previously have gone unrecognised or not been addressed properly. It might be quite difficult for people who have had a record of needs to move to a system where they do not have the same legally backed-up framework of review and recognition.

Mr Macintosh: There is a particular problem for those who currently have a record of needs and might lose it. We are well aware of that, but we need to find out whether they have any legal rights. All parents will now have the right to ask for an assessment, but we are aware that there is genuine fear and anxiety. We are also aware of how useful the record of needs has been for some parents, but the perception of how useful it has been and the reality is—

The Convener: Can we be clear about what your question is?

Mr Macintosh: I am trying to pin down what parents fear the bill will do. There is genuine fear that parents will lose out as we move from the old system to the new. The fear is genuine, but will they be losing out? We have yet to pin down what they are losing.

The Convener: Are you asking whether rights are being lost?

Mr Macintosh: I am asking whether Dinah Aitken can point to anything else that parents will be losing. Enquire’s written submission says that parents will be losing rights, but I think that Dinah agrees that that is not actually the case, as there are no legal rights. She has said that there is a loss of legal rights, but now she is saying that there are no legal rights. If there is a legal right that parents are losing, we have yet to see it.

Dinah Aitken: The record of needs brought certain rights of review and appeal against certain provisions of the record of needs. If you do not qualify for the CSP, you will have to rely on the general provisions of the bill, such as the provision of adequate and efficient education to all children with additional support needs, which brings us back to the code of practice. If the code of practice is sufficiently strong, and uniformly applied across the country, some of the difficulties that parents are facing at the moment will be met, because an adequate system will be in place.

The system must also meet the needs of those children who do not have parents advocating for them. As Mr Macintosh has pointed out, parents can ask for assessments, but what happens to the child who does not have a parent who is able to ask for an assessment? The system must meet their needs as well.

Mr Macintosh: There is something that I would like to clarify. You said that the record of needs gives parents the right to appeal against an assessment of service, but they will also have that right under the new system, will they not?

Dinah Aitken: If they qualify for the CSP.

Mr Macintosh: My understanding is that all parents will be able to ask for an assessment, but I am not quite sure what they will get. I believe that, under the record-of-needs system, you are able to appeal the record of needs but you are not able to appeal in relation to the provision of services in the record of needs. Provision of services in the record of needs is in the non-appealable part of the record. Last week, we heard about somebody who managed to get the provision of services under a different section, but for most parents who use the record of needs day-to-day, the provision of services part of it is not appealable. That is my understanding, but I am not an expert. That is why I am asking for your view.

Dinah Aitken: That is my understanding as well. However, if you ask for a record of needs, certain assessments will automatically be carried out. If a record of needs is opened, the child’s situation and their level of needs will be regularly reviewed and assessed. If the child does not qualify for a CSP, that framework will not be open to the parents, who will then have to rely on the general duty under the bill to meet additional support needs.

Mr Macintosh: And the right to ask for an assessment.

Dinah Aitken: Yes.

The Convener: Did you have a supplementary question on that point, Elaine?

Dr Murray: No. I wanted to discuss a point that arose in last week’s evidence, but it has now been covered.

Ms Byrne: My question is relevant to what has already been asked, but it moves the discussion on slightly. The submissions of both the Disability Rights Commission and Enquire refer to the bill’s use of the words “a reasonable cost”. Enquire has a concern that parents are worried about that. In some of the evidence that we have received, parents have expressed their concerns about the inclusion of that phrase in the bill being a potential get-out clause for local authorities. I am aware that the DRC is concerned about the broadening out of the definition of additional support needs, and that there might be a diminution of service in some cases—as we have just touched on. Some young people might not get their needs met because the resources will not be sufficient. What are your views on that?

Adam Gaines: There is a general entitlement to provision under section 3. Obviously, that is very welcome. However, our point is that that entitlement is subject to whether it is

"practicable at a reasonable cost."

We are concerned that that gives the impression of being based more on cost than it is on reasonableness.

The Disability Discrimination Act 1995 works on the principle of reasonableness, so we raised the question whether that would offer a better way forward. Under the 1995 act, reasonableness can and does take issues of cost into account. The need for best value is critical, as is the need to protect public funds. Under the 1995 act, the principle of reasonableness takes into account the needs and circumstances of the situation as well as cost. That is why we posed the question whether the concept of reasonableness might offer a slightly better approach than that of "reasonable cost".

Dinah Aitken: Our experience is that parents are well aware of the facts that resources are finite and that local authorities work within budgetary constraints. They often express concern for other children when they are pushing for services for their own children. The Education (Scotland) Act 1980 does not refer to reasonable cost, although it contains a duty to make "adequate and efficient provision". Parents will be concerned that a cost test is being applied early on in the process of assessing their children.

Ms Byrne: I wish to move on to assessment and identification. I know that the matter has already been raised, but I am particularly interested in the phone calls that Enquire referred to, from parents of children with social, emotional or behavioural difficulties. Did any of their concerns involve the identification of the difficulties that those young people had or the reasons why they were displaying them?

Dinah Aitken: Yes. Looking again at the content of the calls, I was struck by the fact that there were several cases of children being subjected to the disciplinary procedures that have—quite rightly—been set up by schools when that was perhaps not appropriate. After what can sometimes be quite a lengthy period, an assessment is often eventually carried out after which it is discovered that the child has an underlying condition at the root of their behavioural difficulties.

That is quite a difficult area for schools. Some of the conditions that parents say have finally emerged in a diagnosis are quite rare. It is a problem for schools to get to the root of that while trying to manage general discipline. Often the consequence for children is exclusion, so the issue is important.

11:30

Ms Byrne: Will the bill fulfil parents' expectation that if they request a full assessment, it will be carried out? One of you said that many parents might not realise that they can request an assessment or that one is needed. Will the bill allow needs to be identified quickly and accurately or do we need to make changes in order for that to happen?

Dinah Aitken: The bill addresses those issues in that parents can request assessments and there is a duty on local authorities to identify and assess children. We have to be sure that the underlying structures are strong enough to ensure that not so many children slip through the net.

Adam Gaines: The right of parents to seek an assessment where appropriate is one of the important changes that has been made to the bill. That moves away from the current situation, in which for a child to get a record of needs, there have to be medical and psychological tests, which are not necessarily appropriate for all children. Children with mobility difficulties might not need a psychological test in relation to their provision. It is important that a parent can request an assessment if they feel that one is necessary. It is a helpful step forward.

The Convener: You have identified a particular problem with children with disciplinary problems and another underlying difficulty. Is there a need for an additional trigger for an assessment, before exclusion, in association with exclusion or at an earlier point? Have you any thoughts on how that might be focused more satisfactorily? Will the code of practice be the proper place to deal with it?

Dinah Aitken: The code of practice is one place where it could be dealt with. My understanding is that some schools could be breaching the Disability Discrimination Act 1995 if they apply disciplinary procedures to children who have an underlying condition. Greater awareness of how the different legislation intersects—there is quite a lot of legislation now—is an important factor as well.

The Convener: That has to be taken on board in the guidance and pamphlets as well.

Adam Gaines: Given that we will be dealing with the eventual act as well as the DDA, information and training on the provisions will have to be available for teachers.

Rhona Brankin: Given that there will not be automatic medical assessments, is there a danger that youngsters who display behavioural problems with an underlying cause will be missed out? Will that have to be clear in the code of practice? Is there an issue there?

Dinah Aitken: There could be an issue there. We are getting information from parents that their children are missing out and are not being picked up by the system, so that danger needs to be highlighted. I am not sure whether that could be done in the bill, but it should certainly be in the code of practice. There is already guidance that says that exclusion should be a last resort for schools. That could be examined to see whether schools should be alerted to the fact that when they are thinking about exclusion, they ought to consider whether there are underlying reasons for the child's behaviour.

Dr Murray: I know that you have welcomed the extension of the transition period from six months to 12 months, but we are still receiving evidence to suggest that arrangements should be in place by the time the child is 14. Do you feel that 12 months is long enough?

Adam Gaines: I do not have evidence that would suggest that a precise time scale is appropriate. We felt that a minimum of one year would enable information to be gathered and then taken into account for onward transmission to other agencies. Our priority is not so much to have a time scale of 12 months—although that is welcome—but to ensure that information is used well. The transition period can be absolutely critical to a young person's life chances—they may be moving to an education college or into employment. Their needs during that period must be properly considered.

Dr Murray: I notice that you have suggested amendments to section 19(1) and section 19(4). I am sure that we will consider those.

Lord James Douglas-Hamilton: Dinah Aitken's submission states:

> "There is no provision for the Tribunals to consider the failure of the education authority to actually deliver the provision specified in the CSP, ie there is no right of appeal where the education authority does not carry out its duties".

Should there be a right of appeal to the tribunal?

Dinah Aitken: The more that the tribunal can deal with under this legislation the better. There is a gap in the tribunal's powers. From our reading of the bill, it appears that you can have a beautifully written CSP—which says everything that you want it so say—so that there is no reason to appeal to the tribunal, but if the services specified in the CSP are not provided to your child, you cannot go back to the tribunal. It would be very welcome if the tribunal's powers were extended to allow it to oversee that what is in a CSP is what the child receives.

Adam Gaines: There is a difference between, on the one hand, the position of the tribunal and the CSP, and, on the other, the current situation in which one cannot appeal against the provision in part V of the record of needs. My understanding is that, under the CSP, the provision that is written down can be subject to appeal.

The Convener: I would like a couple of points to be clarified. I think that reference was made to the Disability Rights Commission's mediation arrangements. Will you give us some information on how those arrangements might work?

Adam Gaines: I can give you some information today and then follow that up with more detailed information. The Disability Rights Commission's approach is based on advice and conciliation, and then legal enforcement. We feel that, if it is possible and appropriate to overcome difficulties through advice, information and conciliation, so much the better—before matters end up in court or before a tribunal. We have conciliation powers, in the sense that we have set up an independent conciliation service—which is independent of us although contracted by us—that deals with conciliation cases. The service is run for us by Mediation UK. The service has just started for part IV of the Disability Discrimination Act 1995, which covers education, because that has come into effect only in the past year.

I am afraid that I cannot give you figures for how many cases have been referred to conciliation in the past year with regard to education, because the provisions have only just come on stream. According to the provisions, if someone wished to raise a case before the sheriff court to do with alleged discrimination, they would have to do so within six months. That time scale can be extended to eight months if the person has asked for conciliation, to enable conciliation to take place.

The Convener: It might be helpful if you could give us more information about that, just to give us a different perspective on how that all works.

My final question is about legal aid or representational support, which was touched on earlier. Does the Disability Rights Commission have specific views based on experience of the equality-of-arms issues that we heard about from the previous witnesses?

Adam Gaines: We believe that there will be circumstances in which it is likely that an education authority might take a solicitor to a tribunal, so there is an issue to do with parity. Whether that is solved through legal aid or by another mechanism is obviously important. We think that it would be helpful if legal aid were a possibility, particularly for employment tribunals. We understand that, where a person has English as their second language, there are certain circumstances in which they may be entitled to legal aid. For special needs, there may also be certain situations in which people are entitled to legal aid. We wonder whether it might also be possible to apply that in the case of the tribunals that we are discussing today.

Ms Alexander: We have just learned something useful—that the time limits compel the complainant to raise the action with six months, while there is no obligation on the employer or the authorities to consider how long it takes to process the case. Therefore, the analogy is not particularly helpful, because in it, the complainant would be the parent, and there is no point in placing a time limit on them, because the educational experience of the child will change throughout his or her educational career. At different points, the parent might want to raise an issue, and they would still be left with the issue that we have identified of potentially inexorable delays being built into the consideration of issues.

I am just leaving that comment on the table, but I think that the committee would be very interested indeed in details of any tribunal where the time limit was not about compelling the complainant but about compelling the authorities to deal with the issues within a fixed period of time. If members of this panel or previous panels of witnesses can help us in that regard by providing us with written evidence, that would be helpful.

Dinah Aitken: There is one provision in relation to placing requests under which, if a decision is not made within a certain period of time, it is deemed to be a refusal of a placing request. That then opens up the appeal process to the parent. That is one mechanism that already exists.

The Convener: Thank you for that useful evidence, for which we are grateful. If there are points on which you would like to come back to us once you have reviewed what you have said and heard today, please feel free to do that. If there are specific amendments that you feel we should consider in due course, we will also be grateful for any guidance that you can give us on that.

11:43

Meeting suspended.

11:53

On resuming—

The Convener: We now welcome Kate McGuiness, who is a learning and support co-ordinator in Kilwinning. You have that side of the desk entirely to yourself on this occasion, Kate, and we are very glad to have you here. Perhaps you could introduce yourself and share your perceptions of the bill.

Kate McGuiness: Thank you for the invitation to come along, which has been greeted with consternation in North Ayrshire, because it is rare that ordinary practitioners get a chance to talk about practicalities. I am a depute head teacher at Kilwinning Academy, which is a fairly standard comprehensive with a roll of around 1,000 pupils.

For the past seven years, my remit has included an oversight of support for learning, and I am quite well versed in the practicalities of managing the current special needs arrangements. Indeed, all that I can talk about are the practical implications that my colleagues and I see in the proposed legislation. On a positive note, I have not spoken to anyone who does not feel that the philosophy behind the bill is extremely sound. Having said that, there is a great deal of apprehension and fear as to its practical implications. In particular, concern has been expressed about the resource implications. I heard mention made this morning of the number of CSPs that there will be, and whether that will be less or more than the current number of records of needs. I do not think that we at the chalkface have the answer, but the apprehension is that we will not have the resources to do adequately what the legislation sets out.

We have particular concerns about the management implications of the right of all additional support needs children to future needs assessment—FNA—procedures. That is admirable, but we know that the system is creaking at the moment, if not bursting at the seams. Those rights are only available to record of needs children at the moment. We are conscious that, unless additional resources are available when those rights expand, some very good practising teachers might become administrators and will no longer work with children. That will not do anything to support their education needs. There is also concern about persons being named as responsible. We know how often staff change, and there will be some fear about that until clarification is made.

A further source of fear comes with the link-up between individualised educational programmes, personal learning plans and the co-ordinated support plan. It would be terrific to have all of those joined up, but we do not know how that would work. We hear the term PLPs blithely being used, but no one has yet given us a definitive PLP. There have been some pilots, but everyone is inventing the wheel themselves. If we are to have a joined-up system—and the bill seems to provide an opportunity to make it more joined up—some clarifications and guidelines would be extremely helpful.

We all agree that how the bill will work very much depends on the code of practice. The tighter and clearer that code of practice, the more likely it is that we will be able to offer the improved service that we hope to provide.

The Convener: You have described the school in Ayrshire at which you are based. I take it that you are involved in various groups that discuss special needs throughout the local authority area.

Kate McGuiness: Yes.

The Convener: Could you give us some information about your involvement in such groups?

Kate McGuiness: As new legislation comes into effect or as authorities update their documentation, support for learning co-ordinators working in the sphere of special educational needs are called to meetings or to serve on committees. Over the past four years in particular, in the context of social inclusion initiatives, I have regularly met staff, ranging from ordinary teachers to staff at directorate level, to discuss issues around support for learning and special needs. That now includes involvement with local special schools, of which there are two in the Kilwinning area. We do some joined-up working and joined-up planning on that basis.

The Convener: The committee has had the opportunity of visiting one or two schools where there has been good practice. That has been very useful for our understanding of the issues. I am keen to get more of a feel for how adequate the level of resource in a typical school—perhaps your school—is felt to be for meeting current demands in the special educational needs field. Do you have any thoughts about that or about the additional burdens that will be imposed under the bill?

12:00

Kate McGuiness: I said that the system seems to be creaking, if not bursting at the seams. There is genuine concern that, while the philosophy of social inclusion may be extremely good, the resources have not necessarily followed all the way down to the support department in individual schools, and schools find themselves with inadequate resources to cope with youngsters.

The Convener: What is missing? From your perspective as a practitioner, where are the stress points?

Kate McGuiness: Often it is personnel, or the insufficient availability of support staff, be that teaching staff or classroom assistant auxiliary support. I have battle scars from fighting long and hard to get sufficient auxiliary support for three disabled youngsters who each need a classroom assistant with them constantly, or they would not get an adequate education. The authority recognises that it must provide that, but suggests that it will give us two classroom assistants to manage three children. That means taking a child out of class 10 minutes early, wheeling them along a corridor and leaving them outside a classroom, while another classroom assistant does a similar thing with another child, so that they can get the children into the correct locations to experience a substantial chunk—but not all—of a lesson.

That situation is an example of the issues and the lack of resources. The situation is not isolated to Kilwinning Academy, nor is it a case of the local authority not being prepared to put in the resources: the resources are finite. When two separate toilet facilities have to be adapted, because children's needs are different, and we know that it is costing the best part of £30,000, we begin to realise the implications. While teachers like me, who deal with that, want to do the very best for pupils, we are sometimes hindered because we simply do not have the resources.

Ms Byrne: We have talked about children with social, emotional and behavioural difficulties and the broadening of the definition of additional support needs, which will put a further burden on resources. Everybody welcomes the broadening of the definition, but there is concern about how we can ensure that we provide for the newly identified areas and the newly identified young people within the system. There is good practice in many areas, and many schools have behaviour support departments, with staff attached to learning support and pupil support and so on. However, class teachers have a real concern about the support that they receive in class. Will you give us some insight into your experience of that area, and how you think that the bill will help? What aspects need to be embedded into the code of practice in order for it to work?

Kate McGuiness: There is no doubt that children with recognised behavioural difficulties, and the management thereof, are a growing concern in schools. There is a serious training issue. I heard this morning about the need to train members to serve on tribunals. There is equally a great need to ensure that classroom teachers are not just behaviour support specialists, and that they receive training on how to manage children with complex behavioural difficulties. The profile of the teaching profession indicates that we are an elderly profession. I have never been trained in how to cope with those youngsters. There are glib statements about anger management, and advice is given about classroom teachers needing to modify their methods, but assistance and training is needed. There is good practice. Many schools organise brief inserts, but it is not uniform; it is patchy and there will be many colleagues who do not get the opportunity to participate. That training needs to be there so that we can improve provision.

The Convener: So it is the quality of training that you are identifying in particular.

Kate McGuiness: The quality of training can be patchy. Some of it is excellent; some if it is less so.

Ms Byrne: Everybody welcomes the aspect of the bill that aims to co-ordinate support from other agencies for the benefit of young people with the most complex needs. That will put a huge burden on staff, however, and particularly on people who fulfil your role, working with various agencies, pulling together the different needs of the child and communicating with parents and with other school staff. How do you think that the co-ordination of support will work?

Kate McGuiness: Colleagues are concerned that the person in a school who is to undertake that co-ordination is unlikely to be someone such as myself. I have other management roles, and support for learning is only one of five areas that I cover. I am concerned that those whom we would traditionally call principal teachers of learning support might end up as administrators and could spend large parts of their day organising, making reports and distributing information.

The administrative side of things genuinely strikes fear into the hearts of teachers. In an effort to improve the service and education that is given to those youngsters who very much need assistance, we might take very good practitioners out of the frame, so that they no longer see children. That is happening now. The administration of individualised educational programmes alone can take a member of staff out of the teaching framework over a year. We estimated that at one point—so as to shock our director of education—and found that it was taking 10 teaching weeks to do the administration. It is not that we do not approve of the IEPs; we are just looking for recognition that there is a resource implication.

Work with other services is an area of particular concern. This is not a criticism of those other services but, given the current record-of-needs system and the annual reviews, it is with great difficulty that representatives of those other services can attend meetings to which they are invited. Meetings frequently have to be rescheduled a number of times before an appropriate body of people can be brought together. All too often, apologies are tendered because the situations being discussed at meetings might not be critical.

The co-ordinated support plan is excellent in principle, but there might sometimes be a dearth of social workers, for example. To be anecdotal for a minute, I believe that the local social work department in one of our catchment areas should be staffed by nine social workers. Currently, there are two, which has been the case for over a year. That is not because of a reluctance to employ on the part of the local authority; I believe that it is because of an inability to find the appropriately qualified staff.

If the social workers are not available, we must bear it in mind that the health authorities and psychological services will have similar problems. We are a secondary school of just under 1,000 pupils. That entitles us to the presence of an educational psychologist one morning per fortnight. The other local secondary school in Kilwinning, a Roman Catholic secondary, is slightly smaller than our school, with about 700 pupils. That school is allocated an educational psychologist for one morning every three weeks. If a request is made to increase the number of formal reviews—which, philosophically, we would regard as a good thing—how will the other agencies cope? Therein lie huge resource implications.

Rhona Brankin: In your school, is there interagency provision and do you make provision for children with emotional and behavioural difficulties?

Kate McGuiness: Yes. We have a fortnightly system and an educational psychologist comes to the school. In addition, a young support team worker, with a social work background, is linked to the school. We meet in a forum called the joint support team. In that forum, we often deal with children with attention deficit hyperactivity disorder and we deal with bullying and antisocial behaviour. We use the forum to offer support. If you like, that is additional support; it is not part of a record-of-needs process.

In practice, for a goodly number of years—almost 10—the number of record-of-needs children that we see has dwindled. Currently, we have eight children with a record of needs. Last year, our support department dealt with 128 youngsters, who you would say had additional support needs. Not all of them have a paucity of skills; some—a few—have exceptional gifts and we have to ensure that they are supported too.

Rhona Brankin: Obviously, a lot of good practice goes on in your school. You say that you will be snowed under or drowned in extra bureaucracy, but it seems to me that the bill is based on existing good practice—such as yours—so what will be the difference?

Kate McGuiness: I have just told you, for example, that 120-odd children went through our support department last year—although not always for the entire year, because children have crisis points and may need support only at certain times. They drop in and they drop out. We do not have to have formal reviews for those children. If I have read it correctly, the new legislation says that any child who is recognised as having additional support needs should have a formal review, which currently would fall under the FNA system.

Rhona Brankin: I think that that applies only to children with a co-ordinated support plan, does it not?

Kate McGuiness: I believed that the children with additional support needs would have the same right. That would cause a huge increase in bureaucracy.

Rhona Brankin: We will have to clarify that.

Fiona Hyslop: I want to ask about children who would not get a CSP. You have mentioned the experience of working with individualised educational programmes and the resource implications of specialised support. I am concerned about the implications for ordinary class teachers; they will use IEPs and PLPs for children who have additional support needs, but who do not have CSPs. Concerns have been raised with me about the implications of McCrone plus the PLPs and IEPs, and about the time that teachers would have to make available for the administration of PLPs and IEPs. With your management hat on, would you say that that would be to the detriment of contact time? I am thinking not about the teachers offering specialised support for learning, but about the normal class teachers.

Kate McGuiness: The PLP is a beast that we do not know yet. We have not been a pilot school and I really do not feel that I could say anything useful about it.

Fiona Hyslop: That is fine.

Kate McGuiness: IEPs have been running solidly for four to five years now. The system has slowly become more and more embedded in good classroom practice. Yesterday, I reviewed four IEPs for youngsters in a fourth year class. That involved talking to them, writing up my notes and passing my notes to a support department that arranges for them to be typed up. The support department then provides the link to the parent. We then tie a one-to-one discussion on progress to the regular parents' night. We have built a system that tries to limit the amount of time that teachers lose through having to administer IEPs, but we regularly lose a little time. The process that I have just described happens formally about four times per year for each teacher who is involved.

Fiona Hyslop: The Executive anticipates that only half of the children who currently have a record of needs will have a CSP and that more children will have an IEP. I know that this may be difficult to say, but do you anticipate that all of the 120-odd children in your school who have additional support needs will have an IEP?

12:15

Kate McGuiness: They do not all have an IEP.

Fiona Hyslop: What do they have?

Kate McGuiness: They have additional support. The support that is required is flagged up by support staff in classrooms; classroom teachers who are concerned that youngsters are not coping with the course materials, although they have been adapted; concerns expressed by parents; and issues picked up by traditional guidance teachers.

Fiona Hyslop: So you are not hung up on IEPs. The important thing is the additional support, not for it to be recorded in an IEP.

Kate McGuiness: A phenomenal amount of support work in schools is not governed by paperwork. We have 120-odd kids who receive additional support, but only 16 of them have an IEP. They have one because they have multiple problems, which means that we must set precise targets for them in achievable chunks. They are our serious cases, if you like. Some of our children with a record of needs also have an IEP because the record of needs does not give precise targets and advice, whereas the IEP does. We regard the IEP as a working document, whereas the record of needs is really a legal instrument and does not feature as part of classroom practice.

Fiona Hyslop: That is helpful.

The Convener: If the IEP is the working document, why do only some children with a record of needs have an IEP?

Kate McGuiness: One youngster's record of needs is based on a singular disability, but he copes tremendously well within the school and does not have additional support needs. Surprisingly, some youngsters with a record of needs have fewer disabilities than many youngsters who do not have one. I hope that the new provision will address that situation.

Ms Byrne: Can you give a rough idea of how many of the children in your school who have an IEP will need a co-ordinated support plan?

Kate McGuiness: Possibly three. In that, I include the youngsters who have IEPs that we use to distinguish children who are looked after and accommodated.

Ms Byrne: Is it satisfactory for the other children to continue to have an IEP? Will that meet their needs and dovetail into the system? Is it satisfactory that others with additional support needs will not have an IEP but may well have a PLP?

Kate McGuiness: I hope that the PLP will catch the other 100-odd youngsters. It would be awfully nice if all the parts in the system dovetailed.

The Convener: Would it require major resources to have such paperwork for all children?

Kate McGuiness: It would be interesting to see a definitive PLP. There are suggestions that PLPs could be embodied within the social education aspect of school life, but until we know the exact nature of the beast, it is hard to be more specific.

Dr Murray: You have covered many points. You have said that it is difficult to comment properly on the PLP because it is an animal that you have not actually yet met. However, would I be right in saying that, in principle, you would prefer that uniform system?

Kate McGuiness: It would be preferable if we had one system rather than trying to piece together different elements. The interface between the IEPs and the record of needs is difficult enough to manage and creating another interface would make it even more difficult.

The definition of the CSP is that there is multi-agency involvement. Thinking of our pupils, if that definition were applied strictly, we would have fewer CSPs than we have records of needs. However, that would change as the profile of the school changed.

There is also a concern about the CSP being generated outwith the education authority. For instance, if a CSP were kick-started by social work there might be problems about where its ownership and control lay. The education authority must control the CSP, but that will be successful only if the external agencies are compelled.

Dr Murray: Do you mean compelled in the sense that, if the education authority makes a request, the external agencies should have a duty to comply with that request?

Kate McGuiness: There is an issue about their having that duty even though they do not have the resources to enable them to comply.

Dr Murray: We have touched on the section relating to reasonableness and cost.

In relation to your concerns about resourcing, it sounds to me that you are already doing a lot of the things that are suggested in the bill. Do you think that the point at which you will be under pressure relates to the requirement to plan and prepare for all children who have additional support needs and significant difficulties making the post-school transition?

Kate McGuiness: The worry relates not to the teaching implications, but to the administration implications. However, all the effort to increase social inclusion means that teachers increasingly have to cope with children with difficulties who would not have appeared in a mainstream school before; there is therefore a training issue.

Mr Macintosh: I welcome the comments that we have heard that relate to the practicalities of implementing the proposals.

The bill tries to address the balance of rights between families and the provider. There is a lot of concentration on the point at which the process breaks down and results in arguments and difficulties. The bill tries to find ways of resolving those difficulties and problems amicably and, more important, equitably, by making sure that the needs of parents and children are addressed in a fair manner across Scotland. It strikes me that teachers tend not to be involved at the sharp end of that process because parents tend to think that teachers are on their side anyway. Correct me if I am wrong, but there is little disagreement with what you are doing; the disagreement tends to be at a local authority level.

What sort of disagreements do you experience? What sort of arguments do you have with parents? How are they currently resolved and how would they be resolved under the bill?

Kate McGuiness: There is often dispute with parents over what they see as the inadequacy of the support that the teacher gets in the school. By and large, those disputes are resolved in the school with the involvement of the support staff, a member of senior management and anyone whom the parent wants to bring along, such as their cousin or sister. At the end of the day, everyone has the best interests of the child at heart and, as I said, such disputes are usually resolved within the four walls of the school and are not referred to the local authority. In all honesty, I have to say that I have never been involved in any matters that have been referred to the local authority. As we have never had an appeal or, indeed, a serious situation that has had to be referred to the education authority appeals committee, I cannot really comment on that matter.

The tribunals and the dispute resolution system are the subject of a great deal of debate. However, practising teachers have little or no experience of them. As we have a locus in writing reports, I am concerned that a lot of teaching time will be taken up with report writing. Someone this morning mentioned the effectiveness of the children's panel system. That system certainly is effective; however, one of the first things to happen after a referral is made to the panel is that a school has to submit a fairly detailed report. Although it is obvious that such reports are essential, two weeks ago, one of our support staff received in the space of two days six children's panel reports that had to be done within a teaching week. That is not possible. If further reports are required for tribunals, that will have resource implications. Somehow or other, we will need administration time.

Mr Macintosh: I am impressed that you have managed to resolve all your difficulties in-house. You said that 128 pupils go through the additional support unit each year. I realise that none of those cases escalates enough to require referral to the local authority; however, how many of them would you describe as serious disputes with parents?

Kate McGuiness: I am aware that you might be under the impression that all is wonderful at Kilwinning Academy. It certainly is not. As I have said, when parents come to the school agitated and concerned, it is simply because they are fighting their child's case. Indeed, when everyone sits down and starts talking, the parents almost always realise that we are doing our best as well. That is how matters are resolved.

Since the start of the current teaching session, I have dealt with only one case in which a parent was seriously concerned and agitated about provision. However, we resolved the matter by agreeing to bring in a specialist to reassess the child's eyesight problems, which we did.

Mr Macintosh: Do such matters typically centre on the specialist provision and therapy that might be available, the amount of hours that the child is getting and so on?

Kate McGuiness: In such cases, parents usually feel that their children are struggling in maths or accounts and there are no additional teachers available to help. They will say things like, "You know that he has difficulties, so why aren't additional teachers available?" However, when we sit down with them, go through the calculations, point out that we have six full-time support teachers and two behaviour support specialists who have to serve X number of pupils, and show them that their children are receiving support and that we are doing our best in the most critical areas, the parents usually accept that. By and large, once we show parents that we offer homework clubs at lunch time or after-school, reading recovery schemes and early-bird programmes for kids who come into school at 8 o'clock to catch up and get a bit of extra support, they accept that our provision does not cover everything, but that it is as good as we can manage.

The Convener: Thank you very much for your interesting and useful evidence. I hope that we have not put you through too much this morning. As I have said to previous witnesses, if you have any further thoughts that you want to share with us, please feel free to write in.

Our next witness is Gwynedd Lloyd, who is senior lecturer in education at Moray House School of Education at the University of Edinburgh. We are very pleased to welcome her this morning.

Rhona Brankin would like to make a declaration of interests.

Rhona Brankin: I am related to Gwynedd Lloyd—she is my sister.

12:30

The Convener: I ask you to make an introductory statement. Tell us a bit about your work and your views on the issues in which the committee may be interested.

Dr Gwynedd Lloyd (University of Edinburgh): First, I note that none of us is responsible for our relations.

As the convener said, I am a senior lecturer at Moray House. I am also the director of the Scottish Traveller education programme. I am not here to talk about that, but in some of its deliberations the committee may want to consider the implications of the bill for Gypsies and Travellers.

Most of my work relates to children with social, emotional and behavioural difficulties. With colleagues, I have written a number of books and articles on issues such as school exclusion, SEBD, attention deficit disorder and discipline. I understand why the committee is concerned about those issues.

Like all the other witnesses, I welcome the general drift of the bill. In particular, it is most helpful that the groups with which I have been associated are more clearly included, without the implication of deficit. The legislation makes it clear that we recognise that some children may move in and out of having additional support needs. I hope that we will never talk about "additional support needs children"; instead, we should recognise that there are quite large groups of children who at some stage in their lives may need additional support for learning.

I also welcome the end of the record of needs, which was very problematic for children with social, emotional and behavioural difficulties. The legislation was muddled and unhelpful, and it was never clear whether social, emotional and behavioural difficulties were the same as special educational needs.

I think that the committee really wants me to indicate how many children have additional support needs. Of course, I do not know, so perhaps I should leave now.

The answer to the question is complex, and one reason why it is complex is that there are real fears in schools about what is happening in the area. Some of those fears are well founded, but others are based partly on myths around what is happening in the system. For example, one powerful myth is that because of policies of inclusion, schools must now deal with large numbers of children with social, emotional and behavioural difficulties who would previously have received special provision. That view is not supported by the statistics. Roughly the same proportion of our school population is in special schools as there was 10 years ago, and a large proportion of those children are children with behavioural difficulties.

In many schools there are great anxieties about disruption, challenging behaviour and issues to do with school disaffection. That is one of the problems. Some of the evidence that the committee heard previously swept up together under the heading of social, emotional and behavioural difficulties all children who are perceived to be disruptive and challenging in schools.

The official statistics, which I imagine the Executive is using, are those from the school census. They suggest that at the moment more than 3,000 children have a record of needs or an IEP because of social, emotional and behavioural difficulties. We could increase that figure by including other groups of children. In the future, we must take account of the fact that in Scotland and England there is a medicalising of childhood problems. A large number of children in schools who might be considered to be disruptive or to have behavioural problems are visiting medical services and are being diagnosed as having attention deficit hyperactivity disorder. If we were to include all those children in the definition of SEBD, we would be dealing with a large and increasing number of children.

There may be a large number of children whose behaviour is challenging and who may be considered to have SEBD and ADHD. At issue is how many of those children will need a co-ordinated support plan. The code of practice will be very important in that regard. It will have to be very clear and helpful in its guidance for schools on which children really need a co-ordinated support plan.

As the previous witness indicated, schools are already engaging in multi-agency and interagency working to support children with behavioural difficulties in schools. I see no reason why many of those children would require a co-ordinated support plan. It is important to explain to schools that the fact that a child’s family is involved with the social work department does not necessarily mean that the child requires a co-ordinated support plan.

I shall stop there, because members will have questions.

The Convener: That was a useful introduction. I will kick off and try to get a handle on some of the figures. You mentioned the figure 3,000 in your introduction, but I did not pick up what that was.

Dr Lloyd: The figure is from the latest school census, with which there was some difficulty. The census depends on people completing and processing it reliably, about which there are issues. The figure is the number of children who, because of social and emotional behavioural difficulties, have a record of needs or an IEP. I imagine that those are the children whom the Executive is thinking about when it talks about an additional 0.5 to 0.7 per cent of children who do not have a record of needs but who will need a CSP.

The Convener: You touched on the fact that the same proportion of children went to special schools as had always gone to special schools. How up to date is your statistical information?

Dr Lloyd: It is the most recent information provided by the Executive. I think that it is probably from 2001, but I cannot remember.

The Convener: We heard from Kate McGuiness that there is a perception that the statistics are not correct. Is the explanation that more people are being identified with difficulties of one sort or another? There are indeed more people whose behaviour is disruptive, which may be a wider issue in schools.

Dr Lloyd: That is a more logical explanation. It is difficult to know, because if you read right back through history—my colleague Pamela Munn tends to quote Socrates at this point—every generation has believed that the next generation is worse, more disruptive and more difficult. That said, there are reasons why we may have more children in school whose behaviour is challenging, which is to do with the kind of world that we live in and many of the changes that have taken place over the past 10 or 15 years.

The Convener: Can you give us guidance on the relationship between the record of needs numbers and the potential CSP numbers? The figure of 50 per cent, or whatever it might be, has been a bit of an issue. Do you have information from your studies that could assist the committee?

Dr Lloyd: I can see the logic in the argument that says we would have fewer records of needs. That is quite sensible.

The Convener: Do you mean fewer CSPs?

Dr Lloyd: Let me rephrase that. I meant that fewer of the children who currently have a record of needs might be entitled to a record of needs in the future. As to whether the logic of that is that we will have fewer CSPs, ultimately it depends on the subjective judgment of a group of professionals as to whether they believe that a child's social, emotional and behavioural difficulties are sufficiently complex, and that the interagency working is sufficiently complex, for a CSP to be required. It will also depend on the guidance that is given in the code of practice.

The Convener: I accept that there are definitional issues, but can you give us a handle on the position of people with special educational needs—which we now call additional needs—within the current system?

Dr Lloyd: All together?

The Convener: Yes.

Dr Lloyd: I could not do so without looking in my bag. I can tell you afterwards, if you like.

The Convener: Can you give us any assistance about the number of children who have no record of needs at the moment but who might be entitled to a CSP under the new set-up?

Dr Lloyd: Again, that will depend on professional judgment. I anticipate that there will be 3,000 or more children, whom we have already identified as having social, emotional or behavioural difficulties, and who may not have a record of needs. Beyond that, some additional children may become eligible for CSPs, but it is hard to predict how many. I do not support the views that were expressed by previous witnesses that we are talking about a huge number of children, unless the code of practice encourages people to think that a diagnosis of attention deficit hyperactivity disorder, for example, means that someone should automatically have a co-ordinated support plan, in which case you would be talking about quite a large number of additional children.

The Convener: There is a strong suggestion that there is a high element of under-diagnosis and under-identification of children with social, emotional and behavioural difficulties, because that group is perhaps the most ill-defined and difficult. Are the figures moving?

Dr Lloyd: Most people would think that the figures are increasing. It is not possible to say whether there is under-diagnosis, because a judgment is involved. When we look at a certain child, we judge that their difficulties are more extreme than those of other children and that they may, perhaps, need additional support to deal with those difficulties.

Most of the literature on mental health problems in schools talks about perhaps 20 per cent of the school population having a mental health problem. Not all those children would necessarily be included in the definition of social, emotional and behavioural difficulties because some children who have mental health problems cope quite well with school, and some of them are rather well supported in schools. I do not expect that all those children will require a co-ordinated support plan. In addition, 5,000 children go to children's hearings in Scotland every year, which requires the involvement of other agencies. However, I do not expect that those children will have co-ordinated support plans either.

In my perception of the way in which the proposed system will work, it will be when there is a particular combination of difficulties outwith and within school and when complex arrangements will have to be made with other agencies that a child will need a co-ordinated support plan.

The Convener: It may also depend on the school's decision or on whether a parent pushes for a CSP in a specific instance, whether or not one is needed.

Ms Byrne: I would like you to expand a bit on the identification of social, emotional and behavioural difficulties. One or two of the written submissions that we have received, including one from the National Autistic Society, have expressed concerns about young people who are on the autistic spectrum or who suffer from dyspraxia, but who are not identified as having those difficulties, which are put down to social, emotional and behavioural difficulties. Those young people are never identified as autistic; therefore the correct approach is not taken. What is your view about that? Do you have any idea of the extent of that problem? Do you think that the bill will be able to address those young people's needs?

Dr Lloyd: That is an issue. I agree with what Dinah Aitken said earlier. A number of children are dealt with through the school discipline systems without there being sufficient investigation into whether there is anything underlying their difficulties. In Britain, parents sometimes look for a diagnosis because they feel that they are being dealt with unsympathetically by schools. When a child is disruptive in a primary school, the parents are brought in and they and the child are given a row. However, if a child has a diagnosis of autistic spectrum difficulties or ADHD, the child suddenly has a problem and is supported. There are ways in which schools could be more effective in considering the underlying reasons why children might be disruptive in class and in providing additional support. The bill might be helpful in that respect.

Dr Murray: I appreciate your feeling that we cannot put numbers to this at the moment without the code of practice, and that decisions about who requires a CSP will be subjective decisions made by professionals. We will not be able to gainsay those decisions until we have seen the code of practice. However, do you think that the definition of who might be entitled to a CSP is clear in the bill? Some of our previous witnesses suggested that there is a lot of confusion. In particular, the Convention of Scottish Local Authorities and Careers Scotland seem to be confused about the definition. Do you think that the definition in the bill is fairly clear—albeit that professionals will have to make judgments about individual children?

Dr Lloyd: I do not think that the definition is all that clear, but I am not sure how much clearer it could be. The process of definition is not a scientific process involving exact measurements—such a process did not exist under the previous system. As we know, the number of children with a record of needs who have a diagnosis of SEBD or who go to children's hearings varies hugely between councils and between schools. I am not sure how the element of professional judgment could be entirely eliminated from the process.

Dr Murray: One of the bill's policy intentions is to create a uniform Scotland-wide system, rather than a system in which 0.8 per cent of children have a record of needs in one local authority area whereas the figure is 3 per cent in a neighbouring authority area. We are trying to ensure more uniform and better provision throughout the country. Do you think that the definition of who needs a co-ordinated support plan could be improved, or is it necessarily not that clear? Do you think that the Executive could improve on the current definition, or is that not possible?

12:45

Dr Lloyd: I suspect that, necessarily, the definition is not that clear. It is important that the code of practice specifies the stages and levels of support through which schools and authorities should move before they use a co-ordinated support plan. The present staged system of intervention should be developed into a staged system of support, whereby children move up and down the system depending on the level of support that they require.

Let me be critical of the entire bill. If the Scottish Parliament were really imaginative, it would have created a law that introduced an entirely co-ordinated holistic support system for children because children are whole human beings who have lives inside and outside school. That would have been useful, although I realise that the Education Committee probably cannot address that issue.

The Convener: That point echoes other evidence that we have had. Perhaps resources and time scales are issues.

Mr Macintosh: You say that 3,000 children who have social, emotional and behavioural difficulties have a record of needs—

Dr Lloyd: Or an IEP.

Mr Macintosh: Okay. What factors differentiate those who qualify for an IEP or a RON from the numerous other children with social, emotional and behavioural difficulties who do not qualify? What are the triggers for an IEP or a RON?

Dr Lloyd: At present, the factors vary from council to council. The issue is one on which guidance would be helpful. Most councils have their own structures and systems of assessment—as I said, they tend to call that a staged system of intervention—and, depending on the council, people receive an IEP if they are at a certain stage in the system. Some councils do not think that IEPs are appropriate for certain groups of children. One consequence of the bill may be the extension of IEPs, which would probably be a good thing. In the past, some professionals may not have considered using an IEP with children who have social, emotional and behavioural difficulties; they certainly would not have used them with bilingual learners or with Gypsy Traveller children, some of whom may become eligible for an IEP under the bill.

Mr Macintosh: You mentioned the increasing tendency towards medical diagnosis. Do you expect the guidance to say, for example, that children with ADHD or dyslexia would not normally be expected to have a CSP, whereas children with fragile X syndrome would be expected to have one?

Dr Lloyd: My understanding is that the bill's definition of a child who requires an IEP or a CSP is a functional one and is based on the level of support that the child requires. A child who is diagnosed with attention deficit hyperactivity disorder but who is supported effectively in school would not require a co-ordinated support plan, whereas another child, whose difficulties express themselves in a more complex way and with whom more professionals are involved, might require a CSP. We cannot decide on who requires a CSP by considering labels, but by considering the level of support and professional involvement that is required.

Mr Macintosh: That is almost the opposite of the deficit model because the focus is on the child's behaviour and whether they are well looked after in school. That means that a good school will have few children with a CSP because it intervenes effectively to help the child and parents.

Dr Lloyd: I would not go quite that far, but there will be a relationship between the number of CSPs and the effectiveness of the support. However, some children will require a CSP because of the complexity of their needs and the professional support that they require.

Rhona Brankin: I want to probe the figures a bit further, although you may have partly answered my question. You say that 3,000 youngsters who come under the social, emotional and behavioural difficulties umbrella have an IEP or record of needs. However, you have said that not all local authorities use IEPs for youngsters with those difficulties. The Scottish Executive has calculated the number of additional youngsters who might come into CSP provision, but you suggest that the numbers could be variable. Any financial planning must be based on the recognition that it is difficult to get a handle on the numbers.

Dr Lloyd: I think so. The school census information is limited in what it tells us about that question.

Lord James Douglas-Hamilton: Would it be of assistance if PLPs and IEPs were statutory and were included in the bill?

Dr Lloyd: Probably not.

The Convener: Have you done work, or do you know of work done by others, that gives a flavour of the percentages of the different sorts of people within the categories that we are discussing? That would give the committee some guidance on numbers.

Dr Lloyd: Are you asking specifically about children with social, emotional and behavioural difficulties?

The Convener: I am talking more broadly, although I know that your expertise relates to children with social, emotional and behavioural difficulties.

Dr Lloyd: The largest group of children in Scotland who are identified as having special educational needs is another rather vague group—children who are considered to have moderate learning difficulties, with which overlapping difficulties of behaviour are often associated. For example, it is likely that a child with moderate learning difficulties who ends up in a special school is there because of a combination of their difficulties with learning and their behaviour in mainstream education. One of the things that make this issue so complicated is that the largest groups of children with whom we are dealing are those whose difficulties are not easily measurable and are hard to define. That does not mean that they are not real difficulties, but they are not so easy to count or to measure.

The Convener: I am not sure that you will be able to answer my final question. To what extent have academic studies been done or has information been obtained on which methods of support work and which do not work? Anger management was touched on earlier.

Dr Lloyd: There is much good research on those issues.

The Convener: Are there agreed standards that can serve as the basis for training teachers?

Dr Lloyd: Yes. There is much good research into what is effective—I would say that because we have written a lot about it. There are no absolutely right answers, or I would be in the south of France rather than here. There are well-established methods of supporting children with behavioural difficulties that work for some children in some situations.

We ran a big project in Scotland on interagency working to support children with difficulties and to prevent exclusion from school. One of our findings was that schools were most effective when they were highly flexible and imaginative in the range of provision that they made for children with difficulties. One cannot say that there is a fixed number of children for whom a particular method will work. We said that some schools were just hanging on in there. As was described earlier, they were willing to persist, to try different methods of supporting children with difficulties and to work in partnership with parents to do that. I agree that there is a need for training and for supportive teachers.

Rhona Brankin: Will there be an increased need for such training, given that youngsters with emotional and behavioural difficulties who are currently not within the system will now enter it? We cannot quantify that issue, because some local authorities and schools are already making provision for such children, but some additional youngsters who are not included in the figure of 3,000 will require support. There will be a need to ensure that adequate training is available to class teachers, as well as support teachers.

Dr Lloyd: That is absolutely right. We do not know how many extra children will require support. Councils and schools may already be providing effective support to those pupils, although they do not have a record of needs or an IEP.

The Convener: Thank you for your evidence, which was very useful. As I have said to other witnesses, if there are thoughts that you would like to give us after the meeting we would be more than happy to hear from you—especially if you can cast some light on the issue of figures, which is bothering us quite a bit as we consider what the demands on the system will be.

Earlier you indicated that you had some things in your bag. If there are things to come out of your bag that you want to share with us, that would be very useful.

Meeting closed at 12:54.

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