EDUCATION COMMITTEE

Wednesday 10 March 2004
(*Morning*)

Session 2

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EDUCATION COMMITTEE
8th Meeting 2004, 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)
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 ALSO ATTENDED:

Euan Robson (Deputy Minister for Education and Young People)

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 March 2004

(*Morning*)

[THE CONVENER *opened the meeting at 09:18*]

Education (Additional Support for Learning) (Scotland) Bill: Stage 2

The Convener (Robert Brown): Good morning and welcome to this meeting of the Education Committee. We continue our consideration of the Education (Additional Support for Learning) (Scotland) Bill. I remind people to switch off mobile phones and anything else that makes a noise. I declare a possible interest in legal aid matters because of my membership of the Law Society of Scotland and my consultancy with Ross Harper Solicitors of Glasgow.

Section 13—References to Tribunal in relation to co-ordinated support plan

The Convener: Amendment 269, in my name, is grouped with amendments 258, 270, 261, 267 and 268.

This group of amendments deals with the tribunal issue, with which amendments to earlier sections also dealt. I have tried to do two things with the amendments in the group. First, amendment 261 would give Scottish ministers powers to extend by statutory instrument at a later point, if they are so minded, the categories that can go to the tribunal. I am conscious that officials are worried that, if we go too far in that direction, there will be a flood of people coming into the tribunal and that that will mean that resources are diverted to it that should be spent on dealing with the major issues of substance. Nevertheless, I feel that the fears in this regard, particularly in relation to the efficacy of the mediation and advocacy arrangements that are proposed by the ministry and the arrangements at the school level, are overstated. Therefore, I want to give ministers the power to propose extensions if they are minded to do so in the light of the tribunal's experience.

Secondly, amendments 269 and 258 are designed to deal with a particular source of difficulty that the committee has discussed a number of times; they seek to extend slightly the tribunal jurisdiction to deal with some of the people who would not have a co-ordinated support plan. Although it is fair to say that the co-ordination issue has been identified by the committee and ministers as crucial, it is also fair to say that the issue sits side-on to the complex situations that are the central point of the bill. I have always felt that, while co-ordination of services is important, it is not the only issue that we have to deal with in this context.

Although amendment 269 is in a format of my own, it follows a suggestion by Children in Scotland and linked groups that we should deal with the cases involving a child who would require a co-ordinated support plan were it not for the fact that his or her additional support needs could be met by the education authority exercising its functions relating to education alone. The amendment relates to the arrangements for additional support in that particular situation and attempts to open them up, not hugely, but to a point at which additional support would be provided for children in situations in which co-ordination with services outwith the education department is not needed.

Amendment 269 is slightly different from a similar amendment that I lodged earlier. I made that change because I wanted to put more focus on the system. The central part of the amendment is contained in the words:

"failure by an education authority to make adequate or efficient provision".

That is slightly more satisfactory than the original amendment.

I am conscious that most of the cases that go to the tribunal relate to decisions on whether or not to have a plan. When people fall short of the requirements for the issue of a co-ordinated support plan, of course, there will be no plan as such, although there will be paperwork of various sorts that will back up the situation.

While amendment 269 would open up the situation, amendment 258 attempts to control the flow through the tribunal in one of the many ways in which that could be done. It would give the president of the tribunal a sift power to identify whether a substantial issue is involved and give ministers the power to determine, by statutory instrument, what a substantial issue is. That is quite an important matter, as it would enable a debate on what "substantial" means in this context. Amendment 267 would allow the particular circumstances or factors that can give rise to a substantial issue to be identified.

Amendment 269 would open up the situation to a modest extent and amendments 258 and 267 would create a power to control the tap. I know that all sorts of issues arise from my amendments, but the central matter is that the right to have a civil remedy—an application to a tribunal in certain

limited situations—is extremely important. The inclusion of that right will reassure many people who might otherwise be concerned about the bill.

This is a complex and difficult area with which the committee has grappled from the beginning. I hope that the amendments will commend themselves to the minister and the committee. I think that they provide a reasonable way of tackling people's concerns in this area without opening up the floodgates.

I move amendment 269.

Mr Adam Ingram (South of Scotland) (SNP): I wonder whether you could flesh out a little bit the reasoning behind amendment 261, which seems to suggest the weakening or watering down of the powers of the tribunal in favour of ministers in the first place and the president—who will have the powers to reject an application—in the second place. Will you explain that?

Rhona Brankin (Midlothian) (Lab): I am opposed to this group of amendments for a variety of reasons. The main reason for my opposition is that the amendments propose the extension of the tribunal system, which I think is fundamentally the wrong thing to do. We need to ensure that the bill does not over-legalise the system and I am very concerned about the fact that the amendments in question would do that.

I disagree fundamentally with any change to the criteria that determine whether a young person is entitled to a co-ordinated support plan. That relates to the whole area of the involvement of agencies that are outside education. Changing that would fundamentally change, and in some ways undermine, what underpins the bill.

I think that it would be very unwise to give the tribunal's president the sift powers, as that might serve to gum up and create a pinch point in the system, which would prevent it from working as effectively as it should for the very young people whom the tribunal is designed to help. There would be a negative effect on those young people.

Dr Elaine Murray (Dumfries) (Lab): I have quite a bit of sympathy with the substance of the amendments, in that we are well aware of the concerns of people whose children had a record of needs or would have qualified for a record of needs. They now do not have the comfort of having the piece of paper. I, too, had discussions with Children in Scotland about possible amendments, because it is very important that those issues, which are central to people's fears, are discussed and addressed in a way that gives people comfort. I have considerable sympathy with what this group of amendments tries to achieve.

That said, I also have some niggling doubts. I feel that the definition of who will have a CSP and who will not is quite clear, because the bill says that another outside agency must be involved. If that clarity were taken away, as amendment 269 would do, there could be a lot of discussion about who would have had a CSP if they did not have support from outside. I am concerned about the fact that the proposed change would make it much more difficult to pinpoint who had the right of appeal.

I am concerned about the wording of amendment 269. The phrase

"failure … to make adequate or efficient provision"

appears to be an either/or—it seems to be saying that the education authority can make adequate provision or it can make efficient provision. If provision were adequate, it would have to be efficient. I have a niggle about that wording.

I am less keen on the idea of the president having a sift power; I have more sympathy for amendment 269's aim of giving comfort to those people whose children had a record of needs or would have had a record of needs. I am not terribly keen on the idea of the president having such a power for some of the reasons that Rhona Brankin outlined and because of the question of what would happen if a parent did not agree with the tribunal president's rejection. Would the parents take the president to judicial review over their decision making? There would be many problems associated with people who were unhappy with the president's decisions. I will be interested to hear what other members and the minister say on that.

Lord James Douglas-Hamilton (Lothians) (Con): I have sympathy with the intention behind the amendments in the group, because I have a strong preference for widening access to the tribunal. It is important that Children in Scotland supports the principle of the amendments.

09:30

Mr Kenneth Macintosh (Eastwood) (Lab): Amendments 269 and 258, which are the two substantial amendments in the group, would extend the powers of the tribunal to allow it to consider cases beyond those that qualify because a child has additional needs that require a co-ordinated support plan. As I suggested last week, I am sympathetic to both amendments.

As all of us are aware, many parents and families, particularly those who have had to contest the opening of a record of needs for their children, believe that access to the tribunal is the only guarantee of their rights, or at least the only effective replacement of the record of needs system as a way of enforcing their rights. Although the Executive has done much to reassure all

families who have children with additional support needs that their needs will be met, including the introduction of a dispute resolution process at local authority level, to my mind, it would be more efficient, more consistent throughout Scotland and more satisfactory if one tribunal system handled all cases that required dispute resolution.

I hope that when the bill comes into force, it will succeed in reducing confrontation between families and local authorities and that the tribunal will be able to manage the number of cases in which disputes arise. If that happens, I see no difficulty in extending the powers of the tribunal at that stage to encompass more than just children who require a co-ordinated support plan. I am interested in hearing the minister's response, but I am minded to support amendment 261 and any consequential amendments.

On the face of it, I am attracted to the idea behind amendments 269 and 258, that we should draw the line on access to the tribunal not at those who require co-ordinated support from different agencies but at those who have the most complex needs. I am also attracted to the idea that we should give powers to the president of the tribunal to use his or her discretion in granting leave to appeal. However, I have several worries about that approach. I am not keen on introducing more judgment or discretion into what will already be a relatively complex system. Although hard-and-fast rules on access to a tribunal can sometimes be harsh in their application, they have the advantage of transparency and simplicity. It would be wrong to encourage parents to think that they might be able to appeal, when that is unlikely to happen.

There is no certainty about the numbers that might be involved. Although, as I said, I hope that disputes will be less common and that the tribunal system will be able to cope with them all, we do not know that that is what will happen. As the establishment of the new rights may have the perverse effect of increasing demand and the number of disputes, it is right that the tribunal should concentrate on the complex and co-ordinated needs of the most vulnerable and needy.

I am anxious that we do not repeat the mistakes of the record of needs system. Despite the best intentions behind that system when it was introduced, for many people, the record of needs became a device to secure resources or to ensure that their child's needs were addressed. The bill will break that link by extending extensive new rights to all parents of children with additional needs, not just to a select few, even if they are the most vulnerable. The bill will also impose a range of new duties and responsibilities on local authorities and it will be backed up with substantial new resources, although that is not mentioned in the bill. The issue of resources is clearly a source of problems for many families.

Fundamentally, we are trying to establish a new pattern of relationships between families and local authorities. I hope and believe that we will be successful, but we need to give the system a chance. I am concerned that if we agree to amendments 269 and 258, we will be the authors of our own misfortune by introducing an element of discretion and by almost encouraging parents to look to the tribunal, as they did with the record of needs system. I welcome the minister's comments on the matter, which is difficult and goes to the heart of many of the committee's anxieties about the bill.

The committee should already be thinking about using its powers of post-legislative scrutiny to return to the matter after the bill has been enacted to find out whether it is having the desired effect. At that stage, we could use the powers that have been suggested in Robert Brown's amendment 261. That is the way in which to assuage parents' anxieties on the matter.

Ms Rosemary Byrne (South of Scotland) (SSP): I have much sympathy with what Ken Macintosh said. I also have much sympathy with Robert Brown's amendments in this group, which I will probably support. However, I will be interested in hearing the minister's clarification of what the future holds for the tribunal system.

Like Ken Macintosh, I believe that there should be a universal tribunal system to which everybody would have access. We should continue to seek to attain that ideal. What we have created so far is an adversarial system. We are tinkering around the edges to try to fix something that is fundamentally flawed, and it will be difficult for the tribunal system to work; there will be queues of people who will want to challenge it. If the system goes through as it is, I will be interested to see how it progresses. I hope that we can revisit the issue at stage 3 and try to do something more than just tinker around the edges. I intend to support amendment 269, because I believe that, although it does not go far enough, it is a step in the right direction.

I gave examples at our previous meeting of the English tribunal system and its difficulties. Eighty-three per cent of those in England and Wales who take a case to a tribunal win their cases. The figure for cases that are settled at the last minute before a tribunal sits is an indication of how parents' concerns are not being addressed in England and Wales. I am concerned that the situation will be no better in Scotland.

We must be aware that the issue of children with autistic spectrum disorder is going to get bigger. There is a growing population of such young people, but only patchy resources to deal with

them. In England and Wales, more and more people are going to tribunals to get autism-specific education for their children instead of autism-friendly education and I believe that we will move in that direction in Scotland. I am aware of a number of cases here that are similar to those in England. I do not believe that the tribunal system will deal with such cases efficiently or effectively. Therefore, although I have grave concerns about the tribunal system, I will support Robert Brown's amendments.

The Deputy Minister for Education and Young People (Euan Robson): First, I understand the concern that members have voiced and the genuine nature of the concern that members seek to address. The Executive has given a great deal of thought to the tribunal area, but we do not consider that it would be necessary to refer the matters under discussion to a tribunal in the way in which the amendments propose. In colloquial terms, amendment 269 appears to open the door wide and amendment 258 seems to close it again. In essence, amendments 269 and 258 seek to give a right of referral to a tribunal to a group of children and young persons who would not meet all the criteria for a CSP, who are those who do not need significant additional support to be provided from outwith the education authority.

In a sense, we are returning to earlier debates on amendments that sought to remove the need for co-ordination, when it was accepted that co-ordination will be a central element in targeting those with the most extensive needs. The tribunal system fits into that particular pattern, if you like. Members will recall that, in response to the committee's concerns about those with additional support needs who would not qualify for a CSP, we made clearer with amendment 63 the explicit duty on education authorities to make additional and efficient provision for children's additional support needs. I believe that that amendment was generally welcomed.

Members will note that we have lodged amendment 248, which is on specific transitional arrangements for those who have a record of needs. Those transitional arrangements are likely to cover a lot of the cases at which amendment 269 and related amendments are targeted. Amendment 248 will offer extra protection to safeguard the provision that is made for those particular children and young people.

Amendments 269, 258, 267 and 270 would change fundamentally the role of the tribunals, because they imply that tribunals would monitor service delivery. We have been clear all along that we do not see the tribunals monitoring services at all.

We have been through this before. As I explained last week, sufficient mechanisms are in place to allow parents and young people to raise concerns about the additional support that is provided: there is Her Majesty's Inspectorate of Education, the powers of direction in the bill, the section 70 complaint route, and the mediation and dispute resolution arrangements. We could look at a system beyond dispute resolution arrangements, but that would add a level of cumbersome administration.

As was the case with amendments last week, the problem with amendment 269 is that it is not clear what amounts to "failure". I know that that is described in other parts of the bill, but there may be difficulty in interpreting what is meant by a failure in this particular context. A further difficulty with amendment 269 is how the individuals who fall into the group that is mentioned in the amendment will know who they are, when there is no duty on the education authority to establish who they are. Likewise, with amendment 258, how will the president of the tribunal know who they are? How will the president conduct the sift, on which criteria will it be based, and what will happen if there is disagreement over the president's sift?

The fundamental point is that we should focus on those who are most vulnerable and most in need, and we will do that through the mechanism of co-ordination, as I described. The amendments in the group would introduce a different element into the equation. That goes back to an argument that we have had already.

On amendment 261 and consequential amendment 268, the committee has already raised the presentational difficulties that are involved in embarking on a new system. However, in effect, amendment 261 would send a message that the new system will not be sufficient to meet the needs and concerns of all its users. As I indicated, I do not believe that monitoring service delivery is a matter for tribunals, but there we are.

Amendments 261 and 268 would perhaps undermine the safeguards that exist in the system to resolve disputes over service provision, such as mediation and dispute resolution and the other avenues that I mentioned. They could undermine parents' confidence in the new system, and lead to an element of confusion. Expectations could be raised that ministers would soon use the powers to extend the tribunals, but that is not ministers' intention. As I said when resisting similar amendments, I am not minded to extend the tribunals. I appreciate that giving ministers such powers may appear to offer flexibility in the longer term to avoid further primary legislation. However, if a system is to be radically altered, Parliament should have the opportunity to debate it fully, so primary legislation is probably the more appropriate route. I appreciate that consultation on

regulations would provide such an opportunity, but if we were to make a fundamental change in some years' time, the primary legislative route would be more appropriate for it.

I stand to be corrected, but I think that the Subordinate Legislation Committee has been generally concerned about granting powers to ministers. When such powers are necessary, they should be granted, but as I said, I see no need for the powers that amendment 261 would offer.

The most important point is that amendment 261 would send out the wrong message about the system because it suggests that confidence in the system is lacking. If the system needs to be changed in years to come, it would be better to have another debate and further primary legislation, which would cover all the issues fully.

We can consider those matters further before stage 3, but we ask the committee to reject all the amendments in the group.

09:45

The Convener: I shall sum up the debate, which raised many complex issues. I thank everybody who spoke in the debate. Everyone has a genuine view and valid points were made from all parts of the spectrum. I will do my best to take account of those points.

A difficulty arises because, way back at the beginning, the tribunal was named the additional support needs tribunal. It will deal only with co-ordinated support plans, so if confused messages are being sent out, that name sends out a big confused message from the Administration.

I accept and welcome amendment 248, which deals to a significant extent with the record of needs position. Of course, that amendment relates to those who have records of needs now. The main issue concerns those who would have had records of needs and been in difficulty in the future, but who will not have co-ordinated support plans under the new system. I remain of the view that it is important to deal with that issue.

The minister mentioned several administrative methods of dealing with matters, through the use of section 70 of the Education (Scotland) Act 1980 or through Her Majesty's Inspectorate of Education, for example. There is often stress between administrative and bureaucratic methods and procedures that are stimulated by individual rights of reference or appeal. The general system that my amendments would create echoes what happens in the legal system when application is made to a sheriff for leave to appeal in some situations. I have tried to replicate that in the arrangement with the president of the tribunal—the equivalent of the court.

I accept that the bill's intention is to avoid confrontation—I hope that it succeeds in doing that—and to deal with matters at school level, or, failing that, through mediation or advocacy, rather than people having to go anywhere near a tribunal. I am fairly confident that, under the bill, many cases will not go to tribunals.

The minister made several points that I do not altogether accept. He asked what the word "failure" means. The bill uses the word "failure" in one or two categories of appeal, so I do not regard the minister's point as a substantial objection to the word's use in my amendments.

The minister says that no duty is placed on the education authority to establish who falls short of the requirements for co-ordinated support plans. That is not really the case, because under section 3, every education authority is obliged to put in place arrangements for identifying people who have additional support needs. A process of assessment accompanies that. Although the formal plan that a CSP requires is not needed, the process still needs to be followed.

The minister asked how the president of the tribunal would conduct the sift. I have tried to show in amendment 258 that only a substantial issue would be sufficient. In addition, ministers would be able to define "substantial" and determine the substantial issues that must be taken account of. In most respects, it would be in ministers' hands to try to make clear to the president of the tribunal exactly how that would work.

I do not totally accept that the current arrangements are as clear-cut in practice as Ken Macintosh suggests. I understand what he is getting at and I entirely accept his point, but the question of who gets a co-ordinated support plan is linked to the question of who receives resources from outside the education authority—whether such resources are provided by the health board, the social work department, or another body, either for an educational purpose or for another purpose. That will clearly be a significant issue in relation to whether people take their cases to the tribunal in the context that we are talking about. There will be a lot of appeals anyway, simply because people with borderline cases who are dissatisfied might want to take their cases further. If anything, amendment 258 would give greater clarity about the circumstances in which appeals could go forward. Of course, there will be a settling-down period after the bill is passed, as there is with any bill, before we undertake any post-legislative scrutiny.

I will try to deal with one or two of the additional points that members made. Rhona Brankin mentioned over-legalisation. The committee has worried about that from the start and I entirely accept her point. However, I do not think that the

amendments would lead to over-legalisation; amendment 269, in particular, is an amended version of a proposal that I brought forward and then changed to deal with that very point. Amendment 269 refers to the

"failure by an education authority to make adequate or efficient provision for such additional support".

In other words, the focus would be on provision, not on support.

Although I accept that an issue of resources always lurks behind such amendments—and behind the bill's wording about who will or will not get a CSP—that issue is, as the bill is currently phrased, at second hand. The tribunal will not deal directly with resource issues, and nor would it if amendment 269 were agreed to, given the way in which the amendment is phrased.

Elaine Murray questioned the use of "or" in the phrase "adequate or efficient" in amendment 269. Oddly enough, the wording in my original version of amendment 269 was "adequate and efficient", because I was trying to reflect the wording of section 3(1)(b), but I was advised by the clerks that the amendment would be clearer if the wording was "adequate or efficient". If the wording was "adequate and efficient", there might be no appeals at all, because both requirements would have to come into play. There is a considerable degree of overlap, as we know from earlier debates, but I think that "adequate or efficient" is probably the right phrase.

Ken Macintosh made a number of important points, some of which I have dealt with, about the need to reduce confrontation and about the tribunal system. Like him, I confess that I have qualms about whether the dispute resolution mechanism will be effective or just cumbersome. In lodging the amendments, I am trying to make the references to the tribunal clearer in limited and key areas, to prevent people from becoming entrammelled in what might be a confrontation-producing system, which might be the case if references were made to the tribunal at an earlier stage in some sort of local authority system. I am conscious that it is important not to increase demand, so I have tried to put in place a number of locks, so that the general principle that would be set out would apply only to the very limited number of people who would not have a co-ordinated support plan but who had some element of complex or multiple needs. The principle would be in place and ministers would have the power to define "substantial" issues.

I know that ministers are concerned that judicial review actions might be raised by people who were dissatisfied with decisions of the president of the tribunal. However, such actions could also be raised in relation to, for example, the local authority's earlier decisions and to ministers' decisions. Judicial review is not a catch-all that anyone can initiate; the number of judicial reviews is not huge across the board of all the matters in relation to which such actions can be raised. There must be substance to the case and petitioners must be able to point out an administrative deficiency or other cause for raising the action. In practice, most people would probably need legal aid to do that and legal aid would not be granted to pursue an issue unless there was a probable or substantial cause.

Adam Ingram raised some points about amendment 261, which seeks to extend the tribunal's powers. I did not quite follow his argument that such a provision would weaken the tribunal's powers; indeed, it would not affect the tribunal's existing powers at all, unless ministers decided to exercise it. However, if experience showed that there was a need to fill gaps, the provision would allow ministers to extend the tribunal's powers without having to come back to Parliament with further legislation on the matter. In any case, that would be unlikely to happen. Unlike some arrangements for giving ministers additional powers, these powers would extend civil rights, which means that they contain less of an element that could be criticised.

As any proposal to extend the powers in question would have to be the subject of consultation with the committee under the usual subordinate legislation arrangements, there would be a debate about the matter. The closest parallel that I can think of is the provision in the Homelessness etc (Scotland) Bill, which I dealt with as a member of the Social Justice Committee in the previous parliamentary session, to give ministers the power to extend the categories of people who had priority. Although similar concerns were raised about that provision, the Social Justice Committee felt that it was the appropriate way of dealing with the matter. For all those reasons, I feel that the ministerial objections to my amendments are not well founded.

I want to raise a broader point about the substance of the bill. I am well aware that, as our consideration of the bill has continued, we have struggled to keep our focus on the people with the greatest needs. I do not think that my amendments go against that intention; they simply widen very slightly the categories of such people and try to address the fact that the co-ordination element of the bill, although central and important, is not the only way of defining the areas in which people might have major problems and might be in conflict with the system.

I have listened to other members' arguments on their amendments that seek to widen the tribunal's jurisdiction. However, I want to find the fulcrum

that ensures that committee members' views and the views that we have heard in evidence on both sides of the argument are taken into account. As a result, I am suggesting a modest extension of powers that will not overwhelm the system or add hugely to the numbers of people who go to the tribunal. Inserting such a provision into the bill would give some comfort to quite a number of people who would be affected not so much by the legislation itself but by the very difficult circumstances in which they find themselves. As a result, I intend to press amendment 269, to move the associated amendments and to move amendment 261, on the extension of the tribunal's powers.

The question is, that amendment 269 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Adam, Brian (Aberdeen North) (SNP)
Brown, Robert (Glasgow) (LD)
Byrne, Ms Rosemary (South of Scotland) (SSP)
Douglas-Hamilton, Lord James (Lothians) (Con)
Ingram, Mr Adam (South of Scotland) (SNP)

AGAINST

Alexander, Ms Wendy (Paisley North) (Lab)
Murray, Dr Elaine (Dumfries) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Macintosh, Mr Kenneth (Eastwood) (Lab)

The Convener: The result of the division is: For 5, Against 4, Abstentions 0.

Amendment 269 agreed to.

Amendment 34 not moved.

Amendments 87 and 88 moved—[Euan Robson]—and agreed to.

Amendment 228 moved—[Ms Rosemary Byrne].

The Convener: The question is, that amendment 228 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Adam, Brian (Aberdeen North) (SNP)
Byrne, Ms Rosemary (South of Scotland) (SSP)
Douglas-Hamilton, Lord James (Lothians) (Con)
Ingram, Mr Adam (South of Scotland) (SNP)

AGAINST

Alexander, Ms Wendy (Paisley North) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glasgow) (LD)
Macintosh, Mr Kenneth (Eastwood) (Lab)
Murray, Dr Elaine (Dumfries) (Lab)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 228 disagreed to.

Amendment 35 not moved.

Amendment 138 moved—[Ms Rosemary Byrne].

The Convener: The question is, that amendment 138 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Adam, Brian (Aberdeen North) (SNP)
Byrne, Ms Rosemary (South of Scotland) (SSP)
Douglas-Hamilton, Lord James (Lothians) (Con)
Ingram, Mr Adam (South of Scotland) (SNP)

AGAINST

Alexander, Ms Wendy (Paisley North) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glasgow) (LD)
Macintosh, Mr Kenneth (Eastwood) (Lab)
Murray, Dr Elaine (Dumfries) (Lab)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 138 disagreed to.

Amendment 89 moved—[Euan Robson]—and agreed to.

The Convener: Amendment 107, in the name of Fiona Hyslop, has already been debated with amendment 225. I should have said at the beginning of the meeting that we have received apologies from Fiona Hyslop and that we are pleased to welcome Brian Adam.

Amendment 107 moved—[Mr Adam Ingram].

The Convener: The question is, that amendment 107 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Adam, Brian (Aberdeen North) (SNP)
Byrne, Ms Rosemary (South of Scotland) (SSP)
Douglas-Hamilton, Lord James (Lothians) (Con)
Ingram, Mr Adam (South of Scotland) (SNP)

AGAINST

Alexander, Ms Wendy (Paisley North) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glasgow) (LD)
Macintosh, Mr Kenneth (Eastwood) (Lab)
Murray, Dr Elaine (Dumfries) (Lab)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 107 disagreed to.

10:00

The Convener: Donald Gorrie cannot be with us, but I think that he said that he would not press amendment 139.

Amendment 139 not moved.

Amendment 258 moved—[Robert Brown].

The Convener: The question is, that amendment 258 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Brown, Robert (Glasgow) (LD)
Byrne, Ms Rosemary (South of Scotland) (SSP)
Douglas-Hamilton, Lord James (Lothians) (Con)

AGAINST

Adam, Brian (Aberdeen North) (SNP)
Alexander, Ms Wendy (Paisley North) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Ingram, Mr Adam (South of Scotland) (SNP)
Macintosh, Mr Kenneth (Eastwood) (Lab)
Murray, Dr Elaine (Dumfries) (Lab)

The Convener: The result of the division is: For 3, Against 6, Abstentions 0.

Amendment 258 disagreed to.

Amendment 36 not moved.

Amendment 237 moved—[Euan Robson]—and agreed to.

The Convener: Amendment 259, which is in my name, is in a group on its own.

Amendment 259 is designed to deal with the awkward issue of the anomaly that we identified in respect of legal aid and placement requests. To put matters simply, with ordinary placement requests for children who are not involved with additional support needs or anything of that sort, legal aid is available to take the reference to the sheriff, who will eventually make the decision. In respect of people applying with an additional support needs issue, the bill provides for that issue to go to the tribunal, where, of course, there is no legal aid. I think that the committee supported there being no legal aid in that area, but the consequence is an anomaly, in that people with perhaps a simpler and more straightforward placement request would get legal aid whereas people in more complex situations would not. I think that the minister and the committee have recognised the difficulty.

The amendment is an attempt—and I put it no higher than that—to try to deal with the matter, put such cases back to the sheriff and therefore open up the provision of legal aid where a complex or substantial legal issue arises. To some extent, the amendment is a probing amendment. I would be interested in the views of the minister and committee members as to whether there is a way of resolving the paradox, whether we must live with it, whether the format is acceptable for dealing with matters or whether members can suggest other mechanisms to progress the issue. There is a difficulty and I do not think that any arrangement is entirely satisfactory.

I move amendment 259.

Mr Macintosh: I welcome the convener's comments and whole-heartedly endorse the intentions behind amendment 259. However, like him, I am not sure whether the amendment introduces further weaknesses or anomalies. We have repeatedly raised the issue in the committee and I hope that the Executive will find a way out of the problem for us.

We have the possibility of an uneven system in which families will have to balance the more sympathetic approach that a tribunal will offer with the harshness of the court system, under which they might be granted legal aid. I would be concerned if that choice encouraged parents to choose one route over the other—that would unnecessarily and unfairly increase expense and it might produce different results in different cases. I would welcome the minister's comments on whether the issue is resolvable and whether amendment 259 is the way to resolve it.

Lord James Douglas-Hamilton: There is a point of principle here. My understanding is that, under the present system, a considerable number of people can get legal aid if they apply to the sheriff in relation to placing requests. Under the provisions of the bill, if all such matters went to a tribunal, those people would not be able to get legal aid. Therefore, there is a problem with the bill's withdrawal of the right to legal aid. People who are entitled to legal aid should not be deprived of it. The matter should be addressed and I look forward to hearing what the minister has to say. Amendment 259 gives the tribunal the power to refer cases to the sheriff if the tribunal believes that to be the right course of action.

Euan Robson: I agree that this is a complicated area and, again, it is an area to which the Executive has given consideration. I am afraid that amendment is technically defective. I appreciate that it is a probing amendment and I am happy to continue to consider the perceived difficulty before stage 3—I make those two points before saying anything else.

During stage 1, Peter Peacock said that there is a perceived anomaly regarding the arrangements for appeals on refused placing requests, as a small number of them will be referred to the tribunal rather than to education authority appeal committees and then to the sheriff court. Consequently, for that small number, the possibility of legal aid for legal representation will not be available.

The Executive's view is that because the school that the pupil with the CSP will attend is so

intrinsically linked to the learning objectives and to the additional support provision required to achieve them, appeals on refused placing requests where there is a CSP—or a reference to the need for a CSP—are better dealt with by the tribunal. There is provision in section 14(5)(c) for a tribunal to refer such appeals to an education authority appeal committee in certain circumstances. That would be appropriate when there has been a dispute about whether a pupil requires a CSP and the tribunal finds that a CSP is not required. In other words, the placing request can be dealt with through the current appeal route for refused placing requests.

Amendment 259, however, would allow the tribunal to refer any such appeal on a refused placing request direct to the sheriff where the tribunal considers there to be a likelihood of substantial legal or other complex issues and where the assistance of a solicitor or advocate would be in the best interests of the child or young person. The intention appears to be for the tribunal to consider that as a preliminary matter, and to consider the best interests of the child or young person irrespective of where the appeal rights lie and without any apparent consideration of how that will link into eligibility for legal aid. Frankly, it is not clear on what basis the tribunal would consider that substantial legal or complex issues could not be dealt with adequately by the tribunal itself. It is important to consider that the chair of the tribunal will be legally qualified—that is made clear—and that the complexities may well relate to the CSP.

It appears that each proposed solution to rectify the perceived anomaly produces further anomalies, and Ken Macintosh has suggested that there may not be a way out of this particular situation. In amendment 259, the anomaly is that cases that are believed to raise complex matters requiring legal assistance will be referred to the sheriff court, yet the parties may not actually qualify for legal aid. They will be required to go directly to the sheriff court, missing the opportunity of going to the education authority appeal committee, which has the power to overturn the authority's decision and direct the child to be placed according to the request. The parties' right to have the matter decided by an expert tribunal will also be removed. So, in dealing with one anomaly, another appears to have been created.

As I say, a technical issue also arises with amendment 259. It refers to

"section 28F of the 1980 Act",

which, in fact, will be disapplied under this bill in regard to those with additional support needs. The correct reference would be to schedule 2 to this bill.

I appreciate both the intention behind amendment 259 and the convener's point that it is a probing amendment. However, the amendment is technically flawed and it does not, in the Executive's view, address the anomaly without creating a further anomaly. It is therefore not the appropriate solution.

With those comments, and with the undertaking that we will continue to look into this matter—because I appreciate, as Peter Peacock said during stage 1, that there is a perceived anomaly—I finish by saying that we will try to address the matter for stage 3. However, as Ken Macintosh says, it might be a conundrum with no answer.

The Convener: I am not sure that I accept that the reference in amendment 259 is technically wrong. The amendment intends that

"the reference shall proceed as if it were an appeal to the sheriff under section 28F of the 1980 Act".

That, of course, will continue to apply for non-additional support needs cases anyway.

Euan Robson: Well—

The Convener: However, I will not go into that particular technical issue.

I am aware of the complexities and I am not entirely satisfied that amendment 259 is the way forward. It may be that advocacy provision is the key that will, as far as possible, square the circle. I had thought that the amendment was quite an elegant solution but I accept that it does not do the trick, so I will not press it.

Amendment 259, by agreement, withdrawn.

Amendments 37 to 40 not moved.

Section 13, as amended, agreed to.

Section 14—Powers of Tribunal in relation to reference

Amendment 41 moved—[Lord James Douglas-Hamilton].

The Convener: The question is, that amendment 41 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Adam, Brian (Aberdeen North) (SNP)
Byrne, Ms Rosemary (South of Scotland) (SSP)
Douglas-Hamilton, Lord James (Lothians) (Con)
Ingram, Mr Adam (South of Scotland) (SNP)

AGAINST

Alexander, Ms Wendy (Paisley North) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glasgow) (LD)
Macintosh, Mr Kenneth (Eastwood) (Lab)
Murray, Dr Elaine (Dumfries) (Lab)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 41 disagreed to.

The Convener: Amendment 270, in my name, has already been debated with amendment 269. I think that amendment 270 is consequential.

Mr Macintosh: Is it consequential on amendment 269, amendment 258 or amendment 261?

The Convener: Let me get this right. It is consequential on amendment 269.

The question is, that amendment 270 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Adam, Brian (Aberdeen North) (SNP)
Brown, Robert (Glasgow) (LD)
Byrne, Ms Rosemary (South of Scotland) (SSP)
Douglas-Hamilton, Lord James (Lothians) (Con)
Ingram, Mr Adam (South of Scotland) (SNP)

AGAINST

Alexander, Ms Wendy (Paisley North) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Macintosh, Mr Kenneth (Eastwood) (Lab)
Murray, Dr Elaine (Dumfries) (Lab)

The Convener: The result of the division is: For 5, Against 4, Abstentions 0.

Amendment 270 agreed to.

Amendment 108 not moved.

Amendment 53 moved—[Mr Adam Ingram].

The Convener: The question is, that amendment 53 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Adam, Brian (Aberdeen North) (SNP)
Byrne, Ms Rosemary (South of Scotland) (SSP)
Douglas-Hamilton, Lord James (Lothians) (Con)
Ingram, Mr Adam (South of Scotland) (SNP)

AGAINST

Alexander, Ms Wendy (Paisley North) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glasgow) (LD)
Macintosh, Mr Kenneth (Eastwood) (Lab)
Murray, Dr Elaine (Dumfries) (Lab)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 53 disagreed to.

Amendments 42 and 43 not moved.

Amendment 140 moved—[Ms Rosemary Byrne].

The Convener: The question is, that amendment 140 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Adam, Brian (Aberdeen North) (SNP)
Byrne, Ms Rosemary (South of Scotland) (SSP)
Douglas-Hamilton, Lord James (Lothians) (Con)
Ingram, Mr Adam (South of Scotland) (SNP)

AGAINST

Alexander, Ms Wendy (Paisley North) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glasgow) (LD)
Macintosh, Mr Kenneth (Eastwood) (Lab)
Murray, Dr Elaine (Dumfries) (Lab)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 140 disagreed to.

10:15

The Convener: Amendment 260, in my name, is in a group on its own.

The amendment is a probing amendment and suggests that a tribunal might have wider powers to order an education authority to arrange for an assessment or examination to be carried out, if appropriate, on such terms as the tribunal considered appropriate. The amendment is intended to deal with what I thought was a lacuna in the bill, but I would be interested to hear the minister's views on it. Clearly, tribunals will have to have powers—whether widened or not—to establish the basis on which they form their view. The issue is straightforward.

I move amendment 260.

Lord James Douglas-Hamilton: I support the amendment. I believe strongly that tribunals should have teeth. The amendment would give tribunals the option of ordering an education authority to arrange assessment or examinations, which in practice would give more rights to parents.

Mr Macintosh: I sympathise with the intention behind the amendment, but I am not entirely sure whether it is necessary and whether such a specific provision needs to be made in the bill, rather than in a code of practice or regulations. I would welcome comments from the minister. I assume that tribunals have the powers to which the amendment refers and that those do not need to be stated here.

Dr Murray: I want to make a similar point. The amendment is not necessary, because parents and professionals already have the right to request an assessment. I see the purpose of the amendment, but I doubt that it is necessary.

Ms Byrne: The amendment would tighten up an area about which there is much concern. The appearance at a tribunal of a child or young person may be due to the fact that what the local authority has put in place is not appropriate. Identification of the needs of the child through assessment may be necessary. The amendment is sensible and I support it.

Euan Robson: I appreciate that amendment 260 is a probing amendment. I do not know the technical term for the absence of a lacuna, but we think that the amendment is unnecessary. We have already agreed to amendment 63, which makes it absolutely clear that an education authority has a duty to provide support and to meet the needs of each and every child and young person who has additional support needs. Education authorities will be required to have effective assessment and monitoring arrangements in place.

In some referrals, tribunals may consider the evidence that was acquired through the assessment process by which education authorities reached their conclusions to be insufficient or flawed—for example, if a decision that a CSP is not required is not supported by the available evidence. In such circumstances, tribunals could overturn decisions and direct education authorities to carry out further assessments.

I refer members to paragraph 11(2)(p) of schedule 1, on the rules of procedure, which will allow tribunals to commission medical and other reports in specified circumstances. We will set out those circumstances in the rules on procedure for tribunals. Amendment 260 is thus unnecessary, as the powers that it seeks are already provided for in schedule 1.

The Convener: I accept what the minister has said. One should perhaps read the schedules with a fine-toothed comb, but I did not manage to do that. I will not press amendment 260.

Amendment 260, by agreement, withdrawn.

The Convener: Amendment 238, in the name of the minister, is grouped with amendments 240, 241, 245, 246 and 247.

Euan Robson: We lodged the amendments in this group to meet the Subordinate Legislation Committee's concerns that the code would be partly legislative in character rather than concerned with matters that are of a purely administrative or explanatory nature. The Subordinate Legislation Committee wanted the Executive to publish the code in such a way as to allow for parliamentary scrutiny, rather than merely issuing it to education authorities. Amendment 238 and the Executive amendments to section 23 will address that concern. I hope that the Education Committee will accept that we have tried to meet the Subordinate Legislation Committee's request.

I move amendment 238.

Lord James Douglas-Hamilton: I welcome the amendments, as they will help to clarify the duties of local authorities.

Amendment 238 agreed to.

Section 14, as amended, agreed to.

After section 14

Amendment 261 moved—[Robert Brown].

The Convener: The question is, that amendment 261 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Adam, Brian (Aberdeen North) (SNP)
Brown, Robert (Glasgow) (LD)
Byrne, Ms Rosemary (South of Scotland) (SSP)
Douglas-Hamilton, Lord James (Lothians) (Con)
Ingram, Mr Adam (South of Scotland) (SNP)
Macintosh, Mr Kenneth (Eastwood) (Lab)

AGAINST

Alexander, Ms Wendy (Paisley North) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Murray, Dr Elaine (Dumfries) (Lab)

The Convener: The result of the division is: For 6, Against 3, Abstentions 0.

Amendment 261 agreed to.

Amendment 262 not moved.

Section 15—Appeal to Court of Session against Tribunal decision

The Convener: Amendment 229, in the name of Lord James Douglas-Hamilton, is in a group on its own.

Lord James Douglas-Hamilton: I should perhaps mention that I am a non-practising Queen's counsel.

I lodged amendment 229 on behalf of a parent, but it deals with a matter of common sense. If the Court of Session is minded to allow an appeal, it should have the right to make interim provisions having regard to the best interests of the child. Such appeals should be dealt with speedily, but amendment 229 would clarify the position and put it beyond doubt.

I move amendment 229.

Euan Robson: We will resist amendment 229. If my understanding of what it seeks to achieve is correct, the amendment is unnecessary because the bill already makes provision for ancillary orders.

As Lord James Douglas-Hamilton has explained, amendment 229 proposes to give the Court of Session the power to make such interim orders as it considers appropriate in cases in which it has decided the appeal in favour of the appellant. The amendment proposes that the criterion to be applied in exercising that power is what is in the best interests of the child or young person.

However, an interim order is an order that the court makes pending the rights of parties being determined by the court, whereas amendment 229 wants that power to be available after the court has made its decision on the appeal. Frankly, that does not appear to be appropriate. The intention of the amendment may be to allow the court to make orders connected with its decision, but the bill already provides for the court to make ancillary orders.

A further difficulty with the amendment is that it would give the Court of Session the power to make an interim order based on the interests of the child. However, how can the court know the best interests of the child when it is considering a legal argument on the question of law that is at issue?

I hope that Lord James Douglas-Hamilton will withdraw his amendment on the basis that his concerns about ancillary orders are covered in the bill.

The Convener: Does "ancillary" include "interim"? I inquire on behalf of the members of the committee.

Euan Robson: I will need to take advice on the matter. With the indulgence of the convener, perhaps I can arrange for a civil servant to answer that technical question. It would be better for it to be answered at first hand.

The Convener: I understand that the official is not allowed to speak. I am sorry.

Euan Robson: Interim orders can be sought by the parties at the start of the appeal process.

Ms Wendy Alexander (Paisley North) (Lab): Can I clarify a procedural point? I have never before encountered a case of a civil servant not being allowed to speak in committee.

The Convener: I have to say that it seems very sensible that officials should be allowed to speak, but I have been advised otherwise.

Euan Robson: I would like my civil servant to speak purely on the technical aspects of the matter, in case I get the legal position incorrect. I do not want to mislead the committee.

Martin Verity (Clerk): Only members can take part in a debate. The officials accompanying the minister are not present as witnesses as they would be if this were an inquiry or a stage 1 consideration. That does not prevent officials from giving advice to the minister.

Ms Alexander: I accept that the practice is not considered normal, but I suggest that we send a brief note to the Procedures Committee suggesting that it should examine the possibility of facilitating members' requests for clarification from an official at stage 2.

The Convener: I agree. It seems nonsensical that we cannot receive guidance on technical issues at stage 2.

Rhona Brankin: It may be appropriate to take a short break in proceedings at this point.

Euan Robson: My officials have given me advice and I will try to explain it accurately, bearing in mind the procedural position. I understand that the parties can seek an interim order at the start of proceedings to maintain the status quo, in effect. Nothing in the bill suggests that that could not be the case. Would it be helpful for us to write to the committee on that point so that accurate advice can be put down in black and white? I am not familiar with the interim order procedure.

Lord James Douglas-Hamilton: I do not want to press the minister unduly, as it is obvious that the matter is technical. Amendment 229 has been proposed because appeals may take some time to determine. There may be an urgent need in a particular case to get a preliminary decision to put in place interim measures to deal with a situation as it stands at that moment, before the case is determined. Complicated cases can sometimes take a long time. I want reassurance that the court can pass interim orders to ensure that the situation can be properly covered before the case is fully determined. The cases may be determined quickly, but I think that they are likely to take some time, as some of them will be complicated. I ask for a similar amendment to be lodged at stage 3.

The Convener: I think that we have an undertaking from the minister to write to the committee about the issue. If I understand the matter correctly, we have considered the points that were raised. I am sorry to have caused devastation by asking the question.

Lord James Douglas-Hamilton: The minister should issue his response before members have concluded their preparations for stage 3. The issue needs to be dealt with.

Euan Robson: Forgive me. The situation is straightforward—I am not expert in that area of the law, so I would not want to say on the record anything that misled the committee or was inaccurate.

The Convener: I am grateful. On that basis, Lord James, would you be prepared to withdraw amendment 229?

Lord James Douglas-Hamilton: I think that it would be unworthy of me to press the amendment when the minister was in a state of possible confusion.

The Convener: That slightly overstates the point, but thank you.

Amendment 229, by agreement, withdrawn.

The Convener: Before we move on, I will take up Wendy Alexander's point. If the committee is so minded, I shall write to the Procedures Committee along the lines that she suggested. Is that agreed?

Members *indicated agreement*.

Section 15 agreed to.

After section 15

Amendment 255 moved—[Ms Rosemary Byrne].

The Convener: The question is, that amendment 255 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Byrne, Ms Rosemary (South of Scotland) (SSP)

AGAINST

Adam, Brian (Aberdeen North) (SNP)
Alexander, Ms Wendy (Paisley North) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glasgow) (LD)
Douglas-Hamilton, Lord James (Lothians) (Con)
Ingram, Mr Adam (South of Scotland) (SNP)
Macintosh, Mr Kenneth (Eastwood) (Lab)
Murray, Dr Elaine (Dumfries) (Lab)

The Convener: The result of the division is: For 1, Against 8, Abstentions 0.

Amendment 255 disagreed to.

Before section 16

10:30

The Convener: Amendment 90, in the name of Lord James Douglas-Hamilton, is in a group on its own.

Lord James Douglas-Hamilton: Amendment 90 was lodged on behalf of the Scottish Human Services Trust and is supported by Children in Scotland, Barnardo's and Capability Scotland.

There are four subsections to the section that amendment 90 proposes to introduce. The new section would give every child with additional support needs for whom school education is provided by the education authority the right of access to independent advocacy services. The amendment makes it clear that the service is independent from the involvement of the authority in question. Independent advocacy is important, as a Dutch uncle is needed to help to guide parents through the process of identifying whether their child requires additional support. The new section would help parents in an ever-increasing and daunting legalistic and burdensome process.

Amendment 90 is a parent-friendly means of getting a balanced and happy agreement between parents and the local authority. It has widespread support—when lodging the amendment, I received words of encouragement from parents and from groups such as Barnardo's and Capability Scotland. In cost terms, it could save money, as it may resolve issues before they escalate to tribunals or mediation. I hope that the Executive will have the good will to accept this worthwhile amendment, which has widespread support and is based on nothing more than common sense and a desire for fair play.

I move amendment 90.

Mr Macintosh: I never thought of Lord James Douglas-Hamilton as somebody who went Dutch, but I am impressed by his reference.

I have spoken several times about the need for independent advocacy and for general support services, at tribunals and throughout the system, to help parents and families in what has in the past been a confrontational system in which they have often been outnumbered and in need of such advice and support. I am not sure, but I believe that amendment 90 may be modelled on the section that was included in the Mental Health (Care and Treatment) (Scotland) Act 2003, and I certainly have some sympathy with its intention.

However, as I said at a previous meeting, I am slightly concerned that resources might be diverted into advocacy and away from front-line and direct services for children with additional support needs. That would make advocacy services extremely well funded, perhaps to the detriment of the support services. The minister offered us extensive reassurances, either last week or the week before, and undertook to consider various sections of the bill that could be amended at stage 3. I am certainly looking to the minister or to other members to lodge amendments to secure those rights without having to put in place the structure that Lord James Douglas-Hamilton is suggesting, despite my sympathy for his intentions.

Dr Murray: I, too, have sympathy with the intentions of amendment 90, but I also have some concerns. The amendment seems almost as if it would regulate the independent advocacy services. Children with a spectrum of different

needs could desire advocacy from a wide range of different providers, including people who specialise in certain support needs. The duties that the amendment would place on the providers of services could frighten people off or prevent the provision of other advocacy support, because it might be felt that providers would fall foul of the provisions in the new section. Although I have sympathy with the intention behind the amendment, I believe that, because of the way in which the new section is written, it could work to the detriment of the provision of advocacy.

Mr Ingram: The amendment is important for reassuring parents in particular about the bill. I cannot see how resources will be sucked away as Ken Macintosh suggests, but perhaps we can include some form of words to ensure that that does not happen. In restoring a balance between education authorities and parents, the introduction of independent advocacy, along the lines that the amendment proposes, is very much to be welcomed.

Ms Byrne: I agree. The amendment would in many ways minimise the adversarial approach that I was talking about earlier. If we are giving parents the right to ask for assessment, it makes a great deal of sense to enable them to access advocacy to help them to understand the process and what type of assessments they should seek. That could also prevent people from having to go to a tribunal. The amendment is very sensible and I hope that we can support it.

The Convener: I do not support the amendment, although I understand where it is coming from. We have had quite a lot of reassurance from the minister on this tricky issue, which we will continue to discuss at stage 3.

Subsection (4) of the proposed new section attempts to define what "independent" means. I am not sure that that is an entirely satisfactory definition or way forward. There is a view that advocacy services should be provided only outwith the local authority, but the amendment tries, not entirely successfully, to provide a more complex definition, which recognises that some advocacy services will be provided by the local authority. The matter should probably be dealt with in the code or in subordinate legislation, where we want a nod in favour of independence or Chinese walls. However, I do not think that the amendment is the solution and, for that technical reason, if nothing else, the amendment should not be supported.

Euan Robson: I agree with the convener on the technical point that he has just made and I accept Ken Macintosh's important point about the desirability of putting resources into front-line services rather than into advocacy. I also agree with what Elaine Murray said. The Executive has said that it will lodge amendments at stage 3 for the purposes that I think I described at the previous meeting of the committee. Those amendments will make the position clearer.

The amendment raises serious resource issues. There is nothing in the bill to prevent parents from contacting and seeking advice and assistance from a voluntary organisation that provides advocacy services. As members know, the Executive has indicated that it will put more money into supporting such organisations. With regard to the tribunal, it has always been the policy intent for parents to be able to have a supporter of their choice with them—that may indeed be somebody from an advocacy organisation, who may act as their representative.

The committee ought to be very clear about the costing of the amendment. The right to advocacy that the amendment seeks to introduce is not targeted, so there is no limitation on its use. We must be realistic about the money involved. An unqualified right to advocacy effectively establishes a demand-led service rather than one driven by need. When the bill is amended at stage 3, it will be made perfectly clear that there is an adequate balance.

Lord James Douglas-Hamilton: Is the minister saying that he will introduce an amendment at stage 3 in this regard?

The Convener: To some extent, we have had this debate. I think that assurances—

Euan Robson: Assurances were given in the context of the debate that we had earlier, although not in relation to this amendment.

Lord James Douglas-Hamilton: In that case, I would like to go a little further, as it is necessary or highly desirable to have a provision in the bill that will reassure parents. I do not altogether accept the line of argument about costs, because I believe that resolving issues before they escalate to mediation and tribunals would save funds. I think that tribunals should be avoided wherever possible.

The Convener: The question is, that amendment 90 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Adam, Brian (Aberdeen North) (SNP)
Byrne, Ms Rosemary (South of Scotland) (SSP)
Douglas-Hamilton, Lord James (Lothians) (Con)
Ingram, Mr Adam (South of Scotland) (SNP)

AGAINST

Alexander, Ms Wendy (Paisley North) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glasgow) (LD)
Macintosh, Mr Kenneth (Eastwood) (Lab)
Murray, Dr Elaine (Dumfries) (Lab)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 90 disagreed to.

Section 16—Mediation services

The Convener: Amendment 141, in the name of Donald Gorrie, is grouped with amendments 143, 146 and 148. I believe that amendment 141 relates to the issue of the interrelation between the education authority and the other agencies.

As Donald Gorrie is not here today, I move amendment 141 on his behalf.

Mr Macintosh: I am slightly unclear about this group of amendments. I believe that they are related to the next group of amendments, which is led by amendment 144, and that their aim is to prevent local authorities from being bodies that can provide mediation services, but I am not entirely sure that that is the case. We discussed the matter in committee and concluded that, although independence is an important concept and it is important that we maintain independence, local authorities should be able to provide independent services. I am not sure whether I am reading the amendments correctly, however.

The Convener: I think that what you are saying applies to amendment 144, but I am not entirely sure how the other amendments fit in.

Mr Macintosh: I believe that amendments 141, 143, 146 and 148 are, in effect, consequent on amendment 144, but I could be misreading them.

The Convener: That was not how I read them. I thought that they were to do with widening powers in a slightly different way; however, you might be right. I do not support Donald Gorrie's amendment; I moved it purely for the purposes of debate.

Euan Robson: I agree that there is confusion about the amendments, but I appreciate the intention behind them, which is to avoid or to resolve disagreements between parents and young people and agencies such as health boards. My difficulty with the amendments is that education authorities are responsible for establishing which young people have additional support needs and for making the necessary provision to meet those needs, either directly or with help from others and that, therefore, parents and young people will be concerned with education authorities' compliance with their obligations under the bill.

It would be inappropriate for mediation arrangements that were made by an education authority to allow for resolution of disputes between parents and young persons and other agencies. Any agreement that was reached through mediation might conflict with, or be irrelevant to, the arrangements that education authorities make for complying with their statutory obligations. It will be for authorities to determine what arrangements for mediation they put in place. Where a disagreement with an education authority involves another agency, it will be in the authority's best interests to have a relevant officer or professional from that agency take part in the mediation discussions. Indeed, section 19 of the bill will allow the authority to request the help of other agencies in exercising any of its functions under the bill, and section 22 will place on education authorities a requirement to publish information about their mediation services, which will allow them the opportunity to set out how they would involve other agencies in situations in which their input was required.

The amendments would introduce an element of confusion. It is not helpful or appropriate to be prescriptive in this regard and the bill has—in sections 19 and 22—the means by which to involve other agencies. For those reasons, the amendments are unnecessary, and I hope that they will not be pressed.

10:45

The Convener: I am reassured by what the minister has said—provisions are in place to deal with the issue adequately. I am grateful to Donald Gorrie for raising the issue but, on his behalf, I seek to withdraw amendment 141.

Amendment 141, by agreement, withdrawn.

Amendments 142 and 143 not moved.

The Convener: Amendment 144, in the name of Donald Gorrie, is grouped with amendment 57. Agreement to amendment 144 will pre-empt amendment 57.

Ken Macintosh was right to say that amendment 144 seeks to avoid a local authority's being involved in providing mediation services. However, the committee and I took the view that that would be going too far, although we sympathised with the direction of the amendment. Therefore, although I will move amendment 144 for the purpose of debate, I do not altogether agree with its intention.

I move amendment 144.

Lord James Douglas-Hamilton: Amendment 57 seeks to strengthen the duty on local authorities by stating that they must carry out "any of their functions", and not just

"their functions under this Act".

Additional support needs will come under not just the bill, but under acts such as the Standards in Scotland's Schools etc Act 2000, therefore amendment 57 is appropriate.

Amendment 144 returns to the familiar theme of placing duties on other agencies.

Mr Macintosh: I have already argued against the measures in the wrong discussion.

Euan Robson: On amendment 144, the bill is clear that if mediators are employed by an education authority, they must not be involved in identifying provision for children and young persons who have additional support needs. That requirement will provide the necessary safeguard for users while offering flexibility to authorities to purchase services from existing organisations, including those in the voluntary sector, or to provide the service directly.

The requirement will also offer the opportunity for the service to fit in with existing services, and possibly to develop the service beyond the terms of the bill, for example to include children's services within the authority area. An authority will also be required to publish details of its arrangements; the code of practice will set out good practice in that area. For those general reasons, amendment 144 is not necessary.

Lord James's amendment 57 seeks to ensure the independence of an education authority's mediation service. It is similar to amendment 144 and I resist it on the same basis. Its provisions would be unduly restrictive. It seeks to exclude from involvement in mediation services any staff who are employed by an authority, not just those who are involved in education. For example, a chief trading-standards officer or a surveyor who had nothing to do with the process would be excluded as a result of amendment 57, when they might be perfectly capable of providing mediation. In small authorities, where employment by the local authority accounts for a large proportion of employment in the area, it would be unnecessarily restrictive to exclude people who work in the local authority but have absolutely nothing to do with the education department. The code of practice will set out guidance in that area. I ask Lord James not to move amendment 57.

The Convener: On Donald Gorrie's behalf, I will seek to withdraw amendment 144. However, it is important that there be adequate provision in the non-council or voluntary sector for the provision of assistance. There is an issue about the confidence of parents. Behind amendment 144 is a substantial issue, but the amendment would be the wrong way to deal with that issue because it is too prescriptive. On that basis, I will with the committee's agreement withdraw amendment 144.

Amendment 144, by agreement, withdrawn.

Lord James Douglas-Hamilton: I do not wish to move amendment 57 at this stage, but we may need to return to the issue of firewalls at stage 3.

Amendment 57 not moved.

Amendments 145 to 147 not moved.

Amendment 239 moved—[Euan Robson]—and agreed to.

The Convener: I was going to have a short break at this point, but as the coffee will arrive soon, I will delay the break for a while.

Amendment 221, in the name of Lord James Douglas-Hamilton, is in a group on its own.

Lord James Douglas-Hamilton: Amendment 221, which I lodged on behalf of Independent Special Education Advice, would introduce new subsections in section 16. If mediation is to be successful, we must have a binding agreement with a built-in termination clause that either party can access by giving sound reasons. If not, the system could easily be meaningless to many parents.

Under amendment 221, if an agreement has been reached on conclusion of mediation, the agreement would be in writing—signed by both parties—and would be upheld by both parties until a written statement of discontinuation of the agreement and the reasons for that decision by either party had been sent to the other party.

I move amendment 221.

Mr Macintosh: I agree that, in most processes, agreements should be written down for the benefit of all to avoid misunderstanding, but I am not sure whether that is necessary in this case or whether it is normal procedure. I am not sure whether we should put such specific measures in legislation, as opposed to in the code of practice or in good-practice regulations.

The Convener: I agree—the point is not unimportant, but it could be dealt with in the code of practice or regulations.

Dr Murray: I am a little concerned about the idea that the agreement would be legally binding on the parents of the child in question.

Euan Robson: To make the outcome of mediation legally binding is to turn mediation into arbitration, which is different. If the idea is to draw a conclusion to something, amendment 221 defeats its own purpose because it says:

"but any party may revoke the agreement by notice in writing".

In any event, we resist amendment 221 because we do not think that the concept of making the outcome of mediation legally binding is correct as it would alter the spirit of mediation per se.

Lord James Douglas-Hamilton: I will not press amendment 221 at this stage. I will study what the minister has said with a view to deciding whether an amendment would be appropriate at stage 3.

Amendment 221, by agreement, withdrawn.

Amendment 148 not moved.

Section 16, as amended, agreed to.

The Convener: I suspend the meeting for a 10-minute break.

10:55

Meeting suspended.

11:09

On resuming—

The Convener: I call members to order. We are about to debate a new group of amendments. I call—better late than never—amendment 185, in the name of Rhona Brankin, which is grouped with amendment 186.

Rhona Brankin: This is a straightforward amendment that relates to an issue that the committee picked up at an earlier stage. Amendment 185 would move section 16 to after section 11. It makes more sense for the section on mediation to precede section 12, which concerns appeals to a tribunal.

I move amendment 185.

Lord James Douglas-Hamilton: I hope that the amendment will be agreed to unanimously. It makes for much better sequencing in the bill, which will be more readily understandable by parents.

The Convener: That is right. The amendment is also useful as regards the public relations aspect of the bill. It addresses an argument that was made frequently in committee about the order in which things will happen. Changing the order of the provisions in the bill should resolve that misunderstanding.

Euan Robson: We are happy to accept the amendments in the group if the committee is minded to support them.

Amendment 185 agreed to.

Section 17—Dispute resolution

Amendment 149 not moved.

The Convener: Amendment 230, in the name of Lord James Douglas-Hamilton, is in a group on its own.

Lord James Douglas-Hamilton: If matters can be sorted out before the dispute resolution stage, that will save a great deal of funding—for parents and local authorities—because cases will not have to be referred to tribunal. Under the amendment, parents would not be required to undertake dispute resolution if they did not wish to do so. Matters could be settled readily by amicable agreement.

I move amendment 230.

Euan Robson: Dispute resolution will not be compulsory. It will be free of charge and cannot prejudice any other rights of appeal. The service will be available only for matters that cannot be referred to other appeal routes.

Amendment 230 mirrors the provision in the bill that relate to mediation—I have no problem with that. However, I ask the committee to resist the amendment today, on the basis that I would like to consider what wording is appropriate and its implications. I will address the matter further at stage 3. With those assurances, I hope that Lord James Douglas-Hamilton will be minded to seek the committee's agreement to withdraw the amendment.

Lord James Douglas-Hamilton: I thank the minister very much. I omitted to say that if the minister is in favour of the mediation approach—from the terms of the bill, it appears that he is—why does he not support dispute resolution before mediation is needed? I would be grateful if he would reconsider the issue before stage 3 and address it at that stage, as appropriate.

Euan Robson: I am happy to confirm that we will address the matter at stage 3.

The Convener: I understand that Lord James Douglas-Hamilton will not press the amendment.

Lord James Douglas-Hamilton: That is correct, but I hope that there will be consistency in the bill after stage 3.

Amendment 230, by agreement, withdrawn.

Section 17 agreed to.

Amendment 186 moved—[Rhona Brankin]—and agreed to.

Section 18 agreed to.

Schedule 2

CHILDREN AND YOUNG PERSONS WITH ADDITIONAL SUPPORT NEEDS: PLACING REQUESTS

Amendments 91 and 92 moved—[Euan Robson]—and agreed to.

The Convener: Amendment 58, in the name of Lord James Douglas-Hamilton, is grouped with amendments 59 to 61. Agreement to amendment 93, in the name of the minister, which has already been debated with amendment 68, would pre-empt amendment 60.

Lord James Douglas-Hamilton: I understand that, at present, if a health board believes that a child needs medical help from an institution abroad, public funds can be used for the purpose.

For example, I believe that support has been given for children to go to the famous Peto institute in Hungary. Amendment 58 was lodged because exceptional circumstances could arise whereby parents and a school might find that the best provision for a child with additional support needs is in an independent school because its circumstances exactly suit the child's requirements. For example, I know that, through parental request, a child is at a school in Edinburgh that is run by the Merchant Company. The parents' view was that that placement was best suited to the additional support needs of their child. I expect that there would be only a few such cases. However, a local authority should have the power to decide whether to pay a large or small contribution, or none at all, to support a child with additional support needs in going to an independent school. Amendment 58 proposes an empowering measure that would certainly not be mandatory. It would simply give local authorities an extra power in exceptional circumstances. Amendments 59 and 61 are consequential on amendment 58.

In the previous session of Parliament, the presumption of mainstreaming was included in education legislation. I assume that there will be mainstreaming provision in local authority schools for children with additional support needs and that the kind of case with which amendment 58 seeks to deal would be exceptional. However, the areas of additional support needs, special education and learning difficulties are so complex that I cannot rule out the possibility that there will occasionally be circumstances in which parents might find that their child is best suited to provision in an independent school. In the case of the child who is a pupil in an Edinburgh Merchant Company school, the relevant local authority is not giving support. However, I believe that there should be an empowering provision in case a local authority were minded to give support to, for example, a poor parent from a deprived area who wanted to send their child to a suitable independent school. Such provision should not be ruled out in all circumstances. That is all I have to say, except that I assume that local authorities would be able to deliver the necessary provision in the overwhelming majority of cases.

I move amendment 58.

11:15

Dr Murray: I may be wrong, but I had thought that local authorities could already finance a child to go to an independent special school. I do not know whether that provision extends to other independent schools. However, I cannot envisage circumstances in which a local authority would want to send a child with additional support needs to a school in the private sector that is not a special school. I am not sure how such a circumstance would arise.

Mr Macintosh: Schedule 2 sets out in detail the policy context in which decisions should be made. However, I believe that a local authority has discretionary power to support a child to attend any kind of school. I would welcome any clarification on that. If it is the case, it would make amendment 58 unnecessary.

The Convener: I believe that local authorities have a power of general competence which, even without specific provision, would cover what amendment 58 proposes. However, I may be wrong.

Euan Robson: Amendment 58 is unnecessary. As we have said all along, the bill is about ensuring that those who have additional support needs receive the help that they need to benefit from school education. Placing requests have been opened up to allow children and young people with additional support needs to go to independent special schools. Unlike the current system, in which only those who have a record of needs have such a right, that right will not in the new system be restricted to those with a CSP.

As members will know, education authorities have a duty to comply with placing requests and to meet all the fees and costs of placement when no specific circumstances exist to disapply the duty. Amendments 58, 59 and 61 would muddy the waters to an extent: they would give education authorities the power to comply with requests for placements to independent or grant-aided schools, whether they target additional support needs or not. Furthermore, in complying, education authorities would not have to meet all the fees.

Such a power is unnecessary in the context of the bill. Under the new section that the committee inserted in the bill on the first day of stage 2, education authorities will have a duty to make adequate and efficient provision for each child's and young person's ASNs. Sufficient safeguards exist in the bill without amendment 58. In the context of the bill, local authorities have the powers to do what, in general terms, is being sought, so the amendments in the group are not necessary and would complicate the position.

Lord James Douglas-Hamilton: If I may say so, the minister has missed the main point. At present, local authorities can arrange for children who need the type of educational provision in question to go to special schools. I am suggesting that, in exceptional circumstances, there may be a place in an independent school—not necessarily a special school—to which the parents strongly support their child's going. The local authority might wish to support the child's going to such a

school, but I am not at all certain that local authorities believe that they are empowered to do that. All I ask is that the minister be prepared to consider the matter between now and stage 3.

Euan Robson: I will read the member's comments and examine the issue before stage 3, but I do not guarantee that I will come back with an amendment. I will intimate to the member whether we are content with the existing provision in advance of stage 3.

Lord James Douglas-Hamilton: It would be most helpful if the minister could send a letter to me on that point.

Euan Robson: I will do that.

Lord James Douglas-Hamilton: In those circumstances, I will not press amendment 58, which raises an issue of principle.

Amendment 58, by agreement, withdrawn.

Amendment 59 not moved.

The Convener: Amendment 263, in my name, is grouped with amendments 264 and 265.

Amendment 263 relates to schedule 2, on placement requests, which I suppose is a relatively small part of the bill. My proposition is that, as things stand, paragraph 3(1)(d) of schedule 2 means that the duty in relation to placement requests does not apply in the rather tight set of circumstances in which

"the child does not have additional support needs requiring the education or special facilities normally provided at that school".

I am trying slightly to slacken up the provision so that it would read

"additional support needs of a type or severity requiring the education or level of special facilities normally provided at that school".

I thought that amendments 263 and 264 would add some clarity to the position in that regard.

Amendment 265 would amend paragraph 3(1)(f)(ii) of schedule 2 to state that the authority should make "adequate provision". As it stands, the condition is too black and white: if the authority is able to make any provision—whether adequate or not—for the child's additional support needs, it will be able to get out of the duty. That is not really the sub-subparagraph's intention.

I would appreciate the minister's comments on those matters. It seems to me that the existing provision offers too much of an opt-out.

I move amendment 263.

Euan Robson: I understand the reasoning behind amendments 263 and 264 and am aware that the Convention of Scottish Local Authorities—I think—requested them. However, the Executive does not consider that schedule 2 needs to be amended in the way that is proposed, because we believe that the existing provisions will address COSLA's concerns on the points in question.

If we have understood the amendments correctly, they are intended to allow education authorities not to meet a placing request in cases in which the child's additional support needs are not of a severity or type to match those needs for which the specified school normally provides. However, when a local authority considers a placing request, it can also consider whether any of the circumstances specified in paragraph 3 of schedule 2 are applicable. If any are, the requirement to place a request need not be complied with.

As paragraph 3(1)(b) makes clear, one of those circumstances is

"if the education normally provided at the specified school is not suited to the age, ability or aptitude of the child".

Moreover, sub-subparagraph (f) allows a local authority not to comply if it can make provision elsewhere and if, among other things, "the specified school" is not suitable. I hope that those comments meet COSLA's concerns about this matter; however, convener, I am interested to hear whether you feel that they are not clear enough.

Although I understand why amendment 265 has been lodged, I do not think that it is needed. In allowing education authorities not to comply with a placing request, it is perfectly reasonable to require that any provision that is proposed by an authority as an alternative to that in a specified school should be adequate. However, the new section inserted before section 3 already contains a duty that requires an education authority to ensure that provision for each child is adequate and efficient. As a result, I do not think that there is a need to repeat that obligation in this context.

I hope that, for those reasons, you will consider withdrawing amendment 263. However, I will be interested to hear any further comments that you might have, particularly about that amendment and amendment 264.

The Convener: I think that you have got things the wrong way round. I was not concerned about COSLA's interests when I lodged these amendments; given its local authority interests, COSLA already has a whole series of reasons for not complying with the duty. Instead, I was seeking to narrow down one of the reasons for not complying in order to give it some substance and meaning.

I am not proposing to press amendment 263 today, but perhaps I can explore the issue further with you before stage 3. After all, it raises a point that we have already touched on in other contexts.

Indeed, it is similar to the issue of definition that was raised with regard to section 1, in which I felt that the matter was stated too baldly and did not quite mean what it was intended to mean. Perhaps I can find out whether I can reach an accommodation with you on the matter.

Euan Robson: I am happy to agree to that. I also apologise for getting the wrong end of the stick about COSLA.

Amendment 263, by agreement, withdrawn.

Amendments 264 and 265 not moved.

The Convener: Amendment 93 has already been debated with amendment 68. If amendment 93 is agreed to, it pre-empts amendment 60, which has already been debated with amendment 58.

Amendment 93 moved—[Euan Robson].

The Convener: The question is, that amendment 93 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Alexander, Ms Wendy (Paisley North) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glasgow) (LD)
Douglas-Hamilton, Lord James (Lothians) (Con)
Macintosh, Mr Kenneth (Eastwood) (Lab)
Murray, Dr Elaine (Dumfries) (Lab)

AGAINST

Adam, Brian (Aberdeen North) (SNP)
Byrne, Ms Rosemary (South of Scotland) (SSP)
Ingram, Mr Adam (South of Scotland) (SNP)

The Convener: The result of the division is: For 6, Against 3, Abstentions 0.

Amendment 93 agreed to.

The Convener: Amendment 61 has already been debated with amendment 58.

Lord James Douglas-Hamilton: As the minister has agreed to examine the issue raised in amendment 61, I will not move it.

Amendment 61 not moved.

Schedule 2, as amended, agreed to.

Section 19—Other agencies etc to help in exercise of functions under this Act

The Convener: Amendment 222, in the name of Elaine Murray, is grouped with amendments 94, 150, 44, 266, 45, 95 and 151. Amendments 94 and 150 are direct alternatives and do not pre-empt each other, so if amendment 94 is agreed to and then amendment 150 is agreed to, amendment 150 will replace amendment 94. I am sure that members follow that. If amendment 94 or 150 is agreed to, amendments 44 and 266 will be pre-empted.

11:30

Dr Murray: I lodged amendment 222 to gain clarity about section 19's meaning. Many of the other amendments to section 19 are also a bit semantic and might have been lodged to tease out the precise meaning of the bill and to give some comfort to people who need to interpret their rights under it.

Amendment 222 would change "must" in

"An appropriate agency must comply with a request"

to "has a duty to". This relates to an agency's response to an education authority's request for help. I know that arguments have been had about placing duties on agencies that are not covered by the Education Department. I have a contention with that. The Parliament and the Executive talk a lot about cross-cutting. I do not like that terminology, but I like the concept. If we acknowledge the need to break down departmental barriers and the need to develop policy and strategy throughout the Executive, it is slightly strange that we are shy about placing duties on agencies that do not fall under that department because of the Executive's structure and not for any necessarily logistic reason. The amendment would tease that out and I hope that it would make clear what other agencies' duties to comply with education authorities' requests are.

Amendment 94 would force an agency to comply, irrespective of the effect of compliance on its other functions. That would make the requirement too wide and could seriously restrain agencies in undertaking their duties.

I am not sure about amendment 266, which would replace the word "unduly" with the word "substantially". I am not sure about the difference between the words—both are equally difficult to define. I am not sure what the semantic difference is, but I am sure that that will be explained.

I do not really understand amendment 45, because I do not know why an education authority would request support that

"is not appropriate to the additional support needs of the child or young person."

I look forward to hearing the explanation for that.

The other amendments in the group concern the meaning of the provisions and the get-out clauses for other agencies. One concern that has been expressed to the committee is that the provision for other agencies not to comply with a request should not be abused.

I move amendment 222.

The Convener: I am sorry; I missed reading out one line of my briefing, which says that if amendment 94, 150 or 44 is agreed to, amendment 266 will be pre-empted. That just adds to the complexity.

Lord James Douglas-Hamilton: Amendments 94, 44, 45 and 95 are probing amendments. Amendment 94 is a simple amendment that would drop get-out clauses for an agency and would cease the apparent contradiction in section 19, which sets out what an agency ought to do then says what it need not do.

Amendments 44 and 45 are weaker versions of amendment 94, as they would drop the second paragraph of section 19(3) but allow the first paragraph to stand.

Amendment 95 would strengthen a duty. I look forward to hearing what the minister has to say.

Mr Ingram: I will speak to amendment 150, in the name of Fiona Hyslop, but let me first comment briefly on amendment 222, in the name of Elaine Murray, and on Lord James's amendments.

My reading of amendment 222 is that, by replacing "must" with "has a duty to", it would weaken the requirement on other agencies to comply. On the other hand, I find Lord James's amendments, and amendment 94 in particular, a bit draconian.

We believe that if we were to leave unchanged the requirement to comply that the bill places on other agencies, that would leave too many potential escape routes for those agencies. As currently worded, the bill leaves it for the agencies themselves to decide whether a request "unduly prejudices" the discharge of its other functions. As Lord James said, that provides the agencies with a rather easy get-out.

Amendment 150 would retain the element of not forcing the incurrence of unreasonable public expenditure and it would ensure that other agencies would not be required to act outwith their powers. However, amendment 150 would also ensure that such agencies were compelled to do what they could to help the education authority. No one expects that agencies would regularly try to avoid helping the education authority, but we all know the pressures that our public services are under. Amendment 150 would go a fair way towards ensuring that pupils would get the help that they need.

The Convener: I will speak to amendment 266 and the other amendments in the group.

Elaine Murray made a good point about the need to approach these matters in a way that is not too departmental, as such an approach can sometimes be an excuse for avoiding the issue. That can happen particularly when departmental boundaries are moveable in respect of matters of substance. That is the underlying issue in this group of amendments.

At stage 1, we discussed the interrelations of the education authority and the other agencies and other issues such as opt-outs. However, any Government bill will provide some sort of opt-out. It may be unfair to keep saying this, but Lord James is probably taking a different line from the one that he would have taken on official advice when he was a minister. There needs to be some sort of opt-out, but the one that the bill currently provides is too heavy.

Amendment 266 would increase "unduly" to "substantially", which is a recognised word that is used in other legislation. Whereas the word "substantially" suggests that the issue should be significant and of substance, the tone of "unduly" suggests that the issue could be relatively balanced instead of overwhelming. There is an important difference between the two words.

Given that there is something to be said for all the amendments in the group, I think that the Administration should consider moving a little bit on the issue. However, the precise formulation is a matter for discussion, so I will be interested to hear the minister's response in due course.

Ms Byrne: In some ways, amendment 151 is a probing amendment. I am having great difficulty in understanding what section 19 means and where we are going with it.

Amendment 151 would remove section 19(5)(b) in order to tighten up subsection (5). In my book, the current wording makes little sense, so I look forward to hearing the minister's comments. I think that paragraph (b) acts as just another get-out clause.

I will support amendment 150, in the name of Fiona Hyslop, because I think that these areas need tightened. I will be interested to hear the minister's comments on how all of section 19 can be made clearer so that people who need to use the bill know what can be done.

Mr Macintosh: I echo the comments on section 19 that have been made by other members, especially Elaine Murray. There is general concern about how we ensure that agencies other than the education authority comply with their duties and responsibilities towards families who have children with additional needs.

In my experience, as in the experience of other members, the level of therapy services that is available is a common issue of contention with authorities. Quite often, only a few hours of therapy services are made available by the health board to the parent or family. Education authorities

often have no control over such issues, although I know that some education authorities are reorganising their services in order to cope with the problem.

I appreciate that the minister is trying to balance the duties that he is placing on other agencies with their own duties to ensure that the duties do not clash, but again, I am not sure that we have got things right.

What Elaine Murray said about trying not to follow departmental lines will sound a bell with all of us. When we took evidence early in the process from people who work in the health service, it was clear that they were simply not aware of the bill's implications to anything like the degree that people who work in schools and education are. That compounded my anxiety that people who work in the health service do not regard the bill as fundamental to their job and to meeting the needs of children to whom they have a duty. The very process of introducing the bill, debating it and taking evidence has fuelled my anxiety.

I appreciate that section 19 tries to address such anxieties, but all of us have expressed fears about whether it does so with enough force to ensure that health authorities in particular waken up to their duties and do not try to avoid them, which I am sure that many will try to do if they do not regard them as a primary responsibility.

Section 19(3)(b) states that an appropriate agency must comply with a request, unless it considers that that request

"unduly prejudices the discharge of any of its functions."

Under section 19(5)(b), an education authority would have an opt-out in that it must do certain things unless it considers that doing them would

"prejudice the discharge by them of any of their functions."

I am not sure that I understand at what level the phrase "unduly prejudices" would apply. A very low threshold seems to have been created for opting out of a duty, as I think the convener pointed out. We might have to address that matter by changing the wording to "substantially" and I would certainly welcome an explanation from the minister about the level at which he expects the subsection to be interpreted when there is a clash, as there will quite often be clashes. I can imagine a situation in which a professional in the health service expresses the opinion that they would prefer resources and functions to be applied in a certain way and that doing something else in response to a request by the education authority would prejudice the discharge of their duties or responsibilities. That would mean that they could opt out in any situation whatsoever, which would cause me and all families great anxiety.

The words "unduly prejudices" are used at one point and the word "prejudice" is then used, although the words "unduly prejudices" are used in respect of a request to an "appropriate agency" and "prejudice" is used in respect of the actions of an education authority. However, I do not understand why there is no consistency in the same section in respect of the level of prejudice and would welcome clarification on that matter.

All the amendments address the concern that has been expressed, although I am not sure which offers the best remedy. The Executive must certainly move on the matter before the stage 3 debate, if not today.

Brian Adam (Aberdeen North) (SNP): I recall from my previous visit to the committee at stage 1 that the general issue that we are discussing was raised by committee members and, indeed, in response to the concerns of external interested parties. The Executive has made a genuine attempt to address such concerns, but it has provided many loopholes for external agencies to walk away, particularly if they feel financial pressures that they do not wish to address. They could say, "We cannae do that because it might prejudice the discharge of our functions."

The issue is about priorities. Agencies may choose to have different priorities. Moreover, the group of our citizens in question, who are already significantly disadvantaged, do not have an absolute right to limitless resources. There is a difficult balancing act and members have lodged the amendments to try to get the balance right. However, I am not sure that the Executive and some of the amendments are absolutely spot on.

I am not at all keen on the use of the word "prejudices". I understand what it means in context, but it will undoubtedly give opportunities for those authorities that have concerns about financial matters, particularly education authorities, to walk away, and I am not happy with that.

I am not sure what the effect of amendment 222 is; I am not sure about the subtleties of the change in words. I have a lot of sympathy for Lord James's view that, as Adam Ingram put it, we should be draconian. On the other hand, we also have to be realistic and we cannot give an open-ended commitment to any group in society, no matter how worthy it may be. Perhaps amendment 150 comes closest—I do not say that just because it is in the name of Fiona Hyslop. I am not sure that we have got the issue right, and I would welcome a commitment from the minister to have another stab at it between now and stage 3.

11:45

Euan Robson: First, on Rosemary Byrne's point, we should remember that if the bill is passed, as I hope it will be, there will be regulations, a code of practice and an

implementation phase. Ken Macintosh was concerned about health authorities, but by then those authorities should have a full understanding of their obligations under the legislation. Clearly and obviously, that must include the necessary training for their staff. The matter is not just a question of what lies in statute; as I said, we must consider it in conjunction with the consequent activities, the regulations and the code of practice. We are not seeking escape hatches in section (19)(3) to allow other agencies to walk away from their duties and responsibilities, but an appropriate balance must be achieved, as I will explain.

On amendment 222, I am advised that "must" has the legal meaning that other agencies have a duty to comply with a request for assistance. That is further backed up in subsection (4), which states:

"an appropriate agency is under a duty by virtue of subsection (3)".

I understand the point that is being made, but "must" means "has a duty" and that obviates the need for the amendment.

I understand the reasons for amendments 94, 150, 44, 266 and 45 but, as I said in my introduction, the bill's provisions have been selected to ensure that an appropriate and necessary balance is achieved in placing a duty on agencies to help the education authority. Let it be clear that the agencies have a duty to help, and that that will be backed up in the regulations to which I referred earlier, which will set time limits within which that help must be delivered. However, we must be mindful that those agencies are subject to their own statutory duties and requirements, which are not limited to those of an educational nature. Those other duties must also be discharged and the agencies have established systems to allow them to do so. Under the bill, a request for help can be refused only where in attempting to help, that agency would not be able to carry out its functions. The wording recognises the need for the agencies to offer help within their current operating systems—that is the point that we need to make. The wording is consistent with the wording in section 21 of the Children (Scotland) Act 1995, which places a duty on any other local authority or health board to help a local authority to carry out its functions under the 1995 act. It is also consistent with a similar provision in the English special educational needs system.

I am not in a position to explain the difference between "unduly prejudices" in section 19(3)(b) and "prejudice" in section 19(5)(b). The different wordings might have meanings of which I am unaware, but I understand the point that has been made and I will take the matter away and consider it before stage 3. We could have a long debate, convener, on the difference between "unduly" and "substantially", but I think that "unduly", which is the term that the 1995 act uses, is the appropriate term in the context of the bill. The word "substantially" would not really add much to the clarity of section 19. There will be time to reconsider the matter, but I am not minded to change the wording from "unduly" to "substantially".

I hope that my remarks have cleared up the matters that have been raised. I will consider the point about sections 19(3)(b) and 19(5)(b) and advise the committee appropriately in due course.

The Convener: Thank you. That is helpful. I call Elaine Murray to wind up the debate and to indicate whether she intends to press or to withdraw amendment 222.

Dr Murray: I was a little concerned that Adam Ingram interpreted "has a duty to" as having a less strong effect than "must", as I thought that that wording would strengthen the provision. However, in view of the assurance that the minister has given on the record that the duty will be placed on external agencies, I will withdraw amendment 222.

Amendment 222, by agreement, withdrawn.

Lord James Douglas-Hamilton: On the basis of what the minister said, I will not move amendment 94, but I hope that amendment 150 will be moved.

Amendment 94 not moved.

Amendment 150 moved—[Mr Adam Ingram].

The Convener: I remind members that if amendment 150 is agreed to, amendments 44 and 266 will be pre-empted. The question is, that amendment 150 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Adam, Brian (Aberdeen North) (SNP)
Byrne, Ms Rosemary (South of Scotland) (SSP)
Douglas-Hamilton, Lord James (Lothians) (Con)
Ingram, Mr Adam (South of Scotland) (SNP)

AGAINST

Alexander, Ms Wendy (Paisley North) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glasgow) (LD)
Macintosh, Mr Kenneth (Eastwood) (Lab)
Murray, Dr Elaine (Dumfries) (Lab)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 150 disagreed to.

Amendments 44 and 266 not moved.

Amendment 45 moved—[Lord James Douglas-Hamilton].

The Convener: The question is, that amendment 45 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Byrne, Ms Rosemary (South of Scotland) (SSP)
Douglas-Hamilton, Lord James (Lothians) (Con)

AGAINST

Adam, Brian (Aberdeen North) (SNP)
Alexander, Ms Wendy (Paisley North) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glasgow) (LD)
Ingram, Mr Adam (South of Scotland) (SNP)
Macintosh, Mr Kenneth (Eastwood) (Lab)
Murray, Dr Elaine (Dumfries) (Lab)

The Convener: The result of the division is: For 2, Against 7, Abstentions 0.

Amendment 45 disagreed to.

Amendment 95 moved—[Lord James Douglas-Hamilton].

The Convener: The question is, that amendment 95 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Byrne, Ms Rosemary (South of Scotland) (SSP)
Douglas-Hamilton, Lord James (Lothians) (Con)

AGAINST

Adam, Brian (Aberdeen North) (SNP)
Alexander, Ms Wendy (Paisley North) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glasgow) (LD)
Ingram, Mr Adam (South of Scotland) (SNP)
Macintosh, Mr Kenneth (Eastwood) (Lab)
Murray, Dr Elaine (Dumfries) (Lab)

The Convener: The result of the division is: For 2, Against 7, Abstentions 0.

Amendment 95 disagreed to.

Amendment 151 not moved.

Section 19 agreed to.

After section 19

The Convener: Amendment 187, in the name of Rosemary Byrne, is in a group on its own.

Ms Byrne: Amendment 187 seeks to ensure that the bill is implemented evenly across the country. It would ensure that all children and young people with additional support needs are provided with the same levels of support, wherever they live, and that services are provided at the same levels in different local authorities.

One of the problems with the record of needs was that the number opened could vary from one local authority to another, which resulted in children and young people in one area having records but those in another area not having records. Often those without records had greater needs than those with records.

However, in some local authorities or schools, needs were met regardless of whether a record of needs had been opened. Good practice—which amendment 187 seeks to ensure—happens in many local authority areas and in many schools. I want to ensure that the implementation of the bill is smooth and even-handed in local authorities across the country.

I move amendment 187.

Mr Macintosh: I agree with Rosemary Byrne: it is important that we monitor the implementation of the bill once it is enacted and that treatment is fair across the country. We know that, in the past, local authorities have interpreted legislation differently.

However, I do not think that we should set up a formal structure such as the one proposed in amendment 187, which strikes me as being slightly over-bureaucratic. The minister has already assured us that HMIE will have a specific role. As I said earlier, I would like to think that the committee, because of our extensive interest in the subject, would return to it and use our powers of post-legislative scrutiny to examine how the legislation was being implemented. I do not think that we need to include in the bill a provision such as is proposed in the amendment.

Dr Murray: Like Ken Macintosh, I sympathise with what Rosemary Byrne wants to achieve—she wants to ensure that the legislation is properly monitored and is interpreted evenly across the country. However, requiring annual reports to be prepared and submitted to Parliament is over-bureaucratic. As Ken Macintosh says, other mechanisms would enable us to monitor the effects of the legislation. However, I would be interested to hear from the minister how he intends to do that.

Lord James Douglas-Hamilton: It would be good practice if Parliament and parents were kept properly informed through an annual report. The Administration produces endless annual reports on countless other subjects, so I do not see why children with special educational needs or additional support needs should be excluded.

The Convener: I, too, have some sympathy with the amendment. Monitoring arrangements have been included in other bills, but not, I think, annual monitoring—the period has usually been slightly longer. I would have thought that the HMIE provision was appropriate. The bill is, in a way, subsidiary to other legislation; it does not exist in isolation. The key issue will be the way in which

the provisions are implemented in the schools. There are ways in which we can deal with that issue—through our budget discussions, for example. I would be interested to hear whether the minister has any thoughts on how the Administration can best monitor implementation. The issues are important and relate to some of the financial matters that we have discussed. From what committee members have said, there seems to be a desire to have some degree of continuing involvement.

12:00

Euan Robson: I agree with many of the contributions from members. The Scottish Executive will be watching the implementation of the new system and monitoring it closely. Members have mentioned HMIE, which will be checking the implementation in each education authority, especially in the years just after enactment. Using the usual procedures, HMIE will recommend changes or will offer advice to Scottish ministers as necessary.

As members know, ministers have powers of direction to require any education authority to take remedial action, either on a specific matter or more generally. Far be it from me to suggest this, but I am sure that in future the committee would not hesitate to call ministers before it to discuss the issue if it felt that that was necessary.

I appreciate the concerns about the variation among authorities in opening and maintaining records of needs, but the committee must remember that there will be a code of practice, which will give guidance on minimum standards. The point is to promote consistent good practice throughout Scotland and that will be very firmly provided for in the code. We will know what use is being made of each authority's mediation and dispute resolution arrangements and we will know how many cases are referred to tribunals from each authority. We will get reports from HMIE and indeed from the authorities. The amendment would not add anything substantive, although the concern about monitoring the impact of the legislation is well expressed and is one that we all share. The Executive will take a particular interest in that. The amendment would impose a substantial burden and one that is not entirely necessary. I ask Rosemary Byrne to consider withdrawing the amendment.

Ms Byrne: I am not convinced. I gave examples of inconsistencies in the provision of records of needs in the current system. Given that those inconsistencies have persisted despite HMIE's scrutiny, I am not confident that, under the bill, there will be an improvement throughout the country in the service that young people and children and parents receive. The record of needs system was patchy and, in some cases, parents had to fight for a record to be opened in one local authority area although they would not have had to fight in another local authority area. I expect the same adversarial situation with the co-ordinated support plans.

I am particularly concerned about additional support needs that will not be covered by a CSP and I want to ensure that children and young people with additional support needs are treated equally throughout the country. Some local authorities have excellent systems in place to assess young people for specific learning difficulties or dyslexia, for example, whereas other local authorities do not. There are differences from school to school in how such situations are dealt with. I am not convinced that HMIE was carrying out sufficient scrutiny previously, so I have no reason to believe that it will carry out such scrutiny once the bill has been enacted. I therefore wish to press my amendment.

The Convener: The question is, that amendment 187 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Adam, Brian (Aberdeen North) (SNP)
Byrne, Ms Rosemary (South of Scotland) (SSP)
Douglas-Hamilton, Lord James (Lothians) (Con)
Ingram, Mr Adam (South of Scotland) (SNP)

AGAINST

Alexander, Ms Wendy (Paisley North) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glasgow) (LD)
Macintosh, Mr Kenneth (Eastwood) (Lab)
Murray, Dr Elaine (Dumfries) (Lab)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 187 disagreed to.

Section 20 agreed to.

Section 21—Attendance at establishments outwith the United Kingdom

The Convener: Amendment 231, in the name of Lord James Douglas-Hamilton, is in a group on its own.

Lord James Douglas-Hamilton: The amendment would delete the words "wholly or mainly" from section 21. It is not clear why there is a restriction on an education authority in exercising its discretion. The test should be whether the child or young person would benefit from the education to be provided, not whether the establishment is used "wholly or mainly" for other like children or young persons. Moreover, it is not clear whether the words "wholly or mainly" refer to

the child or young person who has additional support needs or whether it is enough for the establishment to deal, in general, with additional support needs no matter what those needs might be. Either way, the restriction will mean that the child or young person can go only to what is, in effect, a special school rather than to a mainstream school that deals with the additional support needs of the child or young person. The amendment has a simple purpose. It introduces more flexibility into the education system and should be supported for that reason.

I move amendment 231.

Mr Macintosh: I appreciate that the amendment represents an attempt to introduce flexibility, but I think that, perversely, the effect might be to make less clear to local authorities the circumstances in which they can support a child in a school outwith the United Kingdom. I cannot imagine that such a circumstance would be anything other than wholly exceptional and I think that the bill's use of the words "wholly or mainly" emphasises the exceptionality of the circumstance.

The Convener: I share Ken Macintosh's view. In a sense, if people are mainstreaming the arrangements in schools, there might be a paradox, but the circumstance that we are talking about would be exceptional. We should not, as a matter of public policy, encourage people to go abroad for such provision. I cannot believe that that would be in the interests of the child, although there might be exceptional cases in which it could be.

Euan Robson: We share some of the convener's concerns. Section 21 continues the current arrangements whereby an education authority may secure education provision for a child outwith the UK. The circumstance is likely to occur only extremely rarely and is likely to involve an establishment that provides a highly specialised service. As we understand it, Lord James Douglas-Hamilton would extend the placement abroad to any establishment, rather than to one dealing "wholly or mainly" with additional support needs. In our view, that extension is far too wide.

The convener made an important point. Wherever possible, we would encourage parents and education authorities to think of solutions in terms of providing services as close to home as possible. The balance in section 21 is correct. If an education authority has to consider the provision of services abroad, that should happen with regard to particularly innovative or highly specialised services that simply cannot currently be provided in the UK. That would happen only rarely, but would be possible, I suppose. It is not intended that education authorities should consider mainstream or routine provision made by general schools abroad. That is a key point. With that in mind, I would be grateful if Lord James would consider withdrawing amendment 231.

Lord James Douglas-Hamilton: Having listened to the minister, I will seek the committee's agreement to withdraw the amendment. However, I think that, if the minister makes inquiries, he will find that there have been placements of the sort that we are discussing—for example, people have gone to the Peto institute in Hungary. I would like to lay down the principle that it is important that the matter be approached flexibly.

Amendment 231, by agreement, withdrawn.

Section 21 agreed to.

Section 22—Publication of information by education authority

Amendment 206 moved—[Euan Robson]—and agreed to.

Amendment 46 not moved.

Section 22, as amended, agreed to.

Section 23—Code of practice and directions

Amendments 240 and 241 moved—[Euan Robson]—and agreed to.

The Convener: Amendment 242, in the name of Euan Robson, is grouped with amendments 271, 243, 244 and 109.

Euan Robson: If I may, convener, I will speak to amendments 242 to 244 and come back to the other amendments in the group later.

Amendments 242 and 244 are fairly straightforward; they will extend the scope of the code of practice to include other appropriate agencies. We want to ensure that guidance is available to other agencies in so far as they have duties under the bill. I hope that the amendments will meet the concerns that have been raised that education authorities and other agencies should be encouraged to work together. The guidance will cover the responsibilities of all the agencies that may be involved in providing support so that it is clear where responsibilities lie. The guidance will also deal with co-ordinated working and give examples of good practice.

I hope that members will welcome amendment 243, which will mean that any draft code of practice must be laid before the Parliament before it is published. The amendment meets a concern that was raised earlier. It has always been our intention that the code of practice should be developed with the involvement of as wide a range of interests as possible, which of course should include members of the committee and the Parliament. We have an advisory group to

consider and recommend how best to engage with as wide a range of stakeholders as possible in drafting and consulting on the code. That group has been helpful.

I am conscious of the unease that members have expressed whenever we have referred to the fact that the code will deal with matters that we do not wish to be included in the bill. Members want to be assured that the code will be framed correctly and that it will be a useful means of promoting the good practice that the bill intends. Amendment 243 will make it clear that, before the code is published, appropriate consultation and involvement will take place with all those who have an interest. In particular, we want to involve education authorities and other agencies, as well as parents, children and young people. In addition, amendment 243 will require ministers to lay a draft code before Parliament at least 40 days before publication so that Parliament's views can be taken into account. I hope that the amendment will go a long way towards reassuring members that the code will be published only after full and wide consultation and discussion.

That is all I have to say at present; if I may, I will return to the other amendments in the group later.

I move amendment 242.

Lord James Douglas-Hamilton: Amendment 271 is extremely important and has been lodged on behalf of the Disability Rights Commission. I can sum up the point quickly: the objective of amendment 271 is to ensure that the code of practice makes it clear that, in the consideration of the particular circumstances and factors that give rise to additional support needs, disability can and should be taken into account. Although that may be implicit in the definition of additional support needs, amendment 271 would ensure that, under the code, issues such as the implications of disability are fully considered. That would include matters such as the implications for auxiliary aids and services, a subject on which the committee has heard a lot of evidence. Amendment 271 would give a lot of reassurance to disabled persons and to the Disability Rights Commission, which suggested the amendment.

Rosemary Byrne's amendment 109 is altogether reasonable and should be supported because the code will be of such enormous importance. Given the way in which the Administration has dealt with the bill, it seems appropriate that the code should come before Parliament by way of affirmative resolution.

12:15

Ms Byrne: Amendment 109 seeks to ensure that the code of practice has a proper legal foundation through the affirmative procedure. Some committee members were under the impression that the minister, Peter Peacock, had a mind to give it that foundation, but I am disappointed that that has not happened.

I welcome amendment 243, which goes a long way towards including everyone who should be involved in drafting the code of practice to ensure that it meets the requirements that everyone expects it to meet. However, during our consideration of the bill, much weight has been placed on the fact that the code of practice will deal with committee members' concerns and the issues that we have raised. For that reason, it is crucial that the code is embedded in statute.

The minister referred us to the code of practice on a number of occasions this morning: he talked about it in relation to section 19, in relation to the monitoring and implementation of the bill and in relation to consistent practice throughout the country. That has been the thread all the way through our proceedings. I hope that members will support amendment 109.

Mr Macintosh: I warmly welcome amendment 243, in the name of the minister. The minister and his team have been responsive to the committee's concerns throughout. Amendment 243 is a particularly good example of that, because there has been a great deal of concern about the amount of information, the number of duties and the level of detail that have been consigned to the code of practice. The committee is anxious that Parliament and others should play an active role in commenting on the code of practice. Amendment 243 establishes that that will happen, so I warmly welcome it and look forward to fulfilling that role.

I would welcome clarification on Rosemary Byrne's amendment 109, because I believe that a code of practice that is reissued will come before the Parliament. Under section 23(7), a code of practice that is issued, and a subsequent republishing, would come before Parliament.

Much as I sympathise with the intention behind Lord James Douglas-Hamilton's amendment 271, I am slightly concerned that it could elevate disability over other needs. If we are going to start listing the factors that should be taken into account, we should list all the factors to give them equal status, because, ultimately, the bill is about addressing the additional support needs of children. We get into difficulty if one factor is singled out and elevated above others. People with a disability will be treated fairly under the bill as it stands and singling them out does not help matters.

The Convener: With great respect to the Disability Rights Commission, I share Ken Macintosh's reservations about amendment 271. The approach that it suggests is not the right way

of looking at the legislation. Although the issue of disability in various forms lies behind the bill, the bill is not specifically concerned with disability, which, in any event, in the context of the Disability Rights Commission, is a reserved issue, as we have heard before in a different context. Amendment 271 and a similar one that we will consider later would distort the legislation.

I think that I am right in saying that, other than if amendment 243 were passed, the code of practice would not come before the Parliament for approval—it will not be subordinate legislation, so it would not be covered, but the minister will confirm that. There are differences between Rosemary Byrne's formulation and the one provided by the minister. I recognise the distinction between the accountable ministry on the one hand and the Parliament and its committees on the other and I think that the minister's formulation is the right one, because ministers have responsibility for instigating, consulting on and implementing the code of practice and responsibility for the relationships with local authorities and others that emerge from it. The way in which ministers have to take account of what the Parliament says provides political scrutiny in an effective way, as do the timescales in amendment 243. To my mind, amendment 243 is satisfactory and deals with the substantial point that Rosemary Byrne rightly raised.

Euan Robson: I could not have put the last point better myself. The code may need to be reissued and we believe that Rosemary Byrne's amendment 109 is rigid. Amendment 243, which will insert new provisions into section 23, is the appropriate way in which to proceed for the reasons eloquently outlined by the convener. I assure Lord James Douglas-Hamilton that the revised codes of practice reissued under the section will be the subject of consultation in advance.

Amendment 271 is very important. I have already given assurances that the code of practice will include disability as an example of a factor that may give rise to additional support needs. I further assure Lord James Douglas-Hamilton that the code will make appropriate reference to disability. Auxiliary aids and equipment, in particular, will be considered as part of the provision for disabled children. Organisations such as the Disability Rights Commission will be consulted on the particular references and on the code in general.

As the convener and Ken Macintosh said, the bill does not refer to other specific circumstances or factors leading to additional support needs, such as autism or dyslexia. A reference to disability might not only give disability prominence, but imply that autism and dyslexia were somehow not covered. I hope that Lord James Douglas-Hamilton will not press his amendment for those reasons, especially in light of the reassurance that I have given about the code.

Amendment 242 agreed to.

Lord James Douglas-Hamilton: In view of the fact that amendment 271 was lodged on behalf of the disabled, who have expressed a strong preference to include the reference in the bill, I will move it.

Amendment 271 moved—[Lord James Douglas-Hamilton].

The Convener: The question is, that amendment 271 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Adam, Brian (Aberdeen North) (SNP)
Byrne, Ms Rosemary (South of Scotland) (SSP)
Douglas-Hamilton, Lord James (Lothians) (Con)
Ingram, Mr Adam (South of Scotland) (SNP)

AGAINST

Alexander, Ms Wendy (Paisley North) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glasgow) (LD)
Macintosh, Mr Kenneth (Eastwood) (Lab)
Murray, Dr Elaine (Dumfries) (Lab)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 271 disagreed to.

Amendment 47 not moved.

Amendment 204 moved—[Euan Robson]—and agreed to.

Amendment 267 not moved.

Amendment 152 moved—[Ms Rosemary Byrne].

The Convener: The question is, that amendment 152 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Adam, Brian (Aberdeen North) (SNP)
Byrne, Ms Rosemary (South of Scotland) (SSP)
Douglas-Hamilton, Lord James (Lothians) (Con)
Ingram, Mr Adam (South of Scotland) (SNP)

AGAINST

Alexander, Ms Wendy (Paisley North) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glasgow) (LD)
Macintosh, Mr Kenneth (Eastwood) (Lab)
Murray, Dr Elaine (Dumfries) (Lab)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 152 disagreed to.

Amendments 243 to 247 moved—[Euan Robson]—and agreed to.

Amendment 109 moved—[Ms Rosemary Byrne].

The Convener: The question is, that amendment 109 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Adam, Brian (Aberdeen North) (SNP)
Byrne, Ms Rosemary (South of Scotland) (SSP)
Douglas-Hamilton, Lord James (Lothians) (Con)
Ingram, Mr Adam (South of Scotland) (SNP)

AGAINST

Alexander, Ms Wendy (Paisley North) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glasgow) (LD)
Macintosh, Mr Kenneth (Eastwood) (Lab)
Murray, Dr Elaine (Dumfries) (Lab)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 109 disagreed to.

Section 23, as amended, agreed to.

Before section 24

Amendment 96 moved—[Euan Robson].

Amendment 96F moved—[Lord James Douglas-Hamilton].

The Convener: The question is, that amendment 96F be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Adam, Brian (Aberdeen North) (SNP)
Byrne, Ms Rosemary (South of Scotland) (SSP)
Douglas-Hamilton, Lord James (Lothians) (Con)
Ingram, Mr Adam (South of Scotland) (SNP)

AGAINST

Alexander, Ms Wendy (Paisley North) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glasgow) (LD)
Macintosh, Mr Kenneth (Eastwood) (Lab)
Murray, Dr Elaine (Dumfries) (Lab)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 96F disagreed to.

Amendment 96D moved—[Lord James Douglas-Hamilton].

The Convener: The question is, that amendment 96D be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Byrne, Ms Rosemary (South of Scotland) (SSP)
Douglas-Hamilton, Lord James (Lothians) (Con)

AGAINST

Adam, Brian (Aberdeen North) (SNP)
Alexander, Ms Wendy (Paisley North) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glasgow) (LD)
Ingram, Mr Adam (South of Scotland) (SNP)
Macintosh, Mr Kenneth (Eastwood) (Lab)
Murray, Dr Elaine (Dumfries) (Lab)

The Convener: The result of the division is: For 2, Against 7, Abstentions 0.

Amendment 96D disagreed to.

Amendment 96B not moved.

Amendment 96E moved—[Ms Rosemary Byrne].

The Convener: The question is, that amendment 96E be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Adam, Brian (Aberdeen North) (SNP)
Byrne, Ms Rosemary (South of Scotland) (SSP)
Douglas-Hamilton, Lord James (Lothians) (Con)
Ingram, Mr Adam (South of Scotland) (SNP)

AGAINST

Alexander, Ms Wendy (Paisley North) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glasgow) (LD)
Macintosh, Mr Kenneth (Eastwood) (Lab)
Murray, Dr Elaine (Dumfries) (Lab)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 96E disagreed to.

Amendments 96A and 96C not moved.

Amendment 96 agreed to.

Section 24—Interpretation

Amendments 153, 48 and 62 not moved.

The Convener: I ask Lord James Douglas-Hamilton to indicate whether he will move amendment 232, which has already been debated with amendment 68.

Lord James Douglas-Hamilton: Did the minister say that he would look at the amendment again?

The Convener: I think that the minister said that it would be dealt with in the regulations.

Lord James Douglas-Hamilton: I suppose that we have already voted on the principle of disability.

The Convener: Are you going to move amendment 232, Lord James?

Mr Macintosh: Is it not consequential on the earlier amendments?

The Convener: It probably is.

Lord James Douglas-Hamilton: Because we have already voted on the earlier amendments, I will not move amendment 232.

Amendment 232 not moved.

The Convener: Amendment 188, in the name of Lord James Douglas-Hamilton, is grouped with amendment 189.

Lord James Douglas-Hamilton: I will speak briefly to amendments 188 and 189, which concern the situation of pupils who undergo appeals. I have lodged them on behalf of Independent Special Education Advice in the spirit of the new politics and social inclusion.

Mr Macintosh: Hear, hear.

Lord James Douglas-Hamilton: I move amendment 188.

The Convener: I think that we all support that spirit. However, I am not sure whether your comments add very much to the sum of human knowledge.

12:30

Euan Robson: Amendments 188 and 189 appear to us to attempt to expand the definition of children or young persons for whose school education authorities are responsible. As we see it, the amendments seek to ensure that those children and young persons who have been removed temporarily from or have not commenced state education because of a dispute with the authority are included within the definition of the authority's responsibility.

The amendments may have been prompted by a misunderstanding of the current provisions on the requirement to educate children. Parents have an unqualified duty to educate their school-age children—those between the ages of five and 16. They can do so by putting the children into the state system or by other means. When the children are in the state system, they are the responsibility of the authority under the bill. When a parent wishes to withdraw a child, the authority must consent to that withdrawal.

If the child is simply removed without consent, he or she is still within the state system. There are current provisions to compel attendance at school. The definition in the bill is forward looking and captures those who are about to be provided with state education. A pupil who is a young person—someone aged 16 or more—cannot be compelled to attend school. There is no duty on parents to educate them and no requirement to seek the authority's consent to withdraw a pupil from state education. In the case of young persons, it may be an overly burdensome, bureaucratic task for an authority to decide whether the pupil intends to return to school when they have exercised the right not to attend.

The bill provides a number of avenues for the resolution of disputes, which are intended to be speedy. They exist alongside the current mechanisms that are available for parents and young persons to challenge the choice of school through placing requests. Those mechanisms negate the reasons for removing a child or young person from school while issues are being considered and resolved.

For the reasons that I have given, the amendments are unnecessary. They may also reflect a misunderstanding. I ask Lord James Douglas-Hamilton to seek leave to withdraw amendment 188 and not to move amendment 189.

Lord James Douglas-Hamilton: In view of the minister's reassurances, I will seek leave to withdraw amendment 188 and I will not move amendment 189.

Amendment 188, by agreement, withdrawn.

Amendment 189 not moved.

Section 24 agreed to.

After section 24

The Convener: Amendment 248, in the name of the minister, is grouped with amendment 249.

Euan Robson: I need to spend a little time on amendment 248, because it is substantial and adds an important provision to the bill. I hope that it addresses the concern about moving from the current system to the new system that the bill proposes. That is the intention behind the amendment. It is especially important for the parents of children with a record of needs. We are trying to address the issues that the committee has raised from time to time during our four days of deliberations at stage 2.

Many of the children and young people who have a record of needs will get a CSP but some, as we have recognised, will not. I completely understand the worry that that will generate. I have lodged amendment 248 to make clear now what protection those children will receive. I want to ensure that the children and young people who have a record of needs and for whose school education education authorities are responsible continue to get the provision that they require to meet their needs.

Members will recall the duty inserted in the bill and underpinned by amendment 63, to which I am pleased to say the committee agreed. However, I

want to give extra protection to those in our schools with a record of needs. I hope that amendment 248 will ensure that provision for children and young people will not be reduced in any way, unless their needs significantly change.

We expect the changeover to the new system to take about two years from commencement to allow authorities sufficient time to put the new system fully into force. That is a realistic target, because there will be a considerable number of children and young people whose needs for additional support will have to be established. It will also have to be decided whether they should have a CSP. All that will take time. About 17,000 children have a record of needs and they will have to be considered for a CSP, which cannot possibly happen overnight.

If amendment 248 is agreed to, the existing provision for each child with a record of needs will be protected until that child is considered for a CSP. If it is decided that a child should not get a CSP, their provision will be protected for another two years from the date of that decision. Therefore, some children could have their provision protected for up to four years. Only if there is significant change in such a child's needs can the provision be altered. Amendment 248 is an important amendment, which should reassure parents that, if their child does not have a CSP, they will continue to receive the support that they need. Amendment 248 should be read in conjunction with what the committee accepted in agreeing to amendment 63. I commend amendment 248 and the consequential amendment 249 to the committee.

I move amendment 248.

Dr Murray: I welcome the fact that ministers have tried to address the serious concerns that all committee members have recognised. However, I have a couple of questions about the wording of amendment 248. Subsection (1)(b) of the proposed new section refers to a child or young person

"who, immediately before that date, was a recorded child".

We have heard reports of local authorities not recording children because they know that additional legislation is coming into force. Of course, some local authorities have never recorded many children. I am concerned that some local authorities might cease recording children, or might be encouraged to do so, because they feel that, if they continue to record the children, extra duties will be placed on them.

I am also concerned about the wording of subsection (4) of the proposed new section, which states:

"Until the appropriate date, the education authority must ensure that the provision made … is no less than the provision which was, immediately before the commencement date, made for the child or young person".

That could imply that the young person might receive less support after the appropriate date. That is contrary to what the bill is trying to do generally, which is to ensure that all children who have additional support needs have such needs met. Subsection (4) could imply that it would be acceptable to reduce the amount of support after the appropriate date.

Rhona Brankin: I welcome amendment 248. The proposed new section will go a long way towards reassuring parents.

Mr Macintosh: I echo that point. There is a particular cohort of families for whom achieving the record of needs has been a long and difficult struggle. The proposed new section will include in the bill the reassurance that the minister has given in the chamber and in letters and guidance to local authorities. Amendment 248 is very welcome.

The Convener: I agree. Explanatory leaflets and other literature that may go out in connection with the implementation of the legislation should refer to the new section that amendment 248 proposes. The minister may already intend for that to happen. Amendment 248 is an important amendment.

Euan Robson: Explanatory leaflets will go out to accompany the legislation, if Parliament passes it and it receives royal assent.

On Elaine Murray's first point, nothing in the bill should suggest to a local authority that it should not operate the current system fully. HMIE is monitoring what is going on and will report to ministers if there is any cause for concern. Ministers will take a serious view of any local authority that seeks to avoid its present obligations deliberately or in any other inappropriate way.

I am slightly concerned by what Elaine Murray said about subsection (4) of the proposed new section. What she expressed was clearly not our intention but, given that she read the wording in that way, we will look at it, just in case there is any ambiguity. I would not want there to be ambiguity, but, if she has picked the wording up in that way, others might do so as well. I shall take that away and consider it before stage 3. I do not think that I have anything else to say about the amendment, other than to thank members for what they have said. I hope that amendment 248 will go some way towards meeting their concerns.

Amendment 248 agreed to.

Section 25—Ancillary provision

Amendment 249 moved—[Euan Robson]—and agreed to.

Section 25, as amended, agreed to.

Section 26 agreed to.

Schedule 3

MODIFICATION OF ENACTMENTS

Amendment 205 moved—[Euan Robson]—and agreed to.

Schedule 3, as amended, agreed to.

Section 27—Orders, regulations and rules

Amendment 250 moved—[Euan Robson]—and agreed to.

The Convener: Amendment 268, in my name, has already been debated with amendment 269. It is consequential to amendment 261, which was agreed to earlier.

Amendment 268 moved—[Robert Brown].

The Convener: The question is, that amendment 268 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Adam, Brian (Aberdeen North) (SNP)
Brown, Robert (Glasgow) (LD)
Byrne, Ms Rosemary (South of Scotland) (SSP)
Douglas-Hamilton, Lord James (Lothians) (Con)
Ingram, Mr Adam (South of Scotland) (SNP)
Macintosh, Mr Kenneth (Eastwood) (Lab)

AGAINST

Alexander, Ms Wendy (Paisley North) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Murray, Dr Elaine (Dumfries) (Lab)

The Convener: The result of the division is: For 6, Against 3, Abstentions 0.

Amendment 268 agreed to.

Amendments 251 and 252 moved—[Euan Robson]—and agreed to.

Section 27, as amended, agreed to.

Section 28—Commencement and short title

The Convener: Amendment 190, in the name of Adam Ingram, is in a group on its own.

Mr Ingram: I would like not to move amendment 190.

The Convener: I think that there must be a fear of standing between the committee and its lunch.

Amendment 190 not moved.

Section 28 agreed to.

Long title agreed to.

The Convener: That ends stage 2 consideration of the bill. I thank the minister and his officials and the committee for their help and assistance throughout this long process, which has been remarkably smooth. I understand that the likely date for stage 3 is Thursday 1 April.

Dr Murray: April fools' day?

The Convener: Absolutely. That date presupposes a decision by the Parliamentary Bureau and by Parliament to that effect.

Lord James Douglas-Hamilton: On behalf of the back benchers, I thank the clerks very much for going above and beyond the call of duty on the bill. I also thank the staff of the Parliament and the official reporters for their work on what has been a lengthy stage 2 process. I accord thanks to the convener for his good humour, his impartiality and his professionalism and for being—if I may use the words of one of his amendments—thoroughly effective and not just adequate.

The Convener: Thank you very much. With those kind comments, I close the meeting.

Meeting closed at 12:44.

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