



OFFICIAL REPORT
AITHISG OIFIGEIL

Education and Skills Committee

Wednesday 27 February 2019

Session 5



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EDUCATION AND SKILLS COMMITTEE

7th Meeting 2019, Session 5

CONVENER

*Clare Adamson (Motherwell and Wishaw) (SNP)

DEPUTY CONVENER

*Johann Lamont (Glasgow) (Lab)

COMMITTEE MEMBERS

*Dr Alasdair Allan (Na h-Eileanan an Iar) (SNP)

*Jenny Gilruth (Mid Fife and Glenrothes) (SNP)

*Iain Gray (East Lothian) (Lab)

*Ross Greer (West Scotland) (Green)

*Gordon MacDonald (Edinburgh Pentlands) (SNP)

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

*Oliver Mundell (Dumfriesshire) (Con)

Tavish Scott (Shetland Islands) (LD)

*Liz Smith (Mid Scotland and Fife) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

May Dunsmuir (First-tier Tribunal for Scotland)

Nick Hobbs (Office of the Children and Young People's Commissioner Scotland)

Professor Sheila Riddell (University of Edinburgh)

CLERK TO THE COMMITTEE

Roz Thomson

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Education and Skills Committee

Wednesday 27 February 2019

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Clare Adamson): Good morning, and welcome to the seventh meeting in 2019 of the Education and Skills Committee. I remind everyone to turn mobile phones to silent for the duration of the meeting. We have received apologies from Tavish Scott MSP.

Agenda item 1 is a decision on whether to take agenda item 3 in private and whether to take consideration of evidence on additional support needs in private at our next meeting. Do members agree to take those items in private?

Members indicated agreement.

Additional Support Needs

10:00

The Convener: Agenda item 2 is our first evidence session in our follow-up review of the committee's recommendations in its 2017 report on additional support needs, "How is Additional Support for Learning working in practice?" Before we begin the formal evidence session, I take this opportunity to thank the parents, young people and other attendees who came to the informal focus group meeting last Wednesday evening. The experiences that were shared were informative and often very moving. I thank the many attendees for taking time to share their perspective with us.

Today, we will hear from a panel of witnesses who are involved in the tribunal system, the office of the Children and Young People's Commissioner Scotland and inclusion research. I welcome May Dunsmuir, president of the health and education chamber of the First-tier Tribunal for Scotland; Nick Hobbs, head of advice and investigations with the office of the Children and Young People's Commissioner Scotland; and Professor Sheila Riddell, director of the centre of research in education inclusion and diversity at the University of Edinburgh.

I ask our witnesses to give a brief outline of their work in the area, including anything of significance since we produced our report in 2017.

May Dunsmuir (First-tier Tribunal for Scotland): The Additional Support Needs Tribunal for Scotland was created some years ago and has now been in operation for around 14 years. In that time, there have been a number of legislative changes but I will mention two of the most significant. One was the introduction into the legislation of the definition of a looked-after child. In 2010, those provisions were commenced and looked-after children were automatically considered to have additional support needs. The expectation at the time was that that would open the floodgates and we would have a rather overwhelming number of looked-after children coming to the tribunal, which has not been the case.

The other significant legislative matter is the alteration to the law by the Education (Scotland) Act 2016, which for the first time extended rights to children aged 12 to 15 years to make a reference to the tribunal where they have the capacity to do that and where their wellbeing would not be adversely affected by doing so. That has been heralded as the greatest extension of rights to children across Europe. Since that legislation came into force in January last year, we have

received two references from children, raised by their own hand and in their own right, in connection with co-ordinated support plan claims.

The Additional Support Needs Tribunal is a specialist jurisdiction that is well geared up to attend to the particular needs that come before it, but it is a low-volume jurisdiction, despite the increasing number of children in Scotland who are considered to have additional support needs.

Professor Sheila Riddell (University of Edinburgh): Thank you for inviting me. We are doing research, which is funded by the Economic and Social Research Council, on the extension of rights to children in England and Scotland. Actually, the rights go a lot further in Scotland than they do in England but, overall, we tend to find that local authorities in Scotland have not done a great deal to extend those rights to children. The Scottish Government has funded the my rights, my say service providers, which provide child advocacy, information and advice and legal support, and which appear to be doing a good job in helping children and young people. However, in local authorities, there is a general lack of attention to parents' and children's rights. An important indicator is the declining use of statutory support plans in Scotland, which is extremely worrying.

The little table entitled figure 1 in my submission makes clear that many of the new rights depend on having a statutory support plan. Saying that you are extending children's rights while winding down the plan that guarantees those rights is nonsensical.

More and more children—up to 35 per cent in some local authorities in Scotland—are being identified as having additional support needs but the proportion of children with a CSP is less than 0.3 per cent of the total school population.

Unless parents and children have the statutory support plan, they have no means of challenging local authority provision or of making use of the tribunal, in many cases. There are other routes, but for children, in particular, the CSP is extremely important, because they obviously cannot make placing requests.

I think that parents and children are being misinformed by local authorities and schools. They are routinely being told that CSPs have no value and do not provide any access to services. A proliferation of fairly meaningless plans are being used instead and people are not being told that those plans have absolutely no legal status whatsoever.

It is a mistake that the Scottish Government has launched two legal and planning processes side by side. Schools think that all the focus is on getting it right for every child and the child's plan

associated with that but that is not an education document, it does not provide any rights and it cannot be challenged in law.

There is a great deal of confusion, and that is not working to support rights. For rights to be effective, they have to be simple, clear and geared towards the service user. This is not the case at the moment. That is the essence of what I want to say.

Nick Hobbs (Office of the Children and Young People's Commissioner Scotland): As the committee will be aware, the role of the children's commissioner's office is to promote and safeguard the human rights of children in Scotland. Our interest in ASN issues starts at that broadest level.

Since the foundation of the office, ASN has consistently been one of the most frequent subjects about which children, young people and families contact us through our advice function. Last year, it accounted for more than 10 per cent of our advice line calls and contacts, so we are interested in it at that broadest level.

More specifically, May Dunsmuir referred to the 2016 act. Our office expressed significant concerns about the human rights compliance of that legislation when it was going through Parliament. We retain all those concerns; if anything, having seen the guidance and the code of practice that are associated with the legislation, those concerns have magnified. I think that the act is in breach of at least three international human rights treaties, and we have significant concerns about that.

I echo Sheila Riddell's concerns about CSPs and about the practical ability of children and young people to exercise their rights and to access the tribunal. Last year, for the first time, we exercised our formal powers of investigation to look into restraint and seclusion in schools. We are interested in talking to the committee about the outcome, findings and recommendations of our report on that inquiry.

Iain Gray (East Lothian) (Lab): I have a question about CSPs that is largely based on the evidence that was provided by Professor Riddell. Your introductory remarks were very clear and, to a degree, answered quite a lot of what I was going to ask. However, I will press you a little on the detail.

The table in committee paper 1 says that 1 per cent of children who are identified as having an additional support need have a CSP. However, you used a figure of 0.3 per cent. Is that a more up-to-date figure?

Professor Sheila Riddell: It depends what you are talking about. I was talking about the

percentage of the total school population, which is 0.3 per cent; the other figure is to do with the percentage of children with additional support needs. Those are different numbers.

Iain Gray: Sure; I get it.

Professor Sheila Riddell: Of course, as the proportion of children with additional support needs goes up, the number looks bigger.

Iain Gray: Children who require additional support needs for more than a year are legally entitled to a CSP—is that right?

Professor Riddell: There is a very tight legal definition—I think that it is too tight—in Scotland. According to the law, the child has to be getting significant input from agencies other than education in order to have a CSP. That requirement was put into the Education (Additional Support for Learning) (Scotland) Act 2004. I think that we should be giving statutory support plans to children who have significant educational needs that require significant support in addition to that which is normally available in the classroom.

Local authorities have been saying that they cannot get input from social work and health. Children who need additional support are therefore not getting additional support and they do not qualify for a CSP. As services from other agencies have been taken out of school, children are being deemed not to qualify for a statutory support plan, so the numbers are going down.

We must remember that 2 per cent of children had a record of needs prior to 2004. The Scottish Government told us very clearly that it anticipated no decline in the proportion of children with a statutory support plan. Clearly, that is not what has happened.

Iain Gray: I am trying to understand why that has happened. All the panellists have identified the situation as a problem. If nothing else, it affects ability to access the tribunals, does it not?

You suggested in your introductory remarks that local authorities are telling parents that CSPs are of no value and that there are other more useful plans, but you made the point that those other plans have no statutory basis. However, you have just said that the real problem is that the non-educational support services are not available, so children do not qualify for CSPs. Which is it? What is causing the decline?

Professor Riddell: It is a misunderstanding in schools and local authorities. They think that you have got to be getting the service in order to get a CSP. That is not the case. You need to be needing the service. We are finding that if, for example, a CSP is open for a child at primary, when the child moves to secondary, local authorities are saying, “Well, we’re no longer

getting speech and language therapy, we’re no longer getting occupational therapy, we’re no longer getting support from social services and child and adolescent mental health services, so the child doesn’t need a CSP”, when in fact the child desperately needs a statutory support plan.

Iain Gray: You think that local authorities are misinterpreting the statutory entitlement.

Professor Riddell: In my view, yes, but I am not a lawyer. If you talk to people such as Ian Nisbet, who is an expert in this area, he would support my view.

There are serious problems here, which I think are due to the fact that, when the 2004 legislation was introduced, local authorities did not want to have statutory support plans at all. I have analysed the evidence that they gave at that point. Local authorities never liked allocating individual resources to children; they also disliked the fact that a statutory support plan has clear timeframes associated with it and necessitates regular reviews and parental and child involvement. Local authorities and schools consider that that is too much work, given their resource constraints.

A further problem is that, prior to 2004, records of needs were effectively administered by the educational psychology service, which was expert in doing that and had the clout to get multidisciplinary teams round the table. After 2004, the responsibility was passed to the schools, and teachers do not have the time, the expertise or the knowledge to do that.

We found that many additional support for learning staff in schools do not know what CSPs are. To put that in context, in a big Scottish secondary school of 1,200 children, no more than one child will have a CSP. The expertise in schools is simply not there. Personally, I think that it would be much better if educational psychologists fulfilled a much larger role.

10:15

May Dunsmuir: I will answer Mr Gray’s question from a different, simpler perspective. From the tribunal’s experience, it would appear that, quite simply, not enough people in education understand what a CSP is. They are unaware that, when the criteria are met, there is an obligation to provide a CSP. I speak to people from a wide range of education authorities, and the majority believe that they have a choice. We should remember that there are no common definitions across the education authorities; they all provide different types of plans.

I have looked at two recent cases in which the CSP request was refused—one on the basis that the child’s plan was adequate and the another on

the basis that a different type of local plan was meeting the child's needs. In both those cases, if the criteria for the CSP were met, the education authorities would have no choice but to provide a CSP. When I convey that point to an audience of educationalists, I see the colour of faces change from a nice rosy pink to a pale white. As president, I try to reinforce that point during visits to education authorities.

The issue is not just about the complexity of the criteria, but I agree with Sheila Riddell that the criteria are far too complex, and I like the suggestion in her written evidence of what the criteria ought to be. However, the simpler matter at play here is the absence of knowledge and the absence of understanding of the legal obligations.

Iain Gray: I want to clarify the numbers, because I am still a bit confused. Seeing the 1 per cent figure makes me, as a layperson, think that 99 per cent of children with ASN are denied their statutory right to a CSP. However, not all children meet the criteria, so that is not quite right, is it? What percentage of children are being denied their legal right to a CSP?

Professor Riddell: I would have thought that most children who are looked after or care experienced, for example, should have a CSP. Since 2009, there has been an obligation on local authorities to assess whether children in that particularly vulnerable group should have a statutory support plan. Those children all get support from education and social work, so they would qualify. Why are not all those children getting a CSP?

Iain Gray: What was the figure that you gave for the number of children who had a record of needs?

Professor Riddell: It was 2 per cent of the total pupil population.

Iain Gray: That figure is now 0.3 per cent.

Professor Riddell: Yes.

Iain Gray: That might be a useful comparison.

Professor Riddell: Yes. The fact that the number has been going down year on year is also important.

Ross Greer (West Scotland) (Green): I would like to go back to something that you said a moment ago, Professor Riddell. Let me know if this is not a fair characterisation of what you said. Would it be broadly correct to say that, at school level, there is a significant misunderstanding or lack of knowledge about CSPs, and that, at local authority level, there is often some level of understanding, but there is a significant reluctance to grant CSPs because, given that local authorities' resources are stretched, they do not

want to grant something that is so resource intensive?

Professor Riddell: That is true. When the responsibility was de facto passed over to schools, no assessment was done of whether teachers had the knowledge, experience, training and time to deal with CSPs. Therefore, I think that local authorities were fairly sure that CSPs would die a death, and that is exactly what has happened.

The Scottish Government needs to accept its responsibilities a lot more. After all, it is the state that has responsibility for ensuring the rights of parents and children. Passing the responsibility down to local authorities, and then local authorities passing it down to schools, is not good enough.

Ross Greer: I would be interested to hear about the experiences of children and young people who have a CSP. Do you find that, where CSPs are in place, the commitments that are made in them are consistently being lived up to, particularly where multiple departments in a local authority are involved? We are all familiar with the challenges that many children and their families face in getting a CSP in the first place, but what about the 1 per cent who get a CSP? Once they get the CSP, are the commitments being met?

May Dunsmuir: I can comment on that from a tribunal perspective. Obviously, the applications in connection with CSPs that are being brought to the tribunal involve CSPs that are not considered to be being met or delivered in the fashion that you described. I refer in my written evidence to the *City of Edinburgh Council v R*, which would perhaps be a good case for the committee to look at. It is very well set out and it explains why the failure to provide an adequate CSP in that case amounted to discrimination.

Unusually, the case initially came to the tribunal as a reference on the basis that the terms of the CSP were inadequate. It then came as a claim, simply because the appellant—the parent—felt that the reference route was not productive enough. The inner house of the Court of Session upheld the appeal on the basis of the inadequacy of the CSP. In essence, the CSP simply said in a couple of sentences, "The child shall receive support from various people at various times." It did not set out what ought to be provided, when, how or by whom.

The point was made earlier that CSPs are resource intensive, but I think that that is a bit of a fallacy. I do not think that the CSP is intended to be or even needs to be resource intensive. I agree that the test to get a CSP is far too complex, but when one is in place, it ought to set out what is best practice in any event—in other words, specification and clarity, timing and review, which really ought to be in place for any of the

educational objectives that require to be met for any child with additional support needs. There are a host of misconceptions surrounding CSPs. I absolutely agree that that is a probable reason for education authorities perhaps feeling less inclined to use them, but it is a misconception.

In connection with Sheila Riddell's point about the looked-after population, I note that, in 2013 and then in 2015, Govan Law Centre made freedom of information requests to all 32 local authorities, asking them how many members of their looked-after populations had CSPs. The replies clarified that many local authorities did not know how many members of their pupil population were looked after, that some had not been assessed and that many did not have CSPs.

At the tribunal, we see CSPs that are not working well because they lack specification, they are not being reviewed regularly enough or they fail to set out clear ways in which the educational objectives are to be met.

Nick Hobbs: Our position is similar to that of May Dunsmuir, in that the nature of our office and the way in which we engage with children and families means that people tend not to phone us to tell us how wonderfully well things are going and how happy they are with the support that is being provided. However, of all the ASN-related cases that I have come across in the slightly more than 18 months for which I have been with the commissioner's office, I cannot think of one in which a CSP has been in place. In most cases, the parent has not even been aware of what a CSP is.

I defer to Sheila Riddell's evidence but, anecdotally, we are definitely conscious of that absence of CSPs. As my fellow panellists have said, that is particularly significant because the importance of the CSP is that it comes with a set of legal rights. It is not the same as a child's plan under GIRFEC or a local authority alternative plan. There is a reason why the CSP has statutory force, and it is because it comes with legal rights that can be enforced.

Ross Greer: Forgive me if I have misunderstood the point, Professor Riddell, but your submission mentions the English equivalent of the CSP and the fact that—although it is not comparable on a like for like basis—the proportion of children in England who have that equivalent has gone up. Has your research looked into why that is happening in England?

Over the past couple of years in Scotland, there has been a bit of lauding ourselves about the fact that we have broadened the definition of additional needs, meaning that, in theory, more children should be getting more support. However, that has not happened. In England, where a considerably

narrower definition has been kept, the proportion of children who get that kind of intensive plan has gone up. Why is that the case?

Professor Riddell: There is a different educational culture in England. Again, I am talking in generalisations, and we must be careful not to make gross generalisations. However, there is a much stronger parental lobby in England and probably a greater awareness of parents' rights. When we look at England, we find big differences by English region. It is probably the case that education, health and care plan usage is highest, and that local authorities are more responsive, where parents have the greatest awareness of their rights. Relative to the population, there is also much greater use of the tribunal in England; per head of population, 10 times as many cases go to the tribunal in England as go to the tribunal in Scotland.

Ross Greer: Parental and children's rights have been brought up on a number of occasions. From my casework experience with constituents who come to my office for help, I have found that, very often, it starts off with the family not knowing their rights. However, even once they do, that does not result in much progress being made.

There seems to be a fair argument that a substantial number of people do not know their rights and would benefit from knowing them, but also that the benefits are not nearly as significant as they should be, because once people find out what their rights are, they still do not get the services that their children are entitled to.

Do the witnesses find that, even once families are informed of their rights, it is not the breakthrough moment that it should be? I would be particularly interested in Ms Dunsmuir's tribunal experience in that respect.

May Dunsmuir: I cannot say that that is the case from the tribunal's perspective. My experience is that very few people know about the existence of the tribunal. When I have informed parent groups in particular of their right to access the tribunal, they are quite surprised that that right even exists.

You should bear it in mind that, by the time that a case comes to the tribunal, the parent, the school and all those involved will have reached a point of exhaustion. There is a very long journey before a matter comes to the tribunal. I have been asked whether cases ought to come before the tribunal more quickly, but I cannot really answer whether that would be a better and more effective remedial route, because we do not see that in practice. We see the long journey and then the tribunal.

We have received four child applications this year—two claims and two references—and I have

to say that children are exercising their right to come to the tribunal far more quickly than parents. However, that is a very limited number and it is difficult to read much into it. This is also the first year since the right to make references was extended to children. Nonetheless, it is an interesting point. Given that the tribunal is, at present, a low volume jurisdiction, it would be difficult for me to analyse that and to conclude what you suggest. Anecdotally, it is my experience that, where parents are informed of their rights to access the tribunal, they are very interested in engaging those rights.

Ross Greer: I have a brief follow-up question on that. I accept that it is a very small number and therefore hard to generalise or draw a trend from it. However, is there a particular pattern to the background of those children and families? Are they generally middle-class families with a lot of social capital?

May Dunsmuir: No—not in respect of the children who have made their own references and claims. Thus far, three children are themselves parties and have raised their own applications. One has come back again, having been unsatisfied with the education authority's response to their application, which was made towards the end of last year; they have come back very promptly under another heading. The other two children have come in with references. They are not generally middle class, so that small number of children are breaking the mould in a number of different ways.

All four of the applications raised by the three children have come through the new my rights, my say children's service. It seems to me that that service, even though it is in its infancy, is having a very positive effect in having matters brought to the tribunal far more quickly than happens with parents.

10:30

Professor Riddell: Our analysis of the Scottish Government statistics suggests that children are much more likely to have ASN identified—especially if they have social, emotional and behavioural difficulties, which is the biggest single category—if they live in one of the poorer parts of Scotland. Inversely, children are much more likely to have a CSP if they live in the more advantaged parts of Scotland. Local authorities generally say that they will provide a CSP if parents really push for it, but they will do so reluctantly, with the result that the CSP might be written defensively so that it says as little as possible about resources. After that, the parent will have to struggle to get it reviewed to stop it lapsing.

The Convener: You have mentioned variation across the 32 local authorities. Are there areas where there are more CSPs in place as a percentage of the population of schoolchildren?

Professor Riddell: The proportion is extremely low across all local authorities. The figure varies from 0.1 per cent to 0.5 per cent—it falls within that very narrow range. There is much wider variation in the proportion of children who have been identified as having ASN of some sort.

Jenny Gilruth (Mid Fife and Glenrothes) (SNP): I want to pick up on the point about variation, but in relation to classification, which is dealt with on page 9 of Professor Riddell's submission. I was quite taken with the multitude of differing approaches. I am sure that, if we walked into any school in the city of Edinburgh and asked for an example of a support plan, we would find that something would exist, even though there might be different approaches. In a school that I taught in previously, we used individualised educational programmes. We also had confidential information booklets. The fact that there is no CSP does not mean that support is not in place for the child.

The difference relates to the legal obligation on the local authority. Is the issue to do with risk-averse local authorities? Is that the source of the tension? Perhaps schools do not understand the difference. Councils might be concerned about where this might lead.

Professor Riddell: I am sure that that is an element in the whole thing. I completely take your point about the proliferation of plans; May Dunsmuir has already made that point. This is an example of where the system is not working with the service user in mind. A family that moves to a different part of Scotland will suddenly find that any plan that it has is invalid in the new authority area. I presume that the assessment process would have to start again from scratch. The system is designed with practitioners, not parents and children, in mind. It should be the other way round.

Jenny Gilruth: That is helpful.

Oliver Mundell (Dumfriesshire) (Con): Perhaps we can go back a step. For a child to access a co-ordinated support plan, their additional needs must have been identified in the first place. I would like to hear your thoughts on that. I know from experience that my local authority is very unkeen to diagnose specific learning difficulties and will say that it is not necessary to have a diagnosis or an assessment by an educational psychologist. Often, teachers will be asked to identify children with quite specialist needs from within the mainstream

classroom. Is that something that you have come across?

Professor Riddell: The local authority has a legal responsibility to carry out statutory assessments, but most local authorities in Scotland have passed that responsibility down to the schools: in other words, teachers have been given the responsibility. Of course, assessment by teachers is very important—nobody will deny that—but for more specialist things, it is sometimes necessary for an assessment to be done by an educational psychologist or a medical practitioner, such as an expert in mental health difficulties. By delegating the responsibility entirely to schools, local authorities are getting out of their legal responsibilities.

A new right that children have is the right to request a particular assessment under the 2016 legislation, but nobody has the foggiest idea how a child would do that. If a child were to approach a school, the school would not know what to do, and if the child approached the local authority, it would have trouble finding the right person, so it would probably then pass the request back to the school.

We want to incorporate the United Nations Convention on the Rights of the Child into domestic Scottish legislation, but we have to be much more proactive in doing that. Rights on paper are meaningless unless they are really easy for people to use.

Oliver Mundell: In relation to CSPs, you said that local authorities have misinterpreted the statutory entitlement. Do you think that there is misinterpretation in the case that I mentioned, or is it a deliberate choice to pass the buck?

Professor Riddell: I want to be very careful, because we have to remember that local authorities are, of course, working with constrained resources. However, if they were to think about what would really be in the best interests of children, they would not simply pass requests back to schools every time, irrespective of whether there is expertise in the schools.

For some children, it is almost as if their time in school is passed waiting for the right assessment that would lead to the right resources being released. For example, a child of 14 whom I recently encountered had spent a vast amount of time out of school ostensibly getting flexi-education, but was sitting at home watching telly with his mum, while waiting for an attention deficit hyperactivity disorder assessment. The school thought that an assessment was needed, but it felt that child and adolescent mental health services had to be involved in order to do that. Therefore, the child would not get an assessment until he was going to leave school, which is completely

nonsensical. We cannot do anything about helping that child at that point.

Oliver Mundell: I have certainly seen such cases. I am aware in my constituency of at least two or three cases of young people waiting three to five years for a communication disorders assessment team assessment in relation to difficulties through suspected autism. They are simply told that there is no one to do the assessment. The schools say that there is nothing they can do if the national health service and the local authority cannot provide the assessments. Therefore, kids simply do not get an education. What should parents do in those circumstances? If they cannot access a CSP, is the suggestion that they access the tribunal?

May Dunsmuir: Parents can make a reference to the tribunal, as the child can in connection with a CSP, if they fit the criteria.

There are a number of tensions. The Education (Additional Support for Learning) (Scotland) Act 2004 deliberately does not define what the term “additional support needs” means. That is a very positive thing, because it stops us labelling, categorising and narrowing things down, when they might need to be broadened out from time to time. Section 2 of the 2004 act contains the provision on the CSP, and it does not say that a person must have a diagnosis, but that there are certain criteria that must be met for the child to be eligible for a CSP. There is also the Scottish Government’s classification of additional support needs, which is broken down into 23 categories.

I always emphasise that the primary legislation does not define—it is not diagnostic legislation. However, my experience in practice is that teachers generally wait for a diagnosis and a name to be given before resources will be attached. That is partly down to deciding which finite resource would best be used in difficult circumstances. My concern is that that usually involves very vulnerable children and that their rights are being overshadowed by resource-driven decisions rather than needs-led decisions being made.

Oliver Mundell: Who should take responsibility for that? Again, we are back to local authorities saying that they do not get enough money from the Government, and the Government saying that it gives money to local authorities. Meanwhile, children are sitting at home unable to access their legal right to an education. Who takes responsibility for that in the system?

May Dunsmuir: The beauty of being a tribunal member is that we are not resource led; we look at the particular needs of the particular child at the particular time. If the tribunal forms the view that an education authority has failed in its statutory

obligation, the tribunal will make an order accordingly, and the duty will be on the education authority to do what the tribunal says, or it can appeal against the tribunal.

A low volume of appeals have been raised against the tribunal. Last year, we transferred to the First-tier Tribunal for Scotland and there is a new easier appeals system, and since then no education authority has taken up an appeal against the tribunal—although in its earlier years there was a flurry of appeals by some of the more litigious education authorities for clarification of the law. In a sense, the tribunal provides the definitive answer in complex circumstances. If the Scottish tribunal was working at the rate that its English counterpart was working at, perhaps we would see fewer problems of stagnation, if I can put it that way.

The tribunal is not obliged to consider resources, apart from in relation to one of the defences in placing-request references. However, with CSPs, if the criteria are met, it is quite simple and the law is clear—there is no dubiety—that the education authority is failing if it fails to provide a child with a CSP. The law does not say that, where the criteria are met, an education authority “may” provide a CSP; it is clear that there is an obligation. I suspect that, in all 32 education authorities, there will be a number of children who do not have CSPs simply because the education authority has failed to appreciate that it does not have a choice—that it has an obligation.

Nick Hobbs: That certainly reflects the experience that we have had in dealing with cases. A number of people—usually parents—have phoned us because they have been told that an assessment for autism will take 12 months to put in place, and that nothing can happen until that assessment has been done. Our advice is about the legal right to challenge that and to go to what used to be called the Additional Support Needs Tribunals for Scotland.

That raises issues about the resilience and capacity of families and children in challenging decision making and accessing legal processes. The tribunal and the Scottish Government have done a great deal of good work, which May Dunsmuir referred to, to try to make the processes more accessible to children. I hope that we are seeing the fruits of that in the direct engagement by children in the tribunal process. However, we still have legislative barriers in respect of capacity and wellbeing tests, which are particularly significant for looked-after children, who might not have a parent or someone who is able to push at the door, challenge decisions and get to the stage at which they can have independent determination of their rights and what they are legally entitled to.

Johann Lamont (Glasgow) (Lab): I am interested in the presumption in favour of mainstreaming, which has to be underpinned by effective additional support in order to level the playing field so that young people can access mainstream education. When you talk about young people exercising their legal rights in relation to CSPs, that refers to a small group of young people. We have been struck by the anecdotal evidence that we have had from families who have fought this battle. The first theme that comes out of the evidence is about that battle. The second is that, even when young people are identified as having additional support needs, there is sometimes a shifting of resources rather than an increase in them. There is a broader issue about those who do not qualify to go into the legal process, which is what I want to ask about.

Many of the submissions from various groups, including those that support young people with autism, talk about part-time timetables. Do you have any sense of what that means in practice? At what point do those flexible part-time timetables simply become not mainstream education at all? For example, somebody might get an hour a day, but their mum or dad will have to come and sit with them at lunch time, or somebody might spend half their time in school sitting outside the headteacher’s office. Is any work being done to try to use that anecdotal evidence to understand at what point the mainstreaming policy is simply being broken?

10:45

May Dunsmuir: The vast majority of all placing requests that are made to the tribunal involve a move from a mainstream environment to a special school. That speaks for itself. Of the 64 cases so far this year, only one involved a request for a child to be placed in a mainstream school. The remainder of placing requests are all requests for a child to be placed in a special school. In the majority of those cases, the parent has formed the view that mainstream provision is not adequately meeting their child’s needs. Occasionally, the way in which those needs are not being met involves situations such as those that you have just described. Usually, they involve a concern that the number of hours that the child is able to attend the mainstream school is not adequate and that the support that is available to the child in the mainstream environment is either not consistent or not adequate.

In the cases that come to the tribunal, the presumption of mainstreaming is felt to not lead to inclusion at all. In fact, the way in which mainstream schools provide the level of support that is required can often lead to children feeling isolated rather than included. The cases that come

to the tribunal suggest that the presumption is not working as well as it was intended to.

Johann Lamont: Is that because children are placed in mainstream education inappropriately in the first place, or it because, having been placed there, they do not have the support that would make that placement meaningful? The reason why somebody is in school for only one hour a day might not be because they cannot cope with being there for longer but because the system and the institution cannot cope with that, because the supports are not there. Those are two quite different things.

Why are we not delivering on our presumption of mainstreaming? Is it because we are inappropriately placing young people in mainstream settings without having specialist places for them to go, or is it because, even though we accept the presumption of mainstreaming, we are not putting in resources to make that meaningful?

May Dunsmuir: When you create such a presumption, there is a risk that, because of it, you move all resources to that end and form the view that specialist resources are no longer required. Based on my experience on the tribunal over a number of years, my view is that there will always be a need and a place for special schools. That is borne out by the volume and type of placing requests that come to the tribunal.

The two situations that you describe broadly fit with the two types of cases that come to the tribunal. One situation is where a child is placed in a mainstream school environment with the support of the parents and with everyone buying into that but, in practice, it turns out that the child's needs are not being met, in the parents' view. The other situation is when a child has been placed in a mainstream environment and, perhaps during the transition from primary to secondary school, the school has, in the parents' view, an insufficient level of resource in place to meet the child's needs.

I have a strong view, which is consistently borne out by the evidence that I see before the tribunal, that we are continuing to try to make children fit the systems that we have created for them rather than make the systems fit the child, which really ought to be at the core of getting it right for every child. Despite the progress that we have made in many areas, we are still failing in that respect. As long as we try to make the child fit the systems rather than the systems fit the child, we will continue to see problems of that nature.

Johann Lamont: Has there been research on the issue of mainstreaming not really meaning that somebody is mainstreamed?

Professor Riddell: Unofficial exclusion is, obviously, a difficult area to research, because it goes on under the radar, as it is unlawful. A school is not allowed to send a child home in those situations or say to parents that their child can come to school only if the parents will be around at break and lunch times—that has a devastating effect on parents' ability to work.

There have been some freedom of information requests on what is called flexi-education, which seems to be growing in Scotland. Parents are told, "Please keep your child at home for three quarters of the week and we will call it home education." The local authority passes responsibility to the parents for that proportion of the week. Clearly, there is absolutely no evidence of what is happening for those children. It is worrying—we just do not know, as there has not been any research.

My view on the special or mainstream education debate is that we certainly need special schools. There has not been a huge change in Scotland. The data shows that about 1 per cent of children have been in some sort of special setting for the past 50 years, so there has not been a mass dumping of children from special schools into mainstream education. There is sometimes a misapprehension about that. The issue is the capacity of mainstream schools to support children. As we have a reduction in additional support needs expertise in schools and in the number of classroom assistants, we will have more and more difficulties.

We must also acknowledge that some really good work is happening in Scotland. For example, most secondary schools now have special units attached to them called, for example, departments of additional support. When those are running well, children can move between mainstream and special education in a way that works well for them and for the other children in the class, who also have to be considered. When it does not work well, the child spends all their time in the special unit and could spend more time in the mainstream class. We need to learn from best practice and the local authorities that are doing a good job.

There is a tendency to say, "If we got rid of all these troublesome children and put them in special schools, all would be well," but we must remember that some of the problems have been to do with what happens in special schools. You will remember that, before Christmas, there was a lot of concern about what was happening in a special school in Edinburgh for children with autistic spectrum disorder. The teachers were saying, "We can't teach these children," and the local authority said, "We're sorry, but it's in your contract to teach them."

Many exclusions of children with additional support needs are from special schools, not mainstream schools. It is not simply a matter of thinking that, if we get rid of these troublesome children by putting them in special schools, all our problems will be over—that is absolutely not the case. We need the special and mainstream systems to work together and we need the mainstream system to be properly resourced.

Johann Lamont: That is not what people who have experience of the system have said in the evidence that we have received; rather, they feel that young people have been let down because, in theory, it looks as though they are being supported in mainstream education but the reality is different, with informal exclusions and very flexible timetables—far more flexible than I imagined could still be defined as mainstream. The enforcement of a legal right is one thing, but is the children's commissioner looking at the broader issue of the general policy not being real on the ground?

Nick Hobbs: That has certainly come up, again through contact with children and families through our advice service. Those are exactly the concerns that have been expressed. We touch on it in our investigation report "No Safe Place: Restraint and Seclusion in Scotland's Schools", in which we raise concerns about the use of seclusion not just in terms of the fairly obvious human rights breaches that come from locking a child in a room but in terms of its use as a form of behaviour management and a form of exclusion without having to go through the legal process that should be gone through when a decision is taken to exclude a child.

We are not specifically looking at that issue in following up on the report, but it is part of the report, as there is a connection with the concerns about how seclusion is perhaps being used to unlawfully exclude children from education and deny them their rights to education.

Johann Lamont: I have one last point about the research. It feels as though rationing is going on in relation to the use of CSPs, although Jenny Gilruth is correct in saying that there are other plans. That situation is not new. We have talked about records of needs. I recall in my teaching career an educational psychologist saying to a family, "I would put that into the record of needs, but you won't be able to access it, so I'm not going to put it in." Is it possible to expose that rationing mentality, so that we can address the problem? From that educational psychologist's point of view, she was simply being honest with the family—she was not willing to include something that was unrealistic. Is it part of the problem that there is suppressed demand because people have to deal with the real world? The tribunal does not have an issue with resources; accessing a tribunal is a right.

However, people have to enforce those rights by finding the resources.

May Dunsmuir: The tribunal is not always the most popular of institutions when it comes to some of the decisions and the implications that those place on education authorities. I deal with that view regularly, and I have to remind education authorities that we are a judicial institution that makes legally binding decisions.

When it comes to how to overcome what is happening in practice, we have available a useful and well set out code of practice that gives a range of examples and a great deal of information for educational authorities to follow. However, my experience in the tribunal is that when, for example, a headteacher is asked to comment on why they are not complying with a section in the statutory code of practice under the 2004 act, they will be unaware that the code exists.

I am sure that the committee, like the tribunal, hears all the time that people are trying to juggle far more plates with fewer resources. However, ultimately, with those finite resources, we still have to begin to address the problems that exist. There has to be a process of informative learning, which begins when people are learning to be teachers and which is on-going, because the model of learning must not stop once someone becomes a teacher. We have to respect and understand that ASN is a singularly complex educational environment and that teachers have to keep topping up their learning. We also have to monitor its effectiveness, and the Scottish Government has a role in monitoring educational authorities' effective application of the legislation.

We have to go back to the very roots and see it all the way through. We should not have teachers who have been teaching for decades and who are no doubt doing an exceptional job but who are perhaps unaware of the shifts in the legislative obligations and the codes of practice on how those obligations are delivered.

Johann Lamont: With the old support-for-learning teachers—that approach may be a bit old now, but I remember when it was quite new—those teachers went off and trained for a year and were able to support their colleagues with strategies and so on when they came back. They had accountability and responsibility. Perhaps one problem is that that responsibility is now spread out and individual teachers do not have the expertise or support to deal with the issue in the way that they might have done before.

May Dunsmuir: We should also recognise the value of the classroom assistant. The classroom assistant, or the support assistant depending on what you call them—again, we do not have a common vocabulary, which I would love to have

across our 32 local authorities—will often be the one who provides one-to-one support to a child with additional support needs in a mainstream school. They hold a great body of practical knowledge about the child's needs, but they may be unaware of some of the statutory obligations that coexist along with delivering education to the child. In an education environment, much greater education about the statutory obligations is needed.

Liz Smith (Mid Scotland and Fife) (Con): You will know that, in the debate that we had four weeks ago, the Parliament voted unanimously to retain the presumption to mainstream. We also took on board a lot of the comments coming from teachers and parents, who consider that a growing number of youngsters are not coping terribly well with mainstreaming. I very much welcome the cabinet secretary saying that he will review some of the guidance in this area. Do you believe that there are recommendations that you could make to the cabinet secretary about what he could do to improve the guidance? We have a list of three principles whereby mainstream education should not be used automatically rather than a special school. Do you believe that we should extend or amend those principles? Are there suggestions that you can make?

11:00

Professor Riddell: That is quite a difficult question. At the moment, there are three caveats that surround the presumption of mainstreaming: it should not involve unreasonable public expenditure; it should be in line with the parents' wishes; and it should not be against the interests of the individual child or the interests of the other children in the class. I think that those principles should be perfectly sufficient to ensure that children are not inappropriately placed in mainstream education.

Many rural local authorities in Scotland now have no special schools, so they tend to be dependent on neighbouring authorities. For example, East Lothian Council and Scottish Borders Council will be dependent on City of Edinburgh Council. However, many of those authorities have special units attached to mainstream schools. A lot of the problem is to do with how things are being managed in the mainstream system, so I am not sure that major changes are needed. I think that the caveats that already exist should be sufficient.

Liz Smith: That is an interesting point, because there are genuine concerns among the teaching profession, particularly in the primary sector. It appears that there are a growing number of youngsters about whom teachers are concerned, because they feel that mainstream schooling is

perhaps not in their best interests nor in the best interests of other children in the class, who might be affected by their presence. That determines that we must decide how to address the issue.

I ask this question because, in the evidence that we were given, we were told that there are at least three special schools in Scotland that are under capacity—one of them is at only 63 per cent of capacity, with the others being at 70 per cent and just over 50 per cent of capacity. If the three principles are correct, do you believe that the interpretation of them by the teaching profession and local authorities needs to be looked at? How do we get round the dilemma that we have whereby, in theory, people like the presumption in favour of mainstreaming but, in practice, it is posing problems? I do not think that we yet know what to do about that.

May Dunsmuir: I have already fed into the guidance the tribunal's comments on how some of the phraseology is set out and some of the interpretation. I think that the guidance will be a crucial tool, and it is really important that it is as clear as it can be. You must remember that, although we have the statutory presumption and the three principles, every education authority devises its own policies on its schooling and education. We need to be very thoughtful and examine the extent to which the education authority's policies sit comfortably alongside that presumption.

I will give you an example. A case was brought to the tribunal that challenged a particular education authority's policy because the way in which it had phased its policy was considered to amount to discrimination against a child with a particular disability, as it had placed an overemphasis on the presumption. The policy was attacked on the basis that it was so heavily in favour of the presumption that there was very little scope for the individual assessment of children with additional support needs.

The guidance must be very clear, and we need to use what we have learned from tribunal decisions in that respect, because the tribunal can provide clarity on matters of interpretation and the judgments of the higher courts. However, as in all things, we need to make sure not just that the education authorities are applying the guidance at a strategic level if I can call it that—a senior management level—but that those who work in schools, from the headteacher to teachers and classroom assistants, understand the scope of the guidance, too. The only way to do that is to monitor statistically the extent to which the figures support the intention of the presumption.

Liz Smith: Professor Riddell said that there needs to be much better co-operation between mainstream schools and special schools, some of

which are in the independent sector. What needs to happen to ensure that there is better co-operation?

Professor Riddell: I was referring specifically to special units that are attached to secondary schools. I strongly believe that it is important that we educate our children together as much as possible, because the impulse to segregate is generally not a good one.

As May Dunsmuir said, we need to look at the needs of individual children and, of course, at the needs of other children in the class—we cannot forget that. We need much more flexibility so that some children can move between mainstream and special schools. It is generally much better if a child—if at all possible—goes to the same place as their neighbours and other children, because children need to grow up together in the same communities.

If we take children out of their communities, we will create another set of problems. That approach can be right for some children; residential special schools can work really well for a very small number of children. However, that will not be a realistic answer for the majority of children. Quite apart from anything else, that would be far too expensive, and we cannot pretend that resources have absolutely nothing to do with the issue. It can cost as much as £100,000 for a child to be in a residential special school for 52 weeks of the year. We should spend that money on the very small number of children for whom such a school is the right place for them to be. However, for most children, there will need to be a sensible arrangement between mainstream and special schools.

It is interesting that primary schools are saying that they have the biggest problem. Intuitively, the expectation has always been that the problem will be more difficult at secondary school, because children need to move class, have different teachers, take difficult subjects and so on. Scottish primary schools have generally been positive and inclusive environments but, if a lot of problems are arising in primary schools, that suggests that we are not doing enough to assess and meet the needs of the children who come into those schools.

We cannot blame the children or the parents for being inadequate; schools need to provide the services that children need. We cannot take a punitive approach and think that we need to punish children and their families. We need to devise systems that work for everybody.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Could Mr Hobbs expand on the issue of restraint and seclusion? What redress do parents

and carers have if they are concerned about those matters in relation to their child?

Nick Hobbs: We focused the report on the availability of policies and guidance and on the recording and monitoring of information and statistics, because parents consistently said to us that, when they raised such concerns, they struggled to achieve what they would recognise as justice. One reason for that is that there is a lot of inconsistency at local authority level in relation to the guidance on definitions, the use of language and the legal tests and thresholds that are being applied. There are human rights issues, which means—as has been mentioned—that it is squarely the responsibility of the Scottish Government to ensure that an appropriate system is in place.

Having a robust and consistent set of guidance and policies at a national level would mean that there would be a framework that would provide predictability, clarity and certainty for local authorities and teachers. They would be able to know what good practice looks like, how they are expected to behave and the limitations and constraints in relation to their practice. That would also provide a clear framework for accountability for parents and children who are concerned that the level of practice might have slipped below what would be considered acceptable. People could then make use of the complaints mechanisms.

For example, they could refer the matter to the Scottish Public Services Ombudsman, or they could go through the General Teaching Council for Scotland if they were concerned about the conduct of a particular teacher. In extreme cases, they could go to court and seek judicial review. A number of different routes are available, but their effectiveness depends significantly on having in place a robust policy and legal framework that enables people to understand what standards we expect to be applied in our schools.

Rona Mackay: What is your sense of what has happened since the publication of the report? Is it still happening? Is it still an issue?

Nick Hobbs: I think that it is still an issue. We produced our report in December, so it is too early to say that we have magically fixed the problems. Responses have been coming in from local authorities and the Scottish Government, and we are in the process of analysing those responses. We have had some extremely positive and constructive discussions with the Convention of Scottish Local Authorities, the Association of Directors of Education in Scotland and the Society of Local Authority Chief Executives and Senior Managers on the recommendations and local authority responses to them. We will publish the local authority responses and our analysis of those

in due course. There is quite a bit of work to do on collating the responses to individual recommendations, making a determination and providing some analysis on what we consider needs to happen next.

We have had some useful discussions with Scottish Government officials. We have also had an initial response from the cabinet secretary, and we look forward to receiving a further response towards the end of April or in May, when the Scottish Government will have concluded some work that it is undertaking with COSLA and local authorities. We will publish the cabinet secretary's response, along with our response, in the next couple of weeks. The discussion with officials was useful in the sense that it allowed us to discuss some of the recommendations and to explain clearly why we were locating this at a Scottish Government level—in other words, why the work that we think needs to be done needs to be done nationally instead of being left to individual local authorities. That picks up on a number of the points that have been made, such as the idea that we are talking about human rights issues and legal obligations on the state. It is the responsibility of the Scottish Government to make sure that there is a robust policy and legal framework in place so that it is meeting its obligations to respect, protect and fulfil children's human rights.

In the next few weeks, you can expect to see a lot of information on the responses coming out of our office, along with our analysis of them and what we think needs to happen next.

Rona Mackay: Thank you. That was helpful.

Dr Alasdair Allan (Na h-Eileanan an Iar) (SNP): I am interested in taking a step back and looking at the identification of young people with additional support needs. The committee has a table—it was not supplied by you—showing the percentage of children who were identified as having additional support needs in 2017. I venture to suggest that I am not the only member of the committee who is confused by it.

I am sure that you will have views on the matter. Can you shed any light on why the results vary so much across the country? In Aberdeenshire, 41 per cent of primary school pupils were identified as having additional support needs. A few miles down the coast, in a similar local authority—Angus Council—the figure was 10 per cent. In secondary, 16 or 17 per cent of pupils in North Lanarkshire, which is by no means an outlier authority, were identified as having ASN, whereas in other local authorities, such as Highland Council, the figure was 40 per cent. Those are massive variations. I understand that local authorities might have reasons for collating information differently, but can you offer any insight into why the figures vary so wildly?

Professor Riddell: You must understand how the data are gathered. They are drawn from the school census, which is filled in at school level every year. Somebody in the school—it might be the deputy headteacher or the principal learning support teacher—will be asked to tick boxes to indicate which children have some sort of additional support need. It looks as though there has been a huge expansion in the number of children in Scotland with ASN and widening variation across local authorities, but that is because there are different accounting practices in schools.

It is largely to do with the fact that, in some schools, if a child breaks an arm, that is counted as an additional support need, whereas in other schools it would not be. There are more and more types of plan—looked-after children are counted automatically, as are children on the child protection register—and different plans are being counted in different schools and local authorities. It is largely to do with who fills in the census and what gets counted. It does not mean that far more additional support is being given to children in some local authorities. There is no connection at all between how many children are being counted as having additional support needs and who is getting additional support.

11:15

Dr Allan: You mentioned that different schools will take different approaches, but surely different approaches must be being taken in local authorities, which would account for some of the significant variations; otherwise, the wisdom of crowds or whatever it is would even things out. Do different local authorities take a different attitude, rather than just schools?

Professor Riddell: It is certainly not just schools. Each local authority gives the schools in its area guidance on how to fill out the census, so the census is an artefact of what different local authorities believe should be counted as an additional support need. As May Dunsmuir has said, there is no legal definition; it is incredibly vague. In some local authorities, almost 50 per cent of children are being counted as having additional support needs. Once you get to that point, the category becomes meaningless.

In some schools, that will mean that every single child has an additional support need. What support are they getting in addition to what would normally be available? We need to look much more at what should be normally available in schools. We should count fewer children as having additional support needs and then ensure that those who are counted are actually getting some additional support.

Dr Allan: I keep coming back to the variation, although I understand and appreciate your points about some of the reasoning behind that. You mentioned the vagueness of the definition. Does the variation have an impact on children's experience, or is it purely an accounting exercise that differs from place to place?

Professor Riddell: It is partly an accounting exercise. The Scottish Government thought that it was a positive step to have an expansive, umbrella definition of additional support needs. For example, children who do not have English as their first language are counted as having an additional support need. They have no learning difficulties; they are simply learning English, generally very quickly.

It is much better to have a narrower, more precise definition and then ensure that support follows the identification. That is not what happens at the moment. In fact, I would not want to count children who do not have English as their first language as having an additional support need. I think that it has been strongly recommended by rapporteurs from the UN Committee on the Rights of the Child that we should not count children who are learning the English language as part of the additional support needs or special educational needs group. I would leave out those children for a start.

Dr Allan: It is interesting that you say that, because "English as an additional language" is one of the largest categories of need. I will leave my questions there. That was very helpful. Thank you.

Gordon MacDonald (Edinburgh Pentlands) (SNP): Professor Riddell has highlighted in her submission that the number of ASN pupils has risen from about 118,000 to about 199,000. As Alasdair Allan identified, 80 per cent of the increase is covered by three categories. There are 25,000 additional pupils with "social, emotional and behavioural difficulty", or a 270 per cent increase; 24,000 additional pupils in the "English as an additional language" category, which is a 500 per cent increase; and 17,000 additional pupils—again, a 270 per cent increase—in the "other moderate learning difficulty" category. You identified that there is a problem with the definition of additional support needs. What should the definition look like? Should it be built into legislation?

Professor Riddell: That area needs to be looked at in its entirety, because many of the categories that are being used are pretty meaningless. The "social, emotional and behavioural difficulty" category is highly stigmatised. No parent lobbies for their child to be counted under it, because they feel that that would say, "bad child" or, "bad family". It is a punitive

category. It does not exist in England, where the category is instead "social, emotional and mental health difficulty", which focuses much more on the child's needs and difficulties, rather than being about the child behaving badly in school, which is dependent on teachers' subjective judgments. We would be better off going back to a narrower definition that would include much more careful identification. If we carry on expanding the definition, where will that take us?

Gordon MacDonald: You mentioned dependence on "teachers' subjective judgments". There is a wide variation among local authorities in respect of the percentage of pupils who are identified as having an ASN. Is there any evidence from individual local authorities that there is a wide variation among schools?

Professor Riddell: A breakdown by school has not been done, because the Scottish Government's aggregate data does not allow us to do that analysis. However, I suspect that there would be wide variation. When we analyse the data according to the Scottish index of multiple deprivation, we find that children who live in the most deprived areas of Scotland are much more likely to be identified as having additional support needs and, in particular, as having social, emotional and behavioural difficulties.

Jenny Gilruth: Professor Riddell spoke earlier about most Scottish secondary schools having a department for additional support needs, which is pretty well understood now. What has changed in the past decade is our approach to behaviour. When I first started teaching, my school had a department for behaviour support and another for additional support needs. One was about helping children, while the other was about discipline. That cultural change in our schools is partly responsible for some of the category increases, particularly the category "social, emotional and behavioural difficulty". I was quite struck by the increase in the number of pupils in that category—from 14,738 in 2010 to 39,642 in 2017.

I will try not to get too political, but we do not exist in a political vacuum. We had a change of Government between 2010 and 2017; I wonder whether any analysis has been done on the impact of austerity on additional support needs and other pupil needs.

Professor Riddell: We know that local authorities have tried to protect their additional support needs budgets so far, but many local authorities are signalling that they will find it harder to protect those budgets as cuts continue.

In the Scottish system, we count not just children's principal learning difficulty, but as many difficulties as children have. For example, if a child has learning disabilities and is deemed to have

social, emotional and behavioural difficulties, both of those difficulties are counted. It could be that we are simply not putting enough resources early on into managing children's behaviour in primary schools, helping all children to be included, having classroom assistants and learning support, and having skilled, qualified and trained teachers available to help children.

I am very unhappy about the SEBD category in general. It really does not help us.

Nick Hobbs: The distinction between discipline and behaviour is important. That came across strongly through the investigation. Far too frequently, we saw policies that identified and described children's behaviour as "problematic", "aggressive" or "violent". Responses were therefore about dealing with that, rather than about recognising such behaviour as a need that must be met.

One of the strong recommendations that we are making is that we ensure that we frame that appropriately at local authority level and that the Scottish Government makes it clear in national guidance that the way in which we respond to children's needs has to be based on recognition that behaviour is communication. What we are talking about is often an unmet need that the child is trying to express rather than problematic behaviour that has to be dealt with through discipline and punishment.

Jenny Gilruth: Culturally, in our schools we have moved away from that over the past decade, and approaches to teaching and learning are now very much focused on promoting positive behaviour in the classroom.

On the support and training that is available for teachers, Professor Riddell said in her submission that local authorities

"have failed to provide information and training sessions for practitioners, parents and children and young people."

What can the Government do to encourage local authorities to meet their obligations? Should that be done through a training programme? How could it be done at a national level?

Professor Riddell: Again, there is confusion about who has responsibility for training. The Scottish Government has ultimate responsibility for making sure that the staff in schools are trained and qualified.

The legislation on children's rights was passed in 2016, but our work in schools suggests that there has not been training at local authority level or in schools about the change: teachers and classroom assistants simply do not know about it and have no way of knowing about it. Headteachers have told us that they have been astonished to find out that they suddenly have new

responsibilities; they were totally unaware of the changes, because the local authority had not communicated the changes to them. It needs to be clear what the Scottish Government, local authorities and schools will do.

There is a big problem with training additional support needs staff. Johann Lamont will remember the halcyon days when people used to get a whole year's sabbatical to go and do a master's qualification. There has been a major decline in the qualifications of staff. In Scotland, regulations state that the only teachers who require a recognised additional qualification are those who teach children with visual and hearing impairments, and they often get that training only on the job rather than on recognised courses. The teachers who have done properly recognised courses and have the expertise are retiring now, so there is a massive gap in the system and a total lack of clarity about how teachers will magically get trained.

May Dunsmuir: Jenny Gilruth mentioned how we have moved on in respect of recognising behaviour and so on. We must remember that, as recently as the end of last year, teachers were refusing to teach children with additional support needs whose behaviour they felt was far too challenging.

In case the committee is not aware of it, I will mention last year's important judgment by the Upper Tribunal for Scotland, which arises from a Special Educational Needs and Disability Tribunal case, which is the equivalent tribunal in England. In a discrimination case, the Upper Tribunal made a distinction between behaviour arising out of a condition, and assaultive behaviour. That fits with the Children and Young People's Commissioner Scotland's report, which recognises that behaviour is communication.

From the tribunal's perspective, I am not entirely convinced that we have moved on as much as we like to think we have in that respect. At the First-tier Tribunal for Scotland, cases are about behaviour not necessarily having been seen as arising from the child's additional support needs, which leads to all manner of complications and gives rise to the matter coming to the tribunal.

Professor Riddell: I will add to that. The best special units that are attached to mainstream schools do not separate children with behavioural and learning difficulties. Their individual needs are recognised, and it is recognised that a learning difficulty is often associated with a behavioural difficulty.

Dr Allan: Jenny Gilruth talked about changes in the past few years resulting from austerity and other factors. We are—quite rightly—talking about the responsibilities of local government and the

Scottish Government to address problems, but there is also a question about where the causes lie. Many people would acknowledge that one cause is the pressure that families have found themselves under because of changes to the benefits system. In terms of the numbers on social, emotional and behavioural difficulties, is there any evidence that those pressures on families result in the significant changes?

Professor Riddell: We know that children from the poorest families and children who live in the poorest neighbourhoods are those who are identified as having social, emotional and behavioural difficulties, and there has clearly been a big expansion in that category. Obviously, it is very hard to put a cause-and-effect analysis in place, but clearly, when families are under greater stress, it would be surprising if children were not reflecting that stress.

11:30

May Dunsmuir: It is also very likely that looked-after children will attract such categorisation. My concern and worry for that group of children, who I think have an added layer of vulnerability, are about whether anyone is advocating for them and their additional support needs.

Members will be aware of the corporate parenting responsibilities that fall on education authorities. In my submission, I touch lightly on the point that, to date, the tribunal has received no application from a corporate parent for a looked-after child, even though I know anecdotally of children whose placements have been changed from one school to another after a resource-based assessment.

That has had disastrous consequences. One of the children whom we consulted in the course of making improvements to access to justice in the tribunals had been relocated from the school in which they had been placed, which had such a devastating effect that the child is now detained under mental health legislation.

I was a children's reporter many years ago, and as someone who serves on the Mental Health Tribunal for Scotland, too, I am greatly saddened to see at the tribunal people who were once those children, and children who face educational challenges. I have a growing concern that the looked-after population are not getting strong enough advocacy as far as their schooling and additional support needs are concerned.

The Convener: Finally, I want to ask about the outcomes for ASN. Tables that have been produced by the Scottish Government show that the number of positive destinations for pupils in the ASN category is much lower than the number for the whole-school population. Bearing in mind

that positive destinations will mean different things to different pupils, does that indicate a failure of policy?

Professor Riddell: Surely we should expect all children to have positive destinations. That is not a very high hurdle to get over. The children who do not have them are almost disappearing from the radar; for example, those who have an activity agreement are obliged simply to engage with a service for a couple of hours or so a week. There is grave concern that some children with additional support needs are disappearing entirely from the system at that point, because they are the children from poor backgrounds who have been identified as having social, emotional and behavioural difficulties.

I have read that outcomes are improving for children with additional support needs, but what people do not add is that you will expect that to happen, given that a wider group of children is being counted and the category now includes, for example, more able children. We have to be careful about saying that things are getting better when, for some groups, they are clearly not.

Nick Hobbs: A real concern with regard to the families with whom we engaged on the investigation report is that a number of them have removed their children from education because they are not confident that the children are safe and protected in the school environment. Even if such a child goes on to have impressive achievements, the route by which they got there cannot be seen as a positive one. When a parent wants their child to stay in school—and the child wants to do so, too—but has to remove them, that process cannot be seen as positive, whatever the outcome.

Oliver Mundell: Is it common for parents to get in touch with your advice service about that issue?

Nick Hobbs: Among the parents who have been in touch about the investigation report, that issue is fairly common; a number have made the decision and have taken the step to withdraw their child from school. I cannot give you numbers or statistics, but Beth Morrison—who has, as many of you will be aware, done a great deal of work on the matter—has a wide network of parents and families and will, I think, have quite a good sense of how many have felt the need to take that step. We have certainly come across a number of parents who have been so concerned about the child's experience in school and the inability to make use of policy, guidance and procedure to rectify the problem that they have taken that step.

Oliver Mundell: What advice do you give them?

Nick Hobbs: We can talk to them only about access to the complaints procedure, the tribunal and, ultimately, legal proceedings to challenge

what has taken place. However, there are a number of issues in that respect, even with regard to accessibility, which is why we chose to focus our investigation squarely on the starting point of the existence of policy, procedure, guidance and recording so that we have a sense of how frequently that is happening and so that there is a really clear structure and framework for accountability.

The Convener: That concludes our questions. I thank everyone for attending what has been a very valuable evidence session.

11:35

Meeting continued in private until 11:56.

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