

EDUCATION IN THE SCOTTISH PARLIAMENT

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PREAMBLE

During the first session of the Scottish Parliament, educational issues were scrutinised by two Committees. These were the Education, Culture and Sport Committee and the Enterprise and Lifelong Learning Committee. Following the 2003 election, the work of these two Committees has been reorganised to fall under the remit of two new Committees, the Education Committee and the Enterprise and Culture Committee. The former is now the primary Committee for all education matters including lifelong learning (although this appears to have slipped down the education agenda somewhat, and has not featured heavily in the deliberations of the Education Committee between June 2003 and February 2004). This report primarily focuses on the work of the Education Committee.

The Education Committee comprises the following members: Robert Brown (Convener), Wendy Alexander, Rhona Brankin, Rosemary Byrne, James Douglas-Hamilton, Fiona Hyslop, Adam Ingram, Kenneth Macintosh, Elaine Murray. Full records of its meetings include transcripts of proceedings, and Committee papers are found on the accessible and comprehensive Scottish Parliament website at <http://www.scottish.parliament.uk>.

The Committee's September 2003 work programme (Education Committee 2003), which emerged from deliberations over the legacy papers of the predecessor Committees, identified a number of key priorities for the Committee. These included the scrutiny of a major piece of proposed legislation, the Education (Additional Support for Learning) (Scotland) Bill, as well as the following:

- Curriculum issues, including the transition from school to work or FE, and pre-school provision, were identified as important topics for discussion. The relation of the curriculum to the National Priorities for Education was identified as possible area for inquiry. This whole area was perceived by Committee members as being especially pertinent, in the light of the anticipated SEED initiative on curricular structure.
- School discipline was also identified as a priority area, with a position paper to be requested from the Minister for Education and Young People.
- Consideration of petitions, including those inherited from the predecessor Committees (e.g. a UNISON early years petition), was identified as forming important Committee business.
- Scrutiny of the Executive budget was to constitute part of the business of the Committee; discussions have subsequently been conducted in private session.
- The Committee was to be concerned with several legislative initiatives, including proposed Bills to provide secure status for Gaelic and for introducing Ministerial powers of intervention. Proposals for three Member's Bills were also identified as falling within the remit of the Committee.
- Miscellaneous Committee business would include discussion of the European year of education through sport 2004, some secondary legislation, including Scottish Statutory Instruments (SSIs), and research in education.

The bulk of the Committee's work between September 2003 and February 2004 has been concerned with the passage of the Education (Additional Support for

Learning) (Scotland) Bill, which had reached the first reading stage by February 2004. As a consequence the remainder of this report focuses on the deliberations that have accompanied the scrutiny of the Bill at the Committee level, including the questioning of expert witnesses. The second stage of the Bill and the recently launched Child Protection Inquiry will continue to occupy much of the time of the Committee, but these will be covered in the next Parliamentary report.

EDUCATION (ADDITIONAL SUPPORT FOR LEARNING) (SCOTLAND) BILL

The Bill proposes superseding the concept of 'special educational needs' with that of 'additional support needs'. The main mechanism for this will be a new Co-ordinated Support Plan (CSP) to replace the old Record of Needs. The CSP will be available to children or young people who have additional support needs that: arise from one or more complex factors; arise from multiple factors that are likely to continue for a more than a year; and which require significant additional support from agencies outwith the Local Authority education department. Complex and/or multiple factors are defined as those that are likely to have a significant detrimental effect on an individual's school education. Under the terms of the Bill Education Authorities will have statutory duties to make adequate and efficient provision for children's needs, subject to their powers unless this is 'not practicable at a reasonable cost' (Scottish Executive 2003, section 3). Moreover Education Authorities may ask external agencies for additional support, and these agencies must provide such support as is compatible with their statutory duties. The proposed legislation does not include those children who are educated outside of local authority jurisdiction, for example children schooled at home or in private schools.

Between September and December 2003, the Education Committee questioned a range of expert witnesses about the proposed legislation. These included senior academics, representatives of the various organisations such as the NHS and COSLA who would be concerned with implementing the proposals, 'various high heid yins' (Convener 19.11.03, Col 299) representing organisations such as the Association of Directors of Education, and a variety of non-governmental organisations including Capability Scotland, Children in Scotland and the Parents' Awareness Forum Fife.

In general, most respondents welcomed the broad thrust of the proposed legislation, described by Children in Scotland (2003) as the 'first major revision of special educational needs legislation since the Education (Scotland) Act 1981'. For example Professor Julie Allan of Stirling University felt that the proposals represented a radical shift in thinking as they 'shifted attention from the child and the child's problems to the school, the local authority and the Scottish Executive and identified the changes that needed to be made within the system' (Allan 10.09.03, Col 62), thus marking a move away from a pupil deficit model of educational needs. The Social, Emotional and Behavioural Difficulties Association (SEBDA) stated:

'Anything that will give proper representation for parents and young people and that will bring professionals together to work for those young people—whether it be called a co-ordinated support plan or whatever—will be very welcome indeed. From our point of view, anything that raises the profile of being positive about providing support will be welcomed.' (Webb 26.11.03, Col 355)

Only a small minority rejected the basic premises of the Bill; these included the Equity Group, who stated that 'the Bill is a disaster in the making for every child, every family and every local authority in the country, and ultimately for the government' (Prior 03.12.03, Col 402). Nevertheless, as noted in the Education Committee summary of evidence, 'the majority of those that expressly supported the principles also had concerns about certain sections of the Bill, and about aspects of the practical implementation of the Bill' (Education Committee 2004a). Such

concerns include the nature and extent of coverage of the CSP (including issues of eligibility and in particular the status of children currently eligible for a Record of Needs), the definition and scope of the local education authorities' statutory duties, children's and parents' rights, procedures for disputes resolution, and implementation and resourcing issues.

The Co-ordinated Support Plan

A major concern about the CSP, and one expressed by many of the witnesses to the Committee, concerns that potential of the CSP to cater for all children with identified needs. In particular, the definition of the CSP as catering for children who require additional support from agencies other than education was widely seen as providing the potential for many children with needs to slip through the net. According to Professor Sheila Riddell,

'the definition is problematic, as it is likely to exclude many disabled children. For example, if a child is blind, it may well be that all their services are being provided by education, not health and social services, and that therefore the local authority might say that that child does not warrant a co-ordinated support plan. That gap is an important point, as it could be that a large number of children will have no legal document to say what the local authority is going to provide for them. That is a major weakness (Riddell 10.09.03, Col 65).

Such sentiments have been echoed by many other witnesses. In her evidence to the Committee, Katy Macfarlane of the Scottish Child Law Centre stated that:

'a big concern for us is that some children who currently have records of needs might not obtain co-ordinated support plans. They will have undergone medical, educational and psychological testing to show that they have compound, profound or specific needs, yet they might not have CSPs. That might lead to what some people might call discrimination ... A child with additional support needs who needed OT and speech and language therapy would not get a co-ordinated support plan if the services that they were getting were within the education authority (Macfarlane 03.12.03, Col 417).

George Reilly of Dyslexia in Scotland articulated similar fears when he said, 'many dyslexic children will have other support needs and will therefore be eligible to be considered for a co-ordinated support plan, but many will have no other needs at all; we feel that it is wrong that they should not be eligible' (Reilly 26.11.03, Col 397).

While such witnesses expressed worries that eligible children may not receive support under the proposed system, other witnesses suggested that the Bill might result in more children receiving CSPs than had previously been eligible for a Record of Needs, especially given that children with behavioural difficulties would be covered by the CSP if their needs were complex and involved multiple agencies. One witness, representing the Social, Emotional and Behavioural Difficulties Association, starkly illustrated this by revealing that 'of the 30 children currently involved with the Harmeny Education Trust, only two have records of needs. All 30 receive multi-agency support' (Webb 26.11.03, Col 363). Naturally this sort of situation, if realised, has resource implications, as highlighted by COSLA, who disagreed with the Executive projections of the numbers of children who would be eligible for a CSP. However the COSLA estimates have been subsequently disputed by the Minister for Education and Young People, who stated in evidence to the Committee that:

'I am conscious that COSLA has fuelled concerns about the number of co-ordinated support plans. At first, COSLA indicated that CSPs would apply to 3 per cent of the school population compared to the 2 per cent of the school population that currently has a record of needs. I should point out

that I have not seen evidence from COSLA that supports that figure. COSLA subsequently said that that figure would rise to 15 per cent of the school population. We are clear that neither of those figures is correct.

As I understand the situation—and I have had constructive discussions with COSLA over the past couple of weeks on this matter—the 15 per cent figure that was given to the Finance Committee and this Committee arises from a wording change in the draft Bill, which COSLA misinterpreted as a policy change to widen the number of people who would have co-ordinated support plans’ (Peacock 17.12.03, Col 555).

Many witnesses have suggested that a basic problem with the CSP is that it maintains the levels of exclusion inherent in the previous Record of Needs system. COSLA suggested in their written submission to the Committee that a single system of Personal Learning Plans, as being trialed in the Assessment is for Learning pilot programme, would be a better option; the submission envisages that, under the provisions of the Bill, there would be a danger of a three tier system of children without Additional Support Needs, children with Additional Support Needs but no CSP and children with CSPs. Achievement Bute echoed these sentiments stating that, ‘surely... parents should be able to know that their children will be supported regardless of their level of needs, and that a single system will apply to everybody, although some children’s PLPs might be small whereas others’ will be big’ (McDonald 03.12.03, Col 447). Such a system, would they feel, have associated dangers of labelling. This theme was also taken up by the Scottish Socialist MSP and Rosemary Byrne, who stated in Committee that:

‘I want to return to what I said about the two-tier system. It is a great pity that we did not consider having a single system in which every young person is given access to what they require. I do not know whether it is too late to change the two-tier system that is to be created under the Bill. We either do that or we do as Fiona Hyslop and Elaine Murray suggested and consider making the legal recourse for children who have additional support needs the same as the legal resource for children who have CSPs. That could be the way to assure parents that they have some means of being able to get the right resources and planning for their children’ (Byrne 07.01.04, Col 610).

Linked to issues of eligibility has been the proposed removal of the compulsory assessment of children under the terms of the Bill. Some witnesses have questioned the replacement of compulsory medical assessments with assessments at parental request, especially in the areas of complex learning difficulties such as autistic spectrum disorder and dyslexia, where parents may lack the expertise to identify potential problems. For example Mark Bevan, representing Capability Scotland, stressed that, ‘parents are not necessarily in a position to know that their child requires a psychological assessment, nor is a teacher’ (Bevan 26.11.03, Col 376). He went on to emphasise what he saw as a risk of patchy provision under the proposed provisions:

‘Under the Bill, the education authority may be ignorant of the need to assess the physical support needs of the child—an assessment that could be made only by a medical professional. Because the education authority will not have a duty to perform such an assessment or to require the assessment to be performed by anybody else, the onus will fall on the parent. It is then a question of the parent being able to think and ask questions outside the box, if they are able to understand that their child may benefit from a physical, medical or psychological assessment. The jury is out on that - some parents will and some parents will not; some education authorities will and some education authorities will not; some teachers will and some teachers will not’ (Bevan 26.11.03, Col 379).

However most witnesses have welcomed the proposal to remove the compulsory assessment, in that the previous system represented a blunt instrument and a waste of resources. For instance, the Scottish NHS Confederation, in its written submission, stated that:

‘The Confederation also supports... the removal of the compulsory requirement for medical testing. We agree that employing such tests in a targeted way, only where they are necessary and relevant to individual circumstances, is both a far better use of NHS resources and offers more respect to the child as an individual’ (NHS 2003).

All of the above factors are indicative of a level of complexity, and indeed uncertainty, in respect of how the terms of the Bill might be implemented. Such uncertainty also exists in respect of the duties of the various agencies responsible for additional support needs, especially the Education Authority. The next section of the report deals with these issues.

Education Authorities’ Duties

As previously indicated the Bill will place a statutory duty on Education Authorities to identify and address the additional support needs of all pupils in their care. Many of the witnesses expressed concerns about the provisions of the Bill in this respect. For example, several witnesses questioned the provision that appears to provide an opt-out clause, namely that education authorities will not have to provide services if the cost is not reasonable. Mark Bevan of Capability Scotland expressed concern that Education Authorities are only obliged to consider parents’ requests, and that there is no obligation to follow through on these (Bevan 26.11.03, Col 379).

George Reilly of Dyslexia in Scotland echoed these thoughts, stating:

I do not know how a sentence that uses words such as “practicable” and “reasonable” would be rephrased, but I can easily foresee local authorities using such a measure to make even less provision for dyslexic children than they do at the moment. In the vernacular, that could be a means of coping out’ (Reilly 26.11.03, Col 391).

In their interim submission to the Committee, the COSLA indicated its concerns ‘about the resourcing implications of the Bill’ stating that ‘change carries costs’ (COSLA 2003). The Association of Directors of Education echoed these sorts of worries, articulating a belief that the Bill will increase bureaucracy:

‘The co-ordinated support plan is an individual statutory document, which will entail a bureaucratic process—it is difficult to see that process taking less than six months for an individual. If you consider the definition of children who might be eligible for a co-ordinated support plan to be as wide as we do—we believe that it might cover as much as 15 per cent of the school population—the risk is that we will take a much larger group of children through the bureaucratic process than we do in the record-of-needs system, which covers about 2 per cent of the school population’ (Kirkaldy 19.11.03, Col 302).

Such concerns, openly expressed, perhaps add substance to the fears of many witnesses that the system may become resource-led rather than needs-led.

While the Bill places a legal requirement on Education Authorities to provide for the needs of children within their care where resources allow, there is no such compulsion in the case of external agencies that may be needed to provide additional support. That such support may be consequently lacking was a theme raised by many of the witnesses. COSLA expressed concerns about opt out clauses for external agencies, particularly given the already stretched resources of many

health professionals who work with children (COSLA 2003). One witness, while stressing the value of multi-agency support and assessments, referred to an old song to illustrate the difficulties inherent in such collaboration:

‘I do not know whether you remember the song that starts: “’Twas on a Monday morning the gas man came to call”. He damaged a bit of paintwork and the painter came the next day and so on. One of the problems with multi-agency assessment is the number of people who are involved’ (Webb 26.11.03, Col 360).

A final and interesting point in respect of co-ordination was made by the Scottish Child Law Centre in its evidence to the Committee. This concerns the degree of co-ordinated support within Education Authorities as opposed to between local agencies:

‘There seems to be a ludicrous assumption that because support comes from within an education authority, it will already be co-ordinated and so the child will not need a co-ordinated support plan to bring together services from outside. From calls that I have taken in the Scottish Child Law Centre, I know that that simply is not the case within educational authorities. It is a fallacy to suggest that because one education authority is seeing to all the services that a child needs, the support is necessarily co-ordinated’ (Macfarlane 03.12.03, Col 418).

The additional point was made that the degree of co-ordination will vary from authority to authority.

Disputes Resolution

As a result of consultation on the initial proposals for the Bill, provision for disputes resolution was strengthened. The consultation highlighted concerns about the lack of appeal rights for parents whose children are denied CSPs. Subsequently the Bill, when published, has strengthened the rights of appeal by requiring Education Authorities to provide dispute resolution, in addition to free mediation services. Various issues have been raised by witnesses in response to the proposed system of dispute resolution.

Several witnesses have expressed concerns that the system potentially lacks independence, as the mediation services will be operated by Local Authorities. For example Children in Scotland called for mediation to be separated from Local Authorities, and the Scottish Mediation Network urged that:

‘Local authorities that consider the use of in-house mediation services should be aware that the mediators employed by the same authority with which parents are in dispute, may be seen as less independent. This perception could diminish the effectiveness of the process’ (Scottish Mediation Network 2003).

Further concerns revolved around the proposed Appeals Tribunals. Several witnesses suggested that the role of the Tribunals would be limited due to their lack of jurisdiction over external agencies. In this vein, the Disability Rights Commission called for a broadening of the jurisdiction of the tribunals set up by the Bill (see next section), to cover Health Boards and Social Services (Disability Rights Commission 2003). Other witnesses complained about the lack of provision for legal aid in Tribunal proceedings. The representative for Children in Scotland wished to avoid a situation where parents with money could spend considerable sums on legal representation, and suggested that advocacy has a role to play.

‘If there is to be no legal aid for representation at tribunals, advocacy will have a key role to play. We want a level playing field at tribunals, but that will not be the case if a local authority is represented by a solicitor and

apparent only has a supporter with no particular legal knowledge' (Follan 03.12.03, Col 438).

A final theme that was raised by many witnesses concerned the issue of children's rights. The Educational Institute of Scotland pointed to tension between the Bill and other relevant legislation in respect of children's rights (McBride 12.11.03, Col 282). The Disability Rights Commission called for the enshrinement of children's rights in the Bill, so that, for instance young people over the age of twelve may make appeals. As things stand, the Bill clearly does not allow for such provision, and there is tension between the children's rights agenda and the proposed legislation.

Code of Practice

This report has referred already to the complexity and uncertainty that pervades some of the provisions of the Bill. In particular this is the case in respect of how Education Authorities and other agencies will undertake their duties, and the criteria that will be applied to determine eligibility for a CSP. Early witnesses (prior to the publication of the Bill) had called for the development of a 'Code of Practice (which) would provide regulation and local authorities would have to follow it or they could be brought to a tribunal' (Riddell 10.09.03, Col 79). The post-consultation revisions to the Bill have provided for the development of such a code, in consultation with service users and providers. Most witnesses have agreed that this development is essential to 'flesh out' the Bill and provide guidance that will ensure uniform provision. Nevertheless, one must also bear in mind the warning from one witness:

'It is worrying that legislation that is being written will be dependent on a code of practice that has not been written, and it is worrying that even the people who drafted the Bill do not seem to know what the situation will be like. Every teacher to whom I have spoken and people to whom I have spoken in education authorities and health authorities all say that they do not know who will co-ordinate the co-ordinated support plan: nobody knows the answer. To produce a Bill that is so dependent on an as yet unwritten, untried and untested code of practice seems to be completely unwise' (McDonald 03.12.03, Col 445).

To use a well worn cliché, it would appear that the devil may be in the detail.

Six Busy Months

When reading the above summary of proceedings, it is important to bear two things in mind. First, this report does not, and indeed cannot, represent any more than a brief sketch of a complex and detailed set of dialogues within the Committee. The report seeks to identify the main strands of debate, and does not cover some issues, such as transition from school to adult services for those in need of additional support. Readers in search of more detail should refer to the detailed proceedings of Committee business available on the Parliament website. Second, readers should appreciate that while the report focuses in some depth on a number of criticisms of the Bill's provisions, as discussed in Committee by various witnesses, these criticisms largely represent specific and often minor discussion of the fine detail of the Bill. Indeed the majority of witnesses have publicly stated that they support the general principles and broad thrust of the proposed legislation. Such sentiments are well exemplified by the statement made by Brian Kirkaldy of the Association of Directors of Education to the Committee:

'We support and welcome the broadening of the concept of special educational needs to additional support needs, which reflects current practice. We have understood for some time that children with special educational needs are

simply one fragment of a continuum of children who require additional consideration within schools' (Kirkaldy 19.11.03. Col 301).

The CSP has thus been widely welcomed by witnesses to the committee as an improvement on the existing Record of Needs, and the Bill is generally viewed as a welcome departure from a system that potentially labels and stigmatizes children with often complex educational needs.

The Education Committee published its preliminary report on the proposed legislation in January 2004. This report, which reflects many of the issues raised by the expert witnesses, made several observations, including the caveat:

'The Committee recognises that the legislation makes certain changes to existing rights, but the Committee is of the view that that any changes to legal rights must not represent any lessening of the rights of any child to have their additional support needs met' (Education Committee 2004b).

The Committee also expressed some concerns with the wording of the section concerned with the definition of whether children have additional support needs; as the Bill is worded, such support depends on them being unable to benefit from school education. The Report stated that, 'the Committee was concerned that under this section it could be argued that a child benefiting from school education in any way would be deemed therefore not to have any additional support needs. The Committee therefore asks the Executive to reconsider the drafting of this section' (ibid).

On the subject of whether children formerly eligible for support, but without the multiple and complex needs that would confer eligibility for a CSP, the Committee:

'strongly recommends that parents are given clear assurances that appropriate service provision will be made for all children and young people irrespective of whether or not they are eligible for a CSP as stated in the Minister's letter to the Committee. It is firmly of the view that in order to avoid any confusion and to alleviate any fears, clear eligibility criteria need to be set out in the Code of Practice as well as in guidance for parents which should provide reassurances that their children will receive the support that they will require' (ibid).

Related to this is the issue of a unitary system. The report recognises this, in calling for 'further information from the Executive as to how IEPs and PLPs will be used to ensure that adequate and appropriate support is provided for children who are not eligible for a CSP' (ibid). Nevertheless despite such misgivings and uncertainties, the report states the Committee's support for 'the general principles of the Bill' (ibid). Discussions are ongoing at the time of writing as the Bill proceeds to its latter stages, and will be covered in the next report.

REFERENCES

- Children in Scotland (2003) *Written Evidence from Children in Scotland to the Scottish Parliament's Education Committee on the Education (Additional Support for Learning) (Scotland) Bill*, online http://www.childreninscotland.org.uk/docs/policy/work_comm/WritEv1103ASLBill.doc.pdf
- COSLA (2003) *Education (Additional Support for Learning) (Scotland) Bill: COSLA Interim Submission*, online <http://www.scottish.parliament.uk/education/papers/edp03-09.pdf>
- Disability Rights Commission (2003) *Written Evidence on Additional Support Learning for Bill*, online <http://www.scottish.parliament.uk/education/papers/edp03-13.pdf>
- Education Committee (2003) *Work Programme*, online <http://www.scottish.parliament.uk/education/papers/edp03-03.pdf>
- Education Committee (2003/4) Various proceedings from the Education Committee, online <http://www.scottish.parliament.uk/education/index.htm>
- Education Committee (2004a) *Education (Additional Support for Learning) (Scotland) Bill: Summary of Evidence*, online <http://www.scottish.parliament.uk/education/papers/edp04-01.pdf>

- Education Committee (2004b) *Stage 1 Report on Education (Additional Support for Learning) (Scotland) Bill Volume 1: Report*, online <http://www.scottish.parliament.uk/education/reports/edr04-01-vol01-01.htm>
- NHS (2003) *Submission to the Education, Sport and Culture Committee of the Scottish Parliament on the Education (Additional Support for Learning) (Scotland) Bill*, online <http://www.scottish.parliament.uk/education/papers/edp03-09.pdf>
- Scottish Executive (2003) *The Education (Additional Support for Learning) (Scotland) Bill*, online <http://www.scottish.parliament.uk/bills/pdfs/b11s2.pdf>
- Scottish Mediation Network (2003) *Comments On Draft Education (Additional Support For Learning)(Scotland) Bill*, online <http://www.scottish.parliament.uk/education/papers/edp03-13.pdf>