OFFICIAL REPORT
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Education, Children and Young People Committee

Wednesday 6 March 2024

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Wednesday 6 March 2024

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EDUCATION, CHILDREN AND YOUNG PEOPLE COMMITTEE

8th Meeting 2024, Session 6

CONVENER

*Sue Webber (Lothian) (Con)

DEPUTY CONVENER

*Ruth Maguire (Cunninghame South) (SNP)

COMMITTEE MEMBERS

*Stephanie Callaghan (Uddingston and Bellshill) (SNP)
*Pam Duncan-Glancy (Glasgow) (Lab)
*Ross Greer (West Scotland) (Green)
*Liam Kerr (North East Scotland) (Con)
*Bill Kidd (Glasgow Anniesland) (SNP)
*Ben Macpherson (Edinburgh Northern and Leith) (SNP)
*Willie Rennie (North East Fife) (LD)
Michelle Thomson (Falkirk East) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

May Dunsmuir (First-tier Tribunal for Scotland)
Stuart McMillan (Greenock and Inverclyde) (SNP) (Committee Substitute)

CLERK TO THE COMMITTEE

Pauline McIntyre

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Education, Children and Young People Committee

Wednesday 6 March 2024

[The Convener opened the meeting at 09:30]

Subordinate Legislation

Education (Scotland) Act 1980 (Modification) Regulations 2024 (SSI 2024/40)

The Convener (Sue Webber): Good morning, and welcome to the eighth meeting of the Education, Children and Young People Committee in 2024. We have received apologies from Michelle Thomson.

Our first item of business is consideration of a Scottish statutory instrument under the negative procedure. The regulations make several amendments to the Education (Scotland) Act 1980 and will increase the current maximum annual income level for eligibility for free school meals from £8,717 to £9,552 to take account of the forthcoming increase to the national living wage from 1 April 2024.

Do members wish to make any comments about the regulations?

Pam Duncan-Glancy (Glasgow) (Lab): I am slightly disappointed that we need to consider the regulations, on the basis that free school meals should be getting delivered across primary 1 to primary 7 already, as the Government set out that it would do. Nonetheless, it is sensible that, in the interim, while we wait for the Government to come good on that commitment, we proceed with this uprating, which is important.

It would have been useful had the SSI been used to encourage schools to reach out to families in a more proactive way to find those families who may need the support that free school meals can offer. Other than that, I have no further comment.

The Convener: Before I proceed any further, I welcome Stuart McMillan to the meeting, as a substitute for Michelle Thomson. Good morning, Stuart.

Is the committee agreed that it does not wish to make any recommendations in relation to the instrument?

Members *indicated agreement.*

The Convener: Thank you very much, everyone.

Additional Support for Learning Inquiry

09:32

The Convener: The next item on our agenda is an evidence session on the additional support for learning inquiry. This is the third formal session on the inquiry, which will consider how the Education (Additional Support for Learning) (Scotland) Act 2004 has been implemented and how it is working in practice, 20 years on from being enacted.

We will focus on three themes throughout the inquiry: the implementation of the presumption of mainstreaming, the impact of Covid-19 on additional support for learning and the use of remedies, as set out in the act. Today we will focus mainly on the third theme, but we will likely touch on the first theme, too—we do tend to stray a little bit as a committee.

I welcome May Dunsmuir, president of the health and education chamber of the First-tier Tribunal for Scotland. Good morning and welcome, May. Thank you for coming, and thank you for the written submission that you provided ahead of the meeting, which has given us a great platform for our discussion.

I will move straight to questions from members, starting with Willie Rennie.

Willie Rennie (North East Fife) (LD): Good morning. I will first give you a chance to tell us how you think things are just now, but with a particular focus. We have seen a sharp rise in the number of applications over the past period, although it is still not as high as the number of applications in England, and I would like you to explain that. You can perhaps range a bit wider as to what you think is happening in the system. Where are the pressures, and what is your assessment?

May Dunsmuir (First-tier Tribunal for Scotland): Thank you for inviting me to give evidence.

It would probably help to give some context. I have been president of the jurisdiction for 10 years, both in its former iteration and in its current one as the health and education chamber. I have also been a member in this jurisdiction for 14 years, and I have seen patterns fluctuate over that period. In the lead-up to 2020 we were just ready to hit our first three-figure number of applications. Up until then, our annual rate of applications sat between 60 and 70, although we were starting to see a rise emerge.

During 2020—as you might expect, given the impact that the pandemic had on the justice system—we saw a reduction in applications.

There is not much of a pattern to analyse there, given that there were obvious external factors having an impact.

What has been interesting since then, however, is that, following our transition from the lockdown periods and the pandemic overall, we have seen a more dramatic year-on-year rise in the number of applications. In terms of trends, placing requests are undoubtedly breaking all records. As of today, the number of applications has exceeded any year to date, and there are still a few days left in this month. In addition, we are starting to approach the placing request season, when parents would want to prepare and make their requests.

We have not seen such a rise in disability discrimination claims; they have reduced somewhat, although they have never been the most sizeable type of application that the tribunal hears. We have seen a fairly level pattern with regard to CSPs—I use the abbreviation because I think that you will all know what a co-ordinated support plan is. The CSP pattern is surprising, for a range of reasons, but I know from the evidence that the committee has considered that you will be aware that there is a degree of disconnect between the number of children with additional support needs who would be expected to have a CSP and the actual figures. That is what we see in the tribunal.

This year, we have seen a rise—it is a trickle, but a rise nevertheless—in the number of transition applications. Those are focused largely on whether there is adequate transition planning in place for a child, mainly for post-school transition. That rise is unusual, because we were not previously receiving many transition applications at all.

With regard to comparing Scotland with England, there is obviously a difference in size and demography. Nonetheless, I recall that, when I first started as president, the SEND—special educational needs and disabilities—system in England had a far lower volume of applications than it now has. I think that the reason for the rise in the volume would have to be explored with those in England, but we must take it into account that SENDIST, the Special Educational Needs and Disability Tribunal in England, grew. There was a pilot to see whether it could make not only education orders to deal with discrimination in education, but care and social work orders too. I believe that that pilot has concluded and that SENDIST now has an expanded jurisdiction. I cannot really say much more than that about England.

With regard to why the pattern is as it is, it has always been the case that the volume of placing requests is the highest of the bunch, but I have never seen such a rapid increase. In addition, on examination of the types of placing requests that we see, there is still undeniably a very strong connection with what happened during Covid-19, which is still prevalent in many of the references. The committee will be aware of the challenges that education is currently facing, and I suspect that we are seeing that translate into the type and number of references that we are receiving.

Ruth Maguire (Cunninghame South) (SNP): Good morning, May; thank you for being with us. How does the tribunal monitor who is accessing it, in terms of socioeconomic or other characteristics? Conversely, I am keen to know who might be missing out, and what the tribunal is doing to ensure that everyone has that opportunity.

May Dunsmuir: We monitor applications by type. Initially, we used to identify only whether an application was made by a parent or a carer. We now monitor whether it is from a parent or carer, a young person, or a child, because those are the three different types of people who can make an application to the tribunal, with some limitations on children.

I have broken that down further to monitor the number of looked-after children who are subjects of our proceedings, but not necessarily a party. We were not monitoring that some years back, when the presumption was that a looked-after child would be deemed to have additional support needs. I wanted to monitor just how many were accessing the jurisdiction. At that point, no references or claims were being raised for or by children or young people who were looked after.

That is not now the case, and we are seeing a rise in the numbers, although it is not the kind of rise that I would expect, given the statistics on the number of looked-after children that there are in Scotland. What are we doing to try to—

Ruth Maguire: I am sorry to interrupt but I want to be clear. Do you gather equality statistics on who is applying, whether it is a parent, carer or child, or whether they are looked after?

May Dunsmuir: No.

Ruth Maguire: Would you be curious to understand what protected groups are applying?

May Dunsmuir: An ethnicity monitoring form goes out with references or claims, but it is a matter of choice whether the person wishes to complete that. We could monitor more, but our principal concern is to make sure that people are aware of the presence of the tribunal and that we make the tribunal process as accessible as possible. In that regard, we are aware of and we monitor the exact types of additional support need and/or disability.

There are protected characteristics that are naturally monitored through the process, because we ask definitive questions around that, and that is why I can tell you that the majority of children and young people who are subjects of our proceedings are autistic. That is not to say that that is the only type of additional support need, but it is the dominant type.

We do not monitor socioeconomic background. There are two agencies. The let's talk ASN service is the national representation and advocacy service for parents and young people who might wish to bring applications to the tribunal. I am not sure of the extent to which that organisation does any monitoring. There is also My Rights, My Say, which provides a national children's advocacy service for 12 to 15-year-olds. Another agency that has relevance is the Equality and Human Rights Commission, which will occasionally fund disability discrimination claims. Unlike references, placing requests, CSPs and transitions, there is no nationally funded agency that provides funded support to a parent, child or young person to raise a claim and the EHRC will fund some of those.

Ruth Maguire: What gives you confidence that the tribunal is accessible?

May Dunsmuir: We test that. We are committed to making the jurisdiction child and young person centred. To achieve that, we have been on a fairly long and sometimes arduous journey and we have had to learn from mistakes that have been made. We decided early on that the best and most authentic way of doing that would be to have children lead us through it.

Some of you will have visited our sensory hearing suites, which are one example. We discovered early on that, for a neurodivergent child—bearing in mind the fact that that is the dominant category of additional support needs—coming to a conventional hearing would not work. The committee room that we are in now, for example, would just not work. So, rather than us saying, "Here is what we think. What do you think?" we started with a blank sheet of paper. We first asked the children whether they would like to come to a hearing and then, depending on the answer to that, we asked what the hearing should look like. Everything that flowed thereafter came from children's direction.

We also engage with relevant agencies, including those that I have mentioned. All the guidance that I produce is published on our website, including a note called "The Child, Young Person and the Tribunal", and it is all road tested by children and young people. I may put together some guidance and think, "That is wonderful. I have drafted that very well," but, depending on whether the children and young people want to communicate through text, post-it notes or in person, I may be told, "It might be wonderful to you, but we do not understand what you are saying."

09:45

There is a lot of road testing and consistent checking. I am also open to receiving information from the national agencies about the absence of information. I added a section on child party rights into the guidance note on "The Child, Young Person and the Tribunal", because one of the agencies felt that there was a misunderstanding in relation to the rights of a child who is a party. The basic fact is that a child party has all the same rights as an adult party. We work hard to ensure that the rights of children and young people are not being marginalised.

We also connect with parent groups. I have engaged with a number of groups that are looking at issues such as restraint and seclusion, access to the tribunal and to CSPs, and we road test that. I engage regularly with a range of educational authorities. Every year, I host an annual forum, which is exceptionally well attended. This year, we have 117 participants. It will take place online; we alternate between online and in-person. We have learned the benefits of sometimes having online forums. Last year was the first in-person forum that we have hosted for a number of years. The forum is well attended by the people and groups that we would consider to be stakeholders: health professionals, party representatives, children's agencies, parent agencies, education authorities and so on. The forum is very open; I share what the year has been like for the tribunal, as well as some of the patterns that we have seen and things that we might want to change. People engage with us at that forum and challenge us. They ask for improvements, which we look at.

Ruth Maguire: I think that the child-centred work is to be commended. When thinking about my casework as an MSP, I remain curious about the families that are missing out and may not know how to achieve their rights or do not know that there are routes that they are able to follow. I would want the tribunal to be equally curious about who was not using the service.

May Dunsmuir: I am curious about that. That has been raised with me on a number of occasions by several MSPs, cabinet secretaries and ministers. I have been asked many times—as Mr Rennie did—why, although the tribunal is gaining ground in the volume of cases, it is not as busy as our counterpart in England, even when taking into account the different population size. I am usually asked whether that is a good thing or not. I often have to reflect on that. We always have to test that against what is happening in education in Scotland and what is happening with additional

support needs. We know that there is a rise in the number of children who have additional support needs and that the outcomes for those children are not as favourable as the outcomes for those who do not have them. We know that, for specific groups such as looked-after and care-experienced children, the deficit is even greater. The position does not stack up when I look at the facts.

I think that the jurisdiction is not as well known as it ought to be. Much more could be done in order to promote the fact that we exist as well as who can access the service. When I speak to parents, they are very greedy for information and they want to know what rights they have. I know that the Children and Young People's Commissioner for Scotland has expressed concern that those who are disadvantaged socially may not be able to access a jurisdiction and exercise their rights. I think that a right is only a right if you know that you have it and if you are supported to exercise it.

My approach in the tribunal, and that of the judicial members, is that anything that is possible is possible. In other words, we are sufficiently flexible to make a tribunal look and feel as it needs to in order to ensure that access to justice is possible and that we gain the best evidence. Just before the pandemic, I was about to go to a sensory room in Fife to conduct a hearing because it was the only accessible venue for a particular party. That was before we launched our sensory hearing suites. We do not need to do that now, because we have our own facilities, but we will go to whatever lengths we need to go to in order to make it possible for people to access our jurisdiction.

Liam Kerr (North East Scotland) (Con): Part of that accessibility and participation might involve legal advice and representation. You mentioned in your submission that many young people can get legal advice, but whether they are able to access it is another question. Are you able to help the committee understand the situation? There seems to be a dearth of legal aid lawyers. Are legal aid lawyers available for tribunal processes? In any event, what is the general availability and rough cost of representation if a legally aided lawyer is not available?

May Dunsmuir: I will do my best to answer as much of that as I can. I am not able to answer the question about cost, as I have not worked in a legal aid environment for many years—I remember the pains of it well—although I know that others suggested in your previous evidence session that it can amount to thousands of pounds.

In our hearings, most parties are legally represented. The cohort of legal representation that is available free to the parent, young person or child largely comes from let's talk ASN, which is provided by the Govan Law Centre. It was designed to provide a service free to the person making the application. Child parties have so far always been legally represented. They have also been represented by people from the My Rights, My Say service. Cairn Legal is the legal practitioner that makes up the legal element of that service.

As for availability beyond those services, some other, less-known firms are starting to appear in our proceedings. I can say that, because I monitor where the applications and representation come from and I am seeing people who are less familiar with our jurisdiction beginning to dip their toes in the water. There could be a range of reasons for that. It could simply be that a parent has gone to a high street solicitor and knocked on the door or it could be that someone is developing an interest in this area.

The former children's commissioner called for an accreditation for solicitors who work in the field, and some discussions have taken place with the Law Society of Scotland in that regard. The children's commissioner has expressed to me concern whether there is enough availability. To my knowledge, there is no accreditation at the moment, so someone looking for representation would draw from the national agencies, a charity such as the National Autistic Society, which will provide representation, or the Equality and Human Rights Commission—anyone who is prepared to take up their case and fund representation.

Occasionally parties pay for their own services, but no one supports them. That is more rare than common, though. However, where cases are privately funded, motions for expenses are more likely to be made if there has been any reason to argue that expenses for certain things should be met. I cannot say anything more about the costs, as I do not know what they are, but we are acutely aware of the need to avoid delay and to be efficient in our process. That is the case for any case, whether or not it has representation.

It is worth bearing it in mind that parties do not need to be represented by a solicitor in our proceedings—they could use someone else. In the early years, lay advocates were being used initially—although perhaps not in the right way, as we understand it, because an independent advocate should not be engaging in representation.

This is such a complex jurisdiction. The law is inordinately complex, and the sheer nature of a child or young person's additional support needs and the impact that it has on their family is incredibly complex. I can therefore see why most representatives are now legal representatives.

Liam Kerr: You mentioned delay. Can you give us an idea of how long it might take if one wanted to access the service, from putting in the claim, whatever it is, to being heard and receiving a decision?

May Dunsmuir: Whether we are talking about a reference or a claim, there will be a case statement period. That is the point at which the application comes in, the other party gets a copy and we have it, too. There is then a period of up to 30 days for the appellant to put together their case. The case statement is where they put all the documentary evidence on which they want to rely. The respondent—that is, the other party—which is most commonly an education authority but can be an independent or grant-aided school, completes the process by responding to the claim. At the end of that period, the tribunal will have the reason for the application, the case statement setting out why someone thinks that they should succeed and the other party's argument as to why they think that they should succeed. We then go into a judicial case management process.

In my experience, our process is unique. It is quite intense. The legal member is allocated the case and they case manage it to the hearing. In the majority of our applications, most people settle; we are seeing a rise in the number of cases that go to a hearing, but the majority still settle. Part of that process involves the engagement of the tribunal judge to get the case to a point of absolute clarity, and that is about identifying what is in dispute, instead of talking about matters that are in agreement.

By the time that parties come to us, they are very divided; their positions are usually entrenched and the journey to get to this point will have been lengthy. Quite often, though, when you take two parties to that point of judicial engagement, they realise that they agree more than they had recognised. Sometimes, the matter in dispute will be a bit smaller than they had felt it to be.

If the matter is to proceed to a hearing, we will, provided that all procedural matters are tidied up, fix a hearing as soon as we reasonably can—hopefully within, say, six weeks. However, I have to say that, because of the rise in the number of hearings and the rise in volume, the timescale—I am not going to call it a target, because it is all very fact and case specific—has lengthened. Hearings are now being fixed two to two and a half months ahead, rather than four to six weeks ahead.

Another reason for that is tied to your question about legal representation. A small cohort of legal representatives appear in our proceedings and they cannot be everywhere at the same time. We are hindered in some respects by the availability of the legal representative. If they have three hearings in two weeks, there will be less space for them to add in another one. However, the judicial case management process means that the journey is now far more efficient, and we do our best to get there with as few delays as possible.

Liam Kerr: I am very grateful for that. I think that Stephanie Callaghan might have a question.

The Convener: Before we bring in Stephanie Callaghan, I just want to mention that next week we will have witnesses from My Rights, My Say, the Govan Law Centre and the Children and Young People's Commissioner Scotland, so all of that information will be very useful to us as we get ready for that meeting.

Stephanie Callaghan (Uddingston and Bellshill) (SNP): I want to ask about references that are made to the tribunal. I am aware that, under the Education (Additional Support for Learning) (Scotland) Act 2004, 12 to 15-year-olds are subject to capacity and wellbeing tests, but claims under the Equality Act 2010 do not involve those tests. Can you explain why that is the case?

10:00

May Dunsmuir: Yes. I am not sure whether you are aware of the history of how the two tests came into being, so I will set that out very briefly.

When the bill that became the 2004 act was first introduced, there was a best interests test, which was not well received because, at that point, Scotland was moving away from that kind of approach to the exercise of children's rights—although I would note that we have now incorporated into Scots law the United Nations Convention on the Rights of the Child, which includes a best interests test. In order to address the concerns that were raised, the bill was amended to include a different approach. That is how we ended up with the capacity and wellbeing tests.

It is an anomaly. It was unusual to have those tests, and my concern was that they should not inadvertently lead to a delay in children accessing the tribunal and exercising their rights. I could not tell an education authority what to do in relation to its testing, but I could deal with the tribunal's side of things. Therefore, from the very beginning, we introduced a preliminary hearing, which took place by telephone, in which the two representatives addressed the legal member on whether they believed the child had capacity and, if so, why they believed that; and on whether the exercise of the right, in bringing the reference to the tribunal, would adversely impact the child's wellbeing and, if so, why they believed that.

To date, there has been no case in which there has been any dispute over capacity and wellbeing.

In every case, there has been a finding that the child has capacity and that exercising that right would have no adverse impact on their wellbeing.

The SHANARRI—or safe, healthy, achieving, nurtured, active, respected, responsible and included—indicators are regularly referred to when evidence is given on the wellbeing test. What is most commonly said is that exercising that right not only would not have an adverse impact but would have a positive impact on the child's wellbeing through their being respected and included. Those are the two SHANARRI indicators that are most commonly referred to.

Some claims do not have that gateway. That means that, in theory, a child might raise a CSP reference as well as a claim. It is not uncommon for a claim and a reference to be consolidated; it is not very common, either, but it does happen. In theory, it means that, if I were the legal member, I would have to test the child's capacity and wellbeing for one of their applications but not for the other.

It is interesting that the Equality Act 2010 did not introduce those two tests. I do not think that the agencies that were consulted particularly welcomed the introduction of the tests—you would have to look back at their responses—but we have made it work.

Stephanie Callaghan: Do the tests serve a useful purpose?

May Dunsmuir: If we are going to extend rights to children, as we did in Scotland at that time—it was claimed to be the greatest extension of rights to children across Europe—we ought to remove as many barriers to accessing those rights as possible. That should be the case, whatever the right is. Given that the tribunal is a children and young people-centred jurisdiction and that my job is to improve access to the jurisdiction and to remove barriers, I do not think that statutory barriers are always helpful.

Liam Kerr: I am particularly interested in your point about the number of cases that settle and your comment about the parties being divided and having entrenched views if the case gets to a hearing. Are you aware of any research having been conducted into the outcomes for children and families who have accessed the tribunal?

May Dunsmuir: No, I am not aware of any such research. We carry out a feedback process following hearings to assess whether things have worked as they ought to. It is difficult for a judicial body to conduct research because, quite often, you try to explain the process to a party, but the decision stands in the middle of all that. I know that that issue is not unique to my jurisdiction and that it applies to jurisdictions elsewhere that want to analyse things as well as they can. When you ask someone to assess the quality of their experience, the feeling about the decision is often paramount. However, although that can be difficult, it is not insurmountable.

I should also say that the centre for research in education inclusion and diversity did some research on CSPs and access to the tribunal before Covid, which was managed by Professor Sheila Riddell and which I am sure would be available to the committee. She did some work to compare my jurisdiction and the English jurisdiction.

Beyond that, I occasionally get letters from parties expressing a view, but I do not send them on to the tribunal, because tribunals are judicially independent. Each tribunal, when it sits, is independent of my office, so it would be improper for me to say that so-and-so had passed on something. We get a great deal of positive feedback, and we get some negative feedback from time to time, but that is nothing unusual.

The Convener: I know that this is a bit like ping-pong, but Stephanie Callaghan wants to come back in.

Stephanie Callaghan: Thank you very much, convener—it is a bit like ping-pong.

On the right of children and young people to fully participate, do you have any observations about how effectively local authorities support children and young people with complex needs to have a meaningful say in decisions that affect them? I am certainly not looking for you to criticise local authorities; I am more interested in whether particular issues or themes arise that perhaps indicate areas for local authorities to focus on. Are there things that keep coming up again and again?

May Dunsmuir: Yes. I can deal better with the end of that question. I cannot comment on local authorities' experiences on the ground, because they deal with a huge population of children in school education, from nursery school through to secondary school, in different schools with different compositions. However, I can talk about common themes in our decisions.

In cases that proceed to a hearing, there is commonly a misconception in that the parent's view is that the child is struggling with school and is seeing that emerge at home, whereas the school says, "We're not seeing those struggles and therefore the child is doing well." Last year, we had concentrated training on masking from the national autism implementation team. In fact, I would go so far as to say that we have become considerable experts in that area.

If we hear evidence that suggests that there are two completely different pictures from the parties' perspectives, we have to figure out why that is the

case. Does it have anything to do with school education? If so, what is it? Masking, which is a very common theme in our cases that involve neurodivergent children, is when a child puts in so much effort to be who they think they are supposed to be in school that, when they get home to their safe environment, the cost is enormous. Those are the difficult cases that we get, because, if a case proceeds to a hearing, that means that the parties have not been able to reach agreement. There is usually a very disputed component.

We see a great deal more evidence of masking—it is almost common now. We often see cases in which one party says, "We know you're doing the very best you can, but it's still not meeting my child's needs." It is the tribunal's job to work out what those needs are and whether what is being provided is allowing the child to benefit from their education.

Stephanie Callaghan: We have heard that reflected in the evidence that we have taken. Does more work need to be done on recognising the views and expertise of parents and children? Perhaps more work needs to be done on that and on respecting and taking seriously what they say.

May Dunsmuir: Anything that takes people back to basics—although their views are far from basic—and resets the relationship to allow us to see things through the eyes of the child will always be a good thing.

We publish our cases, so I can give you an example of a case that is in the public domain. A child party raised a CSP application, and the school said that everything was fine, that it had everything that the child wanted and that the child just needed to ask for it. The process was quite cathartic for the child party, because it allowed the child to separate themselves from their family. A child is not their parent, their sister or their brother; a child is a child. Their evidence was incredibly compelling and commanding, and the school had no idea what that child's views were. The child said, "All of these things are there, but in order to access them I have to step out of my invisibility." By that, they meant that they do not want to say, "I'm the child with additional support needs, so I'd like an extra 15 minutes," or, "I'm the child who needs a movement break—can I have it?" A culture of inclusion would mean teachers saying, "Everyone, we're taking a movement break."

The decision on that case can be found in our decisions database if you put in "CSP child party". We have a really good accessible database now, and I am promoting it because we have just got it right.

Almost without exception, the common theme among children with additional support needs who appear in, or are the subject of, our proceedings is that they do not want to be visible. They want to be integrated and supported, but they do not want to stand out.

Willie Rennie: That is really interesting. Various factors will influence a child behaving differently at school compared with at home, but I presume that parental behaviour has an impact on a child, because the behaviour of parents is obviously different from the behaviour of teachers. Can you give us an insight into how you ensure that you focus on the shortfalls of school provision? Is there a system in place that helps parents to cope with the consequences of that and of their behaviour?

May Dunsmuir: I think that you are asking me how we wade through the evidence to find what we consider to be the facts. We are decision makers and fact finders; that is what the tribunal is. The beauty of that is that people will go away with a decision that says, "Here are the facts that we have found to be true." That means that the education authority, the independent school, the parent or the child or young person has something to show.

There are legal tests. I will use placing requests as an example, because that is when masking behaviour in school most commonly arises. The education authority will have relied on a particular defence to refuse a placing request, because it ought to grant the request unless there are certain grounds not to do so. We commit to considering those grounds when we analyse the evidence. We must remember that the tribunal is a specialist jurisdiction. We have legal members who are specialists in this area of law, and we are supported by health, social work and education members who are specialists in the field. Together, we scrutinise the evidence.

10:15

It is interesting that you used the word "behaviour". I am sure that you all know about the Promise that Scotland is committed to and how important language is. "Behaviour" is a significant word in this jurisdiction, because there is sometimes a misunderstanding about what is happening when a child does something. Behaviour can be very school orientated, so we focus on that. We sometimes interpret how a child is behaving in the classroom as disruptive or challenging when, in fact, it is not that and is actually caused by distress that emanates from their condition.

There is case law that took us on a journey with that issue. A judgment by the Upper Tribunal in England, which is our sister jurisdiction, tackled the issue head on. In relation to a disability discrimination claim, the tribunal judge said that

the behaviours were actually distressed behaviours. There was no culpability; the child was not choosing to behave in that way. There was a huge sigh of relief across all agencies that try to support a better understanding of neurodivergent children. It is a difficult area that is not well understood.

We are very careful with the language that we use and I moderated my language even more recently when the national autism implementation team asked me to speak at something and asked me not to use the words “distressed behaviour” and just to use the word “distress”. I thought, “Why didn’t I think of that?”

We have to listen and keep listening, because we are learning about language. Language can be very stigmatising, especially for marginalised groups. It is hard to come to a tribunal. Nobody wants to see us. Nobody wants to walk in and sit down in front of three strangers. We do our best to make the process as accessible as possible, and the last thing that we want to do is to use the wrong language.

On the influence of a parent on how their child is at school or at home, every parent will undoubtedly influence the environment in which the child lives. In cases in which there appears to be masking, the difficulties at home can be enormous. I have read some decisions where that is the case. I am not talking about cases in which a child comes home from school and struggles for an hour. If you put “masking” into our decisions database, you can have a look at some of those cases. In some cases, the family home is so disruptive that the physical environment has to be completely stripped out. The relationship between the child who is decompressing and their parent becomes more difficult, because so much of the decompression takes place in that safe environment.

Those are extreme situations; there is nothing minor about them, certainly as far as the tribunal is concerned. I am sure that there are common every-day issues for parents of neurodivergent children, but those cases do not reach the tribunal. I know that a better understanding of masking is called for, because we are learning that from our cases and because we have been taught by experts that there needs to be better understanding of what masking is.

Willie Rennie: That is excellent. Thank you.

Pam Duncan-Glancy: That was fascinating and reminded me of a previous life, when I looked into disability discrimination and internalised ableism. There is a connection between that and the points that you have made.

You talked about placing requests and the reasons that local authorities give for not granting such requests. How many of those cases involve the local authority saying that it cannot afford to have the child in mainstream education?

I ask that because a lot of what I have heard through my casework shows that, when parents apply for a placement in special education if they are really concerned that the support that their young person needs is not available in mainstream education, the school refuses the application for various reasons. There is not the necessary support in mainstream education, because of the costs associated with that, so we would expect the number of requests for pupils not to be in mainstream education to increase. I am trying to make the point that I would expect more local authorities to say that it is too expensive to teach certain pupils in the mainstream environment. Do you see that happening?

The Convener: I am afraid that you are straying into a question that has been allocated to another member for later.

Pam Duncan-Glancy: Forgive me; I am sorry. That was unintentional. I was just responding to the point about placing requests.

The Convener: I am sometimes very protective of Bill Kidd so, if you do not mind, can we leave that subject for now and allow the member to ask the question later?

Pam Duncan-Glancy: Absolutely. I am sorry. I was just responding to what was said, but I take your point, convener.

The Convener: This has been a really enlightening morning so far, particularly on the subject of masking and how the tribunal can extrapolate what some of the needs are.

Given what you are seeing and experiencing, does the tribunal consider that the legal framework around the presumption of mainstreaming, and its interaction with placing requests, should be changed? Also, if I may be so bold as to ask, how do you think that that might happen?

May Dunsmuir: You will have seen from our written response that, in my view, there is duplication in the mainstream ground of refusal. We see that elsewhere, in the other grounds that are available. If we look at mainstream education from the perspective of inclusion, our evidence shows that a bias in favour of one type of school will not necessarily be interpreted as offering the most inclusive environment.

In our cases, we see quite a number of placing requests that have been refused on the mainstream ground. That was not always the case, but it has happened more in the past four or five years. It would have been less common to see the mainstream ground being relied on before that, which probably reflects the fact that some

education authorities are having to close their special schools or have streamlined availability. I am trying not to go into the question that was asked earlier, so I will not comment on that.

I do not think that the presumption of mainstreaming is a necessary ground of refusal, because the three parts to that mainstream ground appear elsewhere, in the other 12 grounds that are set out in the 2004 act. It is an unnecessary ground, but we now see a number of education authorities refusing placing requests on that basis. They are clearly attaching that ground to their reasoning when they could just as easily use the three strands from the other areas.

I know that you are considering mainstream education, and that Angela Morgan looked at that in her review. I would make the plea that anyone who is looking at something so significant should see it through the prism of the child or young person. I would want to know whether the child or young person even understands what the term means. We talk casually about mainstreaming, because we understand it, but very few children will know what we are referring to and many will not understand that there is a distinction in that regard in Scottish education. It is in the 2004 act, and we are certainly seeing it referred to, but it might be worth looking from an inclusion perspective at the idea of having a bias towards a particular type of schooling and asking whether that is the right approach to take.

The Convener: We certainly heard questions in some of our informal sessions about whether that presumption is good either for the person who has the additional support for learning need or for other children. We have been hearing lots of evidence about that, but I am not sure whether you can respond on that point.

May Dunsmuir: I cannot speak about policy or practice; I can speak only from a judicial perspective. In what I say, I have to stick to the most complex additional support needs, because that is what my jurisdiction deals with. We do not deal with children who have additional support needs who do not need much in order to benefit from education. With regard to the education that a child with additional support needs will need, when it comes to hearings and the judicial process, we find that, at some point, someone has forgotten to ask the child what the right environment for them is.

We know what the two parties think about the situation, which is why we place emphasis on centring the judicial work around the child or young person. We use advocacy and a range of tools to ingather the child's views. It is very unusual for us not to have the child's views. I have sat in other jurisdictions as a tribunal judge over the years, and I think that we are all the richer for having developed ways to get those views.

Sometimes, you find that, in the child's view, what they need in school is not really what is being argued for. We might want to drill down into that with regard to the evidence. Are people aware and alert to that fact? That can change the whole course of a hearing. You will find that parties will come in re-centred and say, "If we want to persuade the tribunal in that direction or that direction, we're not going to be able to ignore what the child has said."

Bill Kidd (Glasgow Anniesland) (SNP): Thank you for your excellent answers, because you are giving us plenty to think about.

When the tribunal is determining placing requests, is assessing and considering the costs to local authorities part of your consideration and, if so, how?

May Dunsmuir: There are defences that local authorities can rely on that, in essence, relate to costs, such as having to grow the classroom and employ an additional teacher. However, one particular ground is often relied on, which is that we have to take into account suitability and cost. That is a comparator ground.

I will look at that ground because it is the one that is most commonly relied on, and cost is central to the evidence in relation to that ground. In some cases, the cost is considerable. I want to give you examples of hard cases rather than balanced ones. I am thinking of a case that was decided last year in which the cost to the education authority was considerable. The costs, in totality, were probably some of the most considerable that we have dealt with, assuming that the child remained in that school for the rest of their school education.

In that case, the tribunal specified that it will not always be the case that suitability trumps cost—in other words, no matter how suitable something is, just being more suitable does not always overcome the cost argument. The evidence was so compelling in favour of the different school that the tribunal went on to make a decision to overturn the education authority's decision and place the child in that school.

However, I will note another case, which will be published soon. In a situation in which the tribunal decides that, with regard to suitability, the balance is fairly even—that is, both schools could meet additional support needs but perhaps one school is slightly more suitable than the other—the cost argument might be more persuasive in favour of confirming the education authority's decision.

Cost is commonly part of our evidence. Sometimes, it can be hard to drill down into those

costs, because some education authorities will say that, if the child is to remain in the school of our choice, the cost to us is nil. That is fine if both parties agree that the cost is nil. In that case, we do not need to look behind that claim. However, in a recent case, the appellant argued that that could not be the case. In such circumstances, the tribunal then has to unpick the evidence to identify what the cost is. If no evidence is led before us, we have to look at the evidence that we have. The process for costs can be quite analytical.

10:30

Where we can, we like to get the costs agreed in advance—for example, it might be agreed that it is £37,000 for this and £8,000 a year for that. There is not often a great deal of dispute, but we have seen disputes emerging over what those costs are in recent times.

Bill Kidd: That is interesting. I will cheat slightly and lift some information from somewhere else. You will no doubt have seen Glasgow City Council's response. One element of it says:

> "The Tribunal process could perhaps benefit from processes which would allow the revisiting of outcomes and impact on children, families and local authority staff to improve partnership working and support earlier resolution of conflicts."

That would include processes in relation to costs, would it not?

May Dunsmuir: Yes, I read that. I think that that view arises from a common misunderstanding of what the tribunal is. It is a judicial body: we do not work in partnership, or have colleagues. We are independent, and that independence is critical for both parties. We are composed of judicial members—they are all judicial officers. One would not expect a court to work in partnership and measure outcomes, and it is the same for the tribunal. That is not our job.

In the children's hearings system, for example, there is a monitoring element present in the rules, whereas the only monitoring element in the tribunal's rules is that I have a president's power to monitor the implementation of a decision. I can do that myself, on my own initiative, but usually I do so because parties write to us to say, "This decision is not being implemented and we would like you to monitor it." I can monitor to that extent. If the tribunal was to monitor the impact of its decisions, that would arguably interfere with its judicial independence. I think that, at all costs, that independence must be protected.

On the comment about partnership working, I wonder whether, in some ways, I am a victim of the tribunal's success. We are a very transparent jurisdiction; I have heard it said to me many times, in a positive way, by agents in particular, that, "We don't get access to this amount of judicial intelligence elsewhere; you are sharing your practice guidance and information with us in forums, you are listening to us and you are developing processes led and guided by us."

However, none of that amounts to partnership working, and I frequently have to emphasise that. We are a listening and learning jurisdiction, and we will be guided by our mistakes and successes, and by developments in certain areas that we think that we could benefit from working towards, but we do not work in partnership.

Bill Kidd: Effectively, therefore, the tribunal is there for the rights and benefits of the child—that is what you are working on.

May Dunsmuir: The tribunal is there to decide disputes between two parties—that is ultimately what we are doing—but the 2004 act is about children and young people. The decisions that we make on references are about whether a child's additional support needs are being met in such a way that they can benefit from education. That is the test.

With a claim, the situation is far more complex. We have to decide whether there has been discrimination and, if so, what kind of discrimination. We are looking at the school education of the child, so we cannot lose sight of the child. I highlight that we do not have a best-interests test in the 2004 act or in the 2010 act, but we have now incorporated the UNCRC, one article of which is about the best interests of the child. We all, therefore, have to think about that, despite the fact that it is not present in the primary legislation that we are obliged to follow.

Bill Kidd: That is excellent—thank you.

The Convener: Stuart McMillan has a question on that theme.

Stuart McMillan (Greenock and Inverclyde) (SNP): First, convener, I apologise to you and to the committee for my tardiness earlier; it was my fault.

I have a quick question on the back of Bill Kidd's questions that relates to Ruth Maguire's question about socioeconomic characteristics. Notwithstanding the socioeconomic point or the issue of availability of staff in schools, in relation to the cost, have you found that there has been an improvement in outcomes in new schools or schools that have been revamped in recent years? Have you found that there are better outcomes in urban settings compared with rural settings?

May Dunsmuir: I do not think that I can really comment on that, bearing in mind that we are seeing only a small percentage of the fabric, if you like, of children with additional support needs. On the socioeconomic point, I can say—it is in the

public domain and I said it earlier—that the children's commissioner has expressed concerns that those who are more disadvantaged are less likely to be able to exercise their rights and access the tribunal.

Although I made the comment about partnership, and it is a point that I must stick to, I have always been very mobile and willing to go out to speak to people, including parent groups. By choice, I have gone to some of the more socially disadvantaged areas to do that. I have discovered that people do not know about their rights, and they have said, "If only we had known." That varies from not knowing about the tribunal to not knowing what a CSP is. Commonly, I will sit in a room, listen to people and then tell them that all the things that they are talking about would fit within a co-ordinated support plan. People are not aware of their right to a statutory education plan.

I probably cannot really say much more than that because I do not have access to the research that would give you the answer that you are looking for here.

Stuart McMillan: Thank you. In a wide variety of policy areas, we regularly hear in the Parliament about the difference between urban and rural processes and outcomes, so I was keen to see whether there is anything to add in that regard.

May Dunsmuir: You will know, as I do, that educational outcomes vary according to social diversity. In two particular education authorities, I have noticed that more applications arise from an area that is more socially mobile. I have seen a pattern there, which has been consistent across the tribunal's term. We are not quite 20 years in operation, although we were established by the 2004 act. There is certainly evidence of that in one particular education authority area, but it is a unique area.

Other than that, we do not break it down to see whether applications come from an urban or a rural area in that education authority, such as Glasgow City Council, which you mentioned. We do not look at that, I am afraid.

Ross Greer (West Scotland) (Green): I am interested in how a placing request is dealt with if the mainstream school has an ASL unit or a dedicated space within it, such that there is not a binary distinction between a mainstream school that does not have specific provision and a specialist school that does. Is a particular process followed? Are there any differences when you handle a request where there is ASL provision in the mainstream school? Obviously, if the request has reached you, either the young person or the family has felt that that is not sufficient to meet their needs.

May Dunsmuir: We are seeing a growing trend in the number of placing request refusals that come to us as references where the child is in a mainstream environment with access to a communication base or a concentrated additional support needs support—the trouble is that everyone calls them different things. That theme is emerging. The extent to which the child accesses a base—I will call it that—can strongly influence the evidence on which the education authority will rely when it comes to its defence.

The authority might say, "We can meet the child's needs in this environment, because we have tailored it to a certain extent", and the tribunal then has to carry out a weighing exercise to decide whether what has been proposed meets the child's additional support needs or whether the school specified in the placing request will do so.

However, we are starting to see certain aspects being highlighted about which there has not been as much argument before, including those that do not relate to neurodivergence. For example, you might have a child who is neurodivergent but has other additional support needs. They might have, say, autism, but they might also be profoundly deaf, and it is that additional support need that it is being argued is not being met.

As a result, we have to examine what the base looks like. It might well be set up so that everybody is trying to meet the neurodivergent child's needs, but is it meeting the child's additional additional support need, as it were? That sort of thing is very dependent on facts and circumstances. You could have a super set-up that might be fit for children who are neurodivergent but which does not meet the needs of a profoundly deaf child.

Ross Greer: I had a piece of casework on exactly that issue.

Perhaps I could ask about that a little bit more. Are the legislation and the guidance under which the tribunal is operating clear enough on how you should go about dealing with a case that relates to provision in the mainstream setting?

May Dunsmuir: The legislation in question is very thin. I have worked in jurisdictions where I have had to use something the size of a telephone book and it has been easier to navigate.

I did not draft the legislation, so I can say this, but I accept the criticisms that are made of it and agree that it is difficult to navigate. Sometimes, when you look for a provision, you cannot find it in the place where it should be.

As for placing requests, the statutory grounds for refusal are found in one of the schedules to the 2004 act, and I think that they are relatively clear. The mainstream issue is more difficult, because

you are looking at exceptions from what you might call a double-negative perspective, which no one likes, and trying to bring clarity when faced with a test framed in such a way can make things a bit more challenging. However, as I have said, I think that the grounds that we are dealing with are relatively clear in the context of what is very complex legislation.

Some people would say that even the very basics are complex, and I think that that is probably true—you need only look at the CSP. I do not know whether your question is specifically on placing requests, but if you were to ask me, "Is the legislation clear enough on CSPs?", I would say, "Absolutely not."

Ross Greer: I believe that we are just about to move on to that topic, and I have got lots of questions about it. However, other members want to come in first.

The Convener: Thank you, Ross, for respecting our colleagues in that segue—smooth as ever.

I call Pam Duncan-Glancy, but I know that Ross Greer has questions on this issue, too.

Pam Duncan-Glancy: First, convener, I apologise for stepping across Bill Kidd's area of questioning earlier. It was genuinely unintentional.

On the CSP, which we were just beginning to discuss, parents and pupils tell us that it is really difficult to get something written down or a plan of action to put in place the support that young people need. School staff tell us that although all sorts of things are written down—obviously there are issues around workload and so on—the fact is that only one plan has a statutory footing, and that is of course the CSP. How important is that statutory footing, notwithstanding the limitations on the CSP, which I will come on to?

May Dunsmuir: I think it is incredibly important. As you said, the CSP is the only statutory education plan. There are 32 education authorities in Scotland doing things their own way, and there is a range of exceptional plans out there. Indeed, quite often, you will see a plan and think, "Oh, that was really well done." However, that sort of thing should not happen as a way of avoiding the statutory plan.

The legal position is simply that, if the criteria are met, the plan has to be in place. I think that there is a bit of doubt and a lack of understanding in that respect. When I sat on the CSP working group following the criticisms made by the Morgan review, I made a plea for clarity. The idea that you can choose whether to have a CSP is misconceived, because that is clearly not the case. The law is clear. There are criteria and, if those are met, there should be a co-ordinated support plan.

10:45

The Parliament intended that for the children who have the most complex additional support needs, and the expectation is that that sits across a certain percentage. I put in my written submission the comments of Lady Poole in the Upper Tribunal judgment. From the evidence that was given to her, she worked out that the figure was at least five times smaller than what would have been anticipated. I do not have the exact figure for the population of care-experienced and looked-after children, but when I came into the jurisdiction and saw that presumption, I thought, "That's brilliant. Finally, we're going to get a very disadvantaged population of children on an even footing. They'll all have their CSPs."

The act makes it clear that there is a duty to consider whether a looked-after child needs a CSP. Freedom of information requests have been made to education authorities. There have been round tables with concerned agencies, including the Children and Young People's Commissioner Scotland, because those FOIs found a disparity in what was happening.

I am surprised that there are so few. People talk about the CSP being important for a range of reasons, but it is often forgotten that it is just as important for the child. We know more about that now, since the expansion of rights to children, because they now make their CSP references.

In a case involving a child party, which was published on the decisions database, the child wanted clarity in their life. They were part of a family who had different social workers for different members of the family. In that case, the child felt that their views were lost in the volume of all the adults' views. It was felt that a CSP was not only for the child to use to insist on having what was stated, but for them to know what was going to happen, who was going to do it, when they were going to do it and how it was going to happen. It is not just about accountability—although, clearly, Parliament intended that there should be accountability—but about clarity and certainty.

You know without my saying them the pressures on education across nations, not just Scotland. To factor in my earlier comment about masking, sometimes the child with the greatest needs does not display them in front of the school. Sometimes such needs will be very obvious, but that has not always been the case in the cases that we decide on. The CSP can give certainty to the child, not just to the parent, because, sometimes, it is the child who asks.

On patterns, the failure to provide a CSP is the most common. CSP references usually settle, following the judicial case management process. I sometimes think that that is because the judicial

process separates the wheat from the chaff. It says that the case is really important but that, in order to decide on the issue, we need to concentrate on a particular thing. That way, we are able to concentrate the parties' minds. Sometimes we will say, "Well, that's a good question, so I'm going to direct that you provide that so I can have a look at it." Through that process, a light bulb suddenly goes on, and the parties manage to talk again and secure agreement.

Not many child-party CSP cases proceed to a hearing, although the one that I mentioned did so. It centred around whether provision by an agency that was funded by the social work department amounted to "appropriate" agency input. That is another complexity. The decision clarified that—helpfully, I think. It said, "Look, even if it is third sector input, if social work is funding it, it is still coming in through social work." That is an interesting decision to look at.

Pam Duncan-Glancy: Do you think that the requirement in the legislation for CSPs to involve interagency work—notwithstanding how important such work is, which I will come to in a minute—restricts some people's ability to access CSPs?

May Dunsmuir: I am sorry—could you say that again?

Pam Duncan-Glancy: Given that a CSP is largely available for people who have complex needs and that "complex" usually means that it is necessary for social work or another agency to be involved, do you think that there needs to be a plan for people who do not always require the involvement of other agencies? Could there be a CSP for such people simply in relation to education?

May Dunsmuir: Are you asking me whether the CSP could be used more broadly rather than as narrowly as it is at the moment?

Pam Duncan-Glancy: Yes.

May Dunsmuir: I do not know whether I can answer that, as I have to stay centred on the judicial perspective.

I can say that I understand the purpose of the plan. We can see how the Parliament intended that it be used, but my concern is that it is not being as well used as it ought to be—we know that from the evidence that we are hearing. If we were to broaden out the way in which the plan can be used, what on earth would that do? Would that mean that it would be used more or would it simply enlarge the problem?

Based on the cases that we hear, I think that it is terribly hard to navigate through the statutory tests. People are struggling with what "significant" means. We now have a judgment from the Upper Tribunal that tells us that, when we look at the significance of the support that someone receives, we must look not at the cumulative support that they receive but at the individual support that they receive from different places. That in itself will narrow the scope.

What we are seeing in the references shows that, from a legal point of view, the process is very difficult for people to navigate. People are struggling to find their way through. However, children are very determined rights exercisers, if I can put it like that. When they find out that they have a right to a CSP, children are more persistent in getting the matter dealt with. I will give an example of that. A child party came to a tribunal for a CSP. It was agreed that they should have a CSP, so the case did not proceed to a hearing. However, the CSP was not issued in the terms that were expected, and the child came back to the tribunal right away.

It was good to see that that child understood their rights as a party. I will not say that they understood the complexity of the legal provision, because I do not think that that would be accurate, but they understood their right to have something, even though, legally, it was very complex to get it.

Pam Duncan-Glancy: How does the tribunal address a lack of support from other services that are not education related? Is that an area in which you think that the scope could be widened?

May Dunsmuir: That is a very topical issue. I was asked to give a talk to a group of educationalists who were doing training on the CSP and on transitions. I was asked whether I would explain what the route to the tribunal was in relation to a variety of things. Everyone at that event said that their greatest difficulty arose when they could not get the other agency to play its part. There are regulations that impose duties on those agencies, but if they do not comply, at the moment the only route to the tribunal is to ask for the president's power to monitor to be triggered. That would involve the education authority saying, "I'm asking you to monitor me because I can't implement this," which has happened. There was one occasion on which an education authority asked that the decision be monitored because it had failed to implement it.

Other than that, we do not have jurisdiction. Is there a gap in the law there? What I am hearing from educationalists is that they feel that there is no redress in that area. The situation is different from the one in England, where the relevant body has a broader jurisdiction, which means that it can deal more fully with the needs—not just education needs, but social and health needs—of the child who is before them and can make orders. I cannot say whether it can make orders to compel an appropriate agency to act, because I do not know whether that is the case.

Until we have jurisdiction to do something about that, the only real route for a party—not just an education authority, for that matter, but either party—would be for them to come back and say that the order of the tribunal was not being implemented and give the reason why. I would then have to look at that and decide whether to make a reference to the Scottish ministers.

Pam Duncan-Glancy: The rules around the CSP say that the education authority's view must be taken into consideration and is needed. Do you think that that should also include the views of the young person?

May Dunsmuir: Yes, absolutely and you will see a section for that in the CSP template in the code of practice. We are getting better at understanding that children have views and will express them if you give them the space to do that and if you respect the way in which they want to do it. We have had to develop that understanding—we are on that journey—and we are learning that children have something to say. This is a jurisdiction where that needs to happen.

With regard to additional support needs, it would be very difficult to put a CSP together without knowing the views of the child or young person. They might not want a speech and language therapist to come into the school. For some children, being taken out of the class for that would just be awful. Some children need a pupil support assistant all the time. Some might need a pupil support assistant for transitions. That very much depends on the child. Therefore, if we take a generic approach to the CSP, we are not fulfilling the statutory expectation, which is that it is for the individual child.

Ross Greer: May, can you explain whether there are significant differences between a referral in relation to a CSP and a claim under the Equality Act 2010 or in what way you would handle those differently?

May Dunsmuir: Cases can come under either guise, as we discovered. Just before we transferred into the First-tier Tribunal, there was a case that related to a CSP refusal, which had been brought to the tribunal by the parent and the tribunal said that a CSP should be made.

I will give you a very short version of what eventually happened, because it was a lengthy process. The resulting CSP was so thinly drafted that the parent felt that it had become an act of discrimination. The tribunal upheld that and said that the CSP was so poorly drafted that it amounted to discrimination.

That was appealed by the education authority and it went to the inner house of the Court of Session. Lady Smith was, I think, the president of the Scottish tribunals at that time. The inner house, including Lady Smith, said that the CSP could amount to discrimination. Actually, I apologise—I do not think that it was Lady Smith who decided that, although I do not think that it matters to you who decided it. I am thinking of another case. However, it was an inner house decision that the CSP amounted to discrimination.

The interesting point is that the Equality Act 2010 is a far broader way to bring a case to the tribunal. Because the tribunal can make any order that it deems fit, apart from an order for compensation, claims could be used in innovative ways. In that case, the parent said, "I'm not coming back through a reference. I'm coming back on a matter of equality."

With regard to matters of discrimination, I am trying to think whether claims under the 2004 act and references are different—because I have sat in both claims and references. Sometimes, when it comes to matters of discrimination where the child is the party, we have seen that the child can express much more of a feeling of need for change to arise for their disabled group. There is almost a campaigning edge, if I can call it that.

11:00

The tribunal makes its decision based on the law before it, but there is a noticeable difference in the enthusiasm of the child party in a discrimination claim. I do not know whether that is because of children saying, "I've got a right now, and I'm going to use it." They might feel strongly about the issue for not just themselves, but their group. That is where the Promise teaches us about voice and co-design. If we listen to the voice of children and young people, we find that there is a great deal of maturity in their understanding of where they perceive that their needs are not being met.

A tribunal will not always make a decision that supports the view that the child has set out, but the tribunal's duty is to record the child's views and explain why it has gone down a different route, respectfully setting that out. We also issue letters to children who are not parties, explaining on one page of A4 why we have made the decision. We are developing a visual letter, which will be rolled out later this year, using imagery to explain why we have made a decision.

We should be respectful at all times when we are explaining what we are doing. The tribunal has worked hard not to appear patronising when it comes to children and young people, respecting how they communicate. When we were developing our hearing suites, the child who led the charge on what should be in the room was non-verbal, but they were incredibly able to communicate their needs.

I apologise: I have gone off on a tangent; you were not asking me about those things.

Ross Greer: That was all very useful.

The Convener: It was interesting.

Ross Greer: On the point about the letters in particular, if you have any anonymised or generic examples of letters that you could provide to the committee—while recognising the confidentiality of each case—we would find that really interesting. I recognise that that might not be possible, given their nature.

May Dunsmuir: I will ask my tribunal judges who are present to take a note of that. I will take that away and think about it. It is my job to decide what to publish and what to approve, and I have not published any letters to children, although I have published decisions. I will see whether there is something that we could share with the committee. It may well be that we could share some of the training models that we have developed.

I can tell you that, at the tribunal forum that is taking place next month, I will be putting an example of a visual letter on screen, into the public domain. I can ensure that you have access to that.

Ross Greer: Something like that would be ideal, thank you.

May Dunsmuir: I should mention that we have developed our own suite of images. One of the first things that we learned from consulting with children is that they are totally confused about who we all are. They think that we are from child and adolescent mental health services, or from their school. It is really important to emphasise our judicial independence, as I have been doing throughout the morning, and the only way that we found to do that was by creating our own imagery—rather than borrowing Makaton imagery or imagery from the children's commissioner's golden rules. We did that and, through repeating it, we can ensure that people eventually see it. The imagery can be found on our website, on the forms, on the guidance, on the doors and the walls of the hearing room and in the letter to the child—everywhere—so that they disconnect us from other agencies and, I hope, understand that we are independent. That is really important.

Ross Greer: I understand the example that you gave and the instances where the situation may start with a referral in relation to a CSP and then escalate to a claim under the 2010 act, but I am interested in cases where children or their carers make a claim under the 2010 act directly. We have heard about how few CSPs there are—0.2 per cent of children with a recognised additional need have one—and part of the reason for that, based on some of the evidence that we have heard previously, is that children and the adults in their life are not aware of the existence of CSPs or their right to access them. I would be interested to know whether you have cases coming to you that go straight to claims under the 2010 act that could perhaps have been resolved through a CSP, but information on CSPs had simply not been provided to the child or their parent or carer beforehand.

May Dunsmuir: That is not common. CSPs usually come in through the reference route. The case that I described to you was unusual. We do not get many claims. Although I say that the 2004 act is a complex piece of legislation, anyone who makes decisions on claims relating to the Equality Act 2010 will tell you that they are re-educating themselves with every case that they sit on. There is a great deal of literature out there to explain what amounts to discrimination.

We have had fewer discrimination claims this year, and they come in the main from parents rather than from children, although we have had children making claims. One very significant claim was raised at the beginning of our lockdown journey in 2020—I say at the beginning, but it was probably at the end of the first lockdown and before we went into the next one. We had a case in which a looked-after child, who had additional support needs just by dint of being looked-after but who was also neurodivergent, raised a discrimination claim because, in the middle of lockdown, all their contact with their parent was shaken up. The information is in the public domain. The looked-after child had also just changed school. Can you imagine that? It had an impact on the child's ability to cope.

I am afraid to say that the language used in the decision is "distressed behaviour" rather than "distress"; however, the tribunal was at pains to specify in the decision that language is important.

The case involved restraint and there had been multiple incidents of the child being restrained. In our jurisdiction we say that all behaviour is communication. If you tell a child who lives in a residential school instead of with their mum, "Your mum's not coming today," and the child then shows how unhappy they are about that, that is a form of communication. In this case, there were multiple instances of restraint. The tribunal went on to decide that there had been multiple areas of discrimination.

I know that that case has informed a number of residential school environments, because they have scrutinised the case. The tribunal makes a number of criticisms, first of the use of restraint but also of the approach taken and the lack of understanding of what was happening when the child was distressed. The case is also an example of the school failing to understand. Conventionally,

if I were a child who misbehaved, a trusted adult would try to sit down with me at the end of that and say, in suitable language, "Do you understand what went wrong?" and I would say, "Yes. I'm sorry" and the adult would tell me to try not to do that again. The school was trying to do that with the child, who could not be accountable for something that was outwith their control. The school interpreted that as a lack of accountability, when it was no such thing.

That is a very rich case, with a child party who was a looked-after child, a discrimination claim and the use of restraint, all of which was topical because it came on the heels of the "No Safe Space" report by the children's commissioner. So, I would say that we are seeing some attempts to use the Equality Act 2010 for less conventional means, but not to the extent that I thought might have happened by now.

Ross Greer: Thank you; that is really useful.

The Convener: You have been very good this morning, May, but we are drawing towards the end of our session.

You have talked about two parties being quite some distance apart and how, prior to them coming to the tribunal, there is a process to try to bring them closer together. In some of our other evidence, we have heard about some of the challenges and about how the tribunal process can be seen as pitting two parties against each other. How could the dispute resolution process be changed to reduce perceived, or real, conflict and to support better working between families and local authorities?

May Dunsmuir: We have done a great deal in this area. The first thing to say is that the tribunal, as with other tribunals, is inquisitorial and, although it is not wholly adversarial, which would be more akin to a court environment, it is both inquisitorial and adversarial.

The adversarial component is present in that there are two parties, both of whom are entitled to representatives, to bring evidence and to examine the evidence of other witnesses and make submissions. That is the adversarial element.

The inquisitorial element, and the fact that the tribunal can regulate its own proceedings in many ways, is what makes us unique. We can change the shape of the tribunal to accommodate the facts and circumstances of the case. When I started as president, there was no real rhythm to the number of days that it might take for a case to be decided. It could be anywhere from two to five or seven days. It seemed to me that we needed to reduce the amount of time that people spend in a hearing room. It is hard for me, and I hope that I know what I am doing. Can you imagine if it is about your whole life? Children ask us, "Why do adults think that we are not allowed to get upset when they are talking about things that upset us?" These are highly sensitive environments.

We therefore put in place a number of pre-hearing steps to reduce the amount of oral evidence. We have written witness statements and outline submissions, so that before everyone comes into the hearing, each side knows what the other side is arguing and what the other witnesses have to say.

More recently—the plan was to pilot this in 2020 but it had to be delayed—I introduced documentary evidence guidance. Four folders as thick as those that I have with me would be the documentary evidence. It was about trying to stop things like putting into evidence a 50-page handbook if we had to refer only to page 3, or stop putting in primary 1 to P7 school reports if we had to look at a secondary school placement at S4.

It was about educating people to help them to understand that the process is a judicial process, not an extension of education, or health. A hearing is not a case conference meeting. A case would be tested evidentially and there would be a conclusion. A lot of information was also put together for unrepresented parties, because although I have said that parties are mainly all represented, we have seen a rise in the number of unrepresented parties.

I started to formulate everything that I was asked and I put in an information note to explain what witnesses could expect to happen in a hearing and how they should behave. For example, we would say to a witness for an independent school that they are not here to give evidence to promote the school's position but to support us in understanding what the child's additional support needs are.

Trying to steer witnesses better is a journey. I have not eaten very much this morning because I was coming here and I was nervous. Any witness who appears in any setting in which a decision is going to be made will be nervous, no matter how good their evidence is. Our job is to make the environment as non-confrontational as possible to assist that witness. Everyone wants the best evidence. I have a principle of dignity and respect, which means that both parties are to behave in a dignified and respectful manner. We do not use court language. We do not talk about cross-examination; we ask whether there are any questions for the witness. We have stripped out all of the jargon. We do not permit multiple questions to be asked of children. For children, one set of questions is agreed by the parties and there is one questioner. The child does not have to be exposed to having to take a turn.

We have the option of a one-to-one room where the child can give their evidence without seeing everyone, although they know that everyone is out there. That is a very popular choice for parents and for children. We also make it clear that the child and young person is at the centre of the process.

However, we cannot rub out the journey to the tribunal. I do not know the correct answer to this, but some people say that we should be the last resort, while others argue that we should be the first. I have had parents say to me, "If I had just known and had come to you first, I would have saved myself years." Disputes can last for years. I do not know the answer to that—and because it concerns a matter of policy I cannot comment—but I can see that there is an argument either way.

11:15

I have read the comments in some of the submissions to the committee. I do not regulate what parties decide to rely on in their documentary evidence. I say that there should be no duplication. If someone puts in a 50-page report I tell them that I will ask them about pages 1, 2, 3 and so on, all the way through. They have now got that message and so we have seen the bundles of papers reduce in size.

However, the moment that a document enters the process in written form it becomes part of the evidence and the other party has the right to test it. At tribunals we see the broadest expression of people's rights, and they should be able to argue their cases. Whoever a party is, they should be able to test the evidence that is presented and to make submissions. In many ways that sits outside the control of the tribunal, but all the efficiencies have reduced the number of days required, so it is now more common for us to have two-day hearings and we would rarely have five or seven-day hearings.

Once it is better understood who we are, and the fact that the tribunal is of a judicial nature, things might change. No one ever likes coming to a tribunal. It would be highly unusual for someone to say, "I am excited because I have three tribunals coming up." I do not think that even the tribunal judges would be too excited about that, because the evidence in our hearings is so intense.

The other point that I would make is that it is common for experts to be present at our proceedings. If we look at the example of the children's hearings system, that is not a common phenomenon there, or even in some other jurisdictions. However, we commonly have to hear expert evidence, which adds its own depth to proceedings. We are providing a forum in which two parties who cannot agree have an opportunity to argue their points before a specialist body that is independent of them, which goes on to say, "Here are the facts. They are facts; they are not disputed any more. We have found them to be factual. Here is our decision and here are our reasons for it."

The Convener: It is interesting that, even with all the changes that you have made, local authorities still submit evidence that gives the perception of there being a conflict between parties.

I will bring in Liam Kerr, who has the final question on that aspect.

Liam Kerr: Is there an appeal process?

May Dunsmuir: Yes.

Liam Kerr: Who, principally, actions that?

May Dunsmuir: There is an appeal and review process. Permission has to be given to appeal or to review a case.

According to the appeal process, someone would have to make a request within a specified number of days. They would have to show that they had an arguable point of law, the threshold for which is low. If such a request is received an independent tribunal member—a legal member—determines them; I try to keep such determinations away from the deciding tribunal. I thought that that was the better approach, but not every tribunal will do that. The reason why I did so was that the perception of neutrality and independence is so important. Before transfer we had a reviewing power, but parents were critical of it. They said, "Well, you're asking the same tribunal to review its own decision. We're not sure that's wholly independent." Therefore, we now have an independent process.

If permission to appeal is refused, the party seeking it can go to the Upper Tribunal, which is the appellate body that sits above the First-tier Tribunal. It will then decide whether to grant permission. If permission to appeal is granted, the case goes to the Upper Tribunal, which hears the positions of both parties and issues a decision. We do not have a huge number of appeals, but those that have been taken have helped us to reframe and understand the law.

There is an appeal above the Upper Tribunal, to the senators of the College of Justice, who are senior judges who sit in the inner house of the Court of Session. Alternatively, I can decide, as a chamber president sitting in the Upper Tribunal. The reason why it is senators—rather than, as in other jurisdictions, other judges such as sheriffs—who make those decisions is that, on the transfer in, it was agreed, as part of the process for the bill that became the Tribunals (Scotland) Act 2014,

that continuity of type would be maintained in the appeal process. The idea is the Upper Tribunal is more efficient and it is specialist, and it was argued that it an appeal there would be quicker than going through the court route. It is for those reasons that there is a further right of appeal to the senators. Our original route was direct to the inner house, but it was argued that that was almost completely inaccessible to many people. That is why a senator or a chamber president like myself would sit. I point out, though, that, to date, I have not sat in any Upper Tribunal appeals.

Liam Kerr: I understand. Thank you.

The Convener: I thank May Dunsmuir for her evidence.

The committee plans to take further evidence on its inquiry in the coming weeks and will then produce a report based on what it has heard, with recommendations for the Scottish Government.

That concludes the public part of our proceedings. I now suspend the meeting to allow our witness to leave, after which the committee will move into private session to consider our final agenda items.

11:21

Meeting suspended until 11:33 and continued in private thereafter until 12:11.

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