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The biggest extension of rights in Europe? Needs, rights and children with additional support needs in Scotland

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The Education (Additional Support for Learning) (Scotland) Act 2004 boosted the rights of parents of children with additional support needs (ASN) by improving access to information, instituting a Code of Practice and establishing new redress mechanisms such as the ASN Tribunal and independent mediation. More than a decade later, Scottish legislation enacted in 2016 and implemented in 2018 attempted to increase children's rights, broadly placing them on a par with those of parents and young people. This paper draws on data from an ESRC project entitled *Autonomy, Rights and Children with Special Needs: A New Paradigm?* (ES/P002641/1). Analysis of Scottish Government policy and legislation, key informant interviews and official statistics are used to examine the extent to which the new rights are likely to be realised in practice, given the complexity of the legislation and competition between discourses of needs, broadly synonymous with the wellbeing agenda, and rights. The paper concludes with a discussion of the lessons which may be learnt from the Scottish experience, which will be of interest to an international audience.

Keywords: rights, children, additional support needs, autonomy, Scotland

Introduction

Over the past few years in both England and Scotland, legislation has established new education rights for children and young people with additional support needs (ASN) in Scotland and special educational needs (SEN) in England. The central aim of research conducted by researchers at the Universities of Edinburgh and Manchester was to ascertain whether the reforms truly represent a paradigm shift in the recognition and realisation of these rights, or whether there continues to be a

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gap between rhetoric and reality¹. Prior to the current legislative changes, the overwhelming emphasis within the law in this area was on the duties of local authorities, and, more recently, the rights of parents (Harris 2009; Riddell and Weedon 2010). Children's and young people's independent rights, which until now have scarcely featured in policy discourse, have been significantly enhanced. The Education (Scotland) Act 2016 (commenced in January 2018) conferred on children aged 12-15 independent rights which are almost equivalent to those held by parents and young people. Children have been granted twenty two additional rights, including the right to advice and information, to request particular types of assessment and to ask the local authority to determine whether a CSP (Co-ordinated Support Plan) is required. They are also able to make a reference to the Tribunal concerning the local authority's decision with regard to the provision and contents of a CSP. Furthermore, if a child decides to refer a matter to the tribunal, they are entitled to free advocacy and legal support.

The Scottish Government claims that the rights focussed reforms go much further than developments in England and Wales, giving children with capacity the opportunity to directly influence and ask for support to be put in place for them. The scale of ambition with regard to children's rights is evident in the Guidance on the Assessment of Capacity and Consideration of Wellbeing (Scottish Government 2017b). The Guidance states that the aim is to make Scotland:

... the best place to grow up and bring up children. This ambition requires a positive culture towards children. One where children are welcomed and nurtured. One where we all are alert to their needs and look out for them. Where children are listened to, where their views are heard and their rights protected. They should be respected as people in their own right, with rights to a life that allows them to fulfil their potential. (Scottish Government 2017b, para 7)

¹ The ESRC-funded project entitled *Autonomy, Rights and Children with Special Educational Needs: A New Paradigm?* (Ref: ESP0026411) investigated the implementation of new children's rights legislation in Scotland and England. Data presented in this paper are drawn from this research.

This paper questions whether the new legislation is likely to lead to a shift in the balance of power between professionals on the one hand and children and their parents on the other. The structure of the paper is as follows. We begin with a brief overview of two parallel discourses, one associated with the discourse of needs, broadly synonymous with the wellbeing agenda, and one associated with the discourse of rights, both of which are reflected in education legislation in Scotland. This is followed by an analysis of the way in which these policy discourses are reflected in the accounts of key informants and the use of statutory support plans. The implications of these findings for the future of children's rights are considered in the conclusion.

Wellbeing and rights in education policy and legislation

Provision for children with ASN in Scotland is governed by two complex and competing pieces of legislation, the Children and Young People (Scotland) Act 2014 and the Education (Additional Support for Learning) (Scotland) Act 2014 as amended in 2009 and 2016. The two bodies of legislation reflect different conceptions of wellbeing/needs and rights. Although often used interchangeably, discourses of wellbeing and rights have different 'conceptual and academic genealogies' ([Tisdall 2015a](#)). Tisdall notes that the Children and Young People (Scotland) Bill was initially framed as a Children's Rights Bill which would have due regard to the UN Convention on the Rights of the Child (UNCRC). The Bill was initially hailed as the most advanced children's rights legislation in the UK, but after extensive consultation the Government produced a consolidated bill which was designed to bring together children's rights with proposals for children's services. Tisdall's analysis of the parliamentary debates and submissions around the Children and Young People (Scotland) Act 2014 shows that initial attempts to foreground rights were gradually replaced by an emphasis on wellbeing. Part 1 of the Act placed new duties on Scottish Ministers and local authorities to implement children's rights as set out in the UNCRC, and to report to the Scottish Parliament on a triennial basis. Later sections of the Act were organised around children's wellbeing, with eight indicators used as the basis of professional judgements as to

whether children's education, health and social needs were being met. The well-being agenda, known as *Getting it Right for Every Child* (GIRFEC) was used to inform the work of all those working with children in different settings. Parts 4 and 5 of the Act stipulated that a Child's Plan should be opened for children whose wellbeing was judged to be in jeopardy, and that each child should have a Named Person, that is a person designated to co-ordinate service provision and share information with other professionals. From a children's rights perspective, Tisdall suggests that the Act provides little opportunity for children, young people or parents to challenge the actions of duty-bearers, for example, in relation to the sharing of confidential information, the identity of the Named Person, the assessment of needs or the proposed provision. Subsequently, the provisions of the legislation with regard to the Named Person have proved particularly controversial, and as a result, at the time of writing (November 2018), the legislation has not been fully implemented.

Tisdall (2015b) argues that evidence and debates on the Children and Young People (Scotland) Bill tended to emphasise problems with allowing children access to litigation to enforce their rights, regarded as being at variance with the Scottish social welfare tradition of collectivism and consensual decision-making. It was argued that the UNCRC was an aspirational document which did not need to be underpinned by legal routes to redress. By way of contrast, there was considerable enthusiasm for the extension of the 'general welfare duty' by local authority managers who referred to Highland Region's positive experience of implementing GIRFEC. The concept of wellbeing was not defined in the legislation, and no definition of wellbeing was provided.

As noted by Tisdall (2015b), evidence presented to the Education and Culture Committee made clear that assessments of wellbeing were based on professionals' rather than children's or parents' understandings, with only limited consultation with children and young people. In addition, those giving evidence to the committee emphasised that assessments of need must take into account local resource availability.

Particularly heated debates arose around the role of the Named Person, with concerns expressed around infringement of parents' and children's rights to confidentiality. The Scottish

Government conceded that the information holder should have regard to children's and young people's views, so far as is reasonably practicable, taking into account the child's age and maturity. However, the Government argued that there can be circumstances where children's wish for confidentiality could legitimately be breached. In the event, a judicial review was launched against the Named Person's provisions of the legislation on the grounds that they breached rights to privacy and family life under the European Convention on Human Rights. At the time of writing, Parts 4 and 5 of the Children and Young People (Scotland) Act 2014 have yet to be commenced. Over time, Tisdall argued, parliamentary debates on the Children and Young People Act showed increasing reference to wellbeing and decreasing reference to rights, driven largely by fears of children and young people engaging in litigation.

Similar tensions between discourses of wellbeing/needs and rights are evident in the discussions around the ASN reforms of 2004 and subsequent amendments in 2009 and 2016. Riddell and Weedon (2010) analysed responses to two stages of consultation on the Education (Additional Support for Learning) (Scotland) Act 2004 (Scottish Executive 2001, 2003). Local authority respondents (educational psychologists and education officers) argued for the abolition of statutory support plans on the grounds that these were overly bureaucratic and accorded too much power to parents. They believed that professionals should have the power to identify and meet children's needs without external interference. Parents, in contrast, felt that statutory support plans were a vital safeguard in providing a clear statement of the provision the local authority intended to make, ensuring regular reviews of provision and facilitating legal redress.

Analysis of the impact of the ASfL legislation indicated ongoing resistance by local authorities to aspects of policy intended to increase parental rights². Surveys of Scottish parents' perceptions of the new dispute resolution routes (Riddell et al. 2010; Weedon and Riddell 2009)

² The ESRC funded project on dispute avoidance and resolution in ASN/SEN (RES-062-23-0803) used analysis of official statistics, key informant interviews, surveys and family case studies to explore the responses of different social actors to the new measures.

revealed strong support for the new Tribunal procedures on the grounds that they provided a clear and (relatively) enforceable route of redress. Parents were less keen on independent mediation on the grounds that recommendations were unenforceable and parents were in danger of mediating away their rights. Complaints procedures at school and local authority level were criticised on the grounds that teachers and local authority officers were unlikely to listen to parents' concerns unless forced to do so. By way of contrast, local authority officers were highly critical of the tribunal on the grounds that it ceded too much control to 'vexatious' parents and impinged on local authority responsibility to reach impartial assessments of children's needs and resource allocation.

The struggle between those promoting either a needs or a rights-based approach continues, as illustrated by the responses to the 2008 consultation on amending legislation (Scottish Government 2008). Local authorities continued to press for a much wider overhaul of the legislation, including abolition of CSPs:

The production of the CSP is procedurally complex and formal. By its nature, it is driven by official letters and procedure-driven meetings. The need to have documents written in a standard defensible style has already resulted in a CSP style of writing which, like the language of its predecessor the Record of Needs, acts as a barrier to plain communication. It is very difficult to detect any additional benefit impact on interagency working either from the CSP process or the documents themselves. (Local authority officer response to consultation on the Education (Additional Support for Learning) (Scotland) Bill 2008)

In contrast, a response from a parents' advocacy organisation documented the ways in which local authorities were subverting the legislation, including restrictive interpretation of qualification criteria for a CSP, failing to respond to requests for adjudication and failing to implement the recommendations of adjudication and the ASNTS (Riddell and Weedon 2010).

The 2009 amendments to the ASfL legislation, far from abolishing statutory documents and duties, appeared to strengthen the rights of particular groups of children with ASN, particularly those looked after by the local authority. Under the terms of the 2009 Act, looked after children were presumed to have ASN, unless otherwise demonstrated, and a duty was placed on local

authorities to determine which required a CSP. Despite these provisions, administrative data published by the Scottish Government in 2017 suggests that most local authorities are not fulfilling their legal duties, with only 2.9% of looked after children having a CSP.

The Education (Scotland) Act 2016 has advanced children and young people's rights further through changes it has made to the 2004 Act. Broadly speaking, children aged 12³ or over with ASN who are judged to have 'sufficient maturity and understanding' now have the same rights as those held by parents and young people, with the exception of requesting mediation and making a placement request (and appealing the placement decision). A child aged 12 or over, with capacity, is also able to make a reference to the tribunal, provided the tribunal is satisfied that the child's welfare would not be adversely affected. The Act places a positive obligation on the child to notify the education authority in writing of their wish to exercise their right. Before the child may exercise his or her right, the education authority must assess and confirm the child's capacity to do so and must be satisfied that exercising the right would not have an adverse impact on the child's well-being. Disputes over questions of capacity and wellbeing have been brought within the tribunal's jurisdiction.

Recognising that children aged 12-15 would need support to be able to exercise their rights under the legislation as a whole, a Children's Support Service has been established, covering information and advice, advocacy and legal advice and representation.

Methods

The research used a range of empirical methods including (i) analysis of administrative data; (ii) key informant interviews and (iii) case studies of local authorities, children and their families. In this paper, we draw on the first two types of data, since the case studies of children and their

³ The age threshold of 12 for the holding of these independent statutory rights is intended to align with Age of Legal Capacity (Scotland) Act 1991. If the child does not want to exercise their right independently, their parents may exercise the right on the child's behalf.

families was ongoing at the time of writing.

The administrative data are published annually by the Scottish Government and are based on the pupil census, whereby each school returns information on the characteristics of pupils in the school, including whether they have additional support needs, reasons for support and type of plan. Unlike the English Department for Education, the Scottish Government does not publish individual level pupil data, so longitudinal tracking of pupils is not possible. However, the data allow for the exploration of the relationship between variables, such as reason for support, type of need/plan and Scottish Index of Multiple Deprivation (SIMD). Some data tables are published in Statistical Bulletins, whereas other data, including the relationship between SIMD, type of difficulty and type of plan, is only available on request for the Scottish Government statistical service. Full details of the methods used in the construction of the SIMD are available at:

<https://www.gov.scot/Resource/0050/00504822.pdf>.

The twenty-three key informant interviews were conducted with representatives from policy sectors involved in the implementation of the education policy agenda in Scotland. This reflects the view that policy is not translated directly from statute into practice, but is interpreted by ‘street level bureaucrats’ charged with its implementation (Weatherley and Lipsky 1977). These social actors are not necessarily seeking to subvert the original intentions of the legislators, but are constrained by many factors outside their control, including working practices and resource constraints. The selection criteria used in our key informant sample was that the individuals should illustrate the influence of the parallel needs and rights agendas identified in the policy, legislation and literature. Individuals from the following groups were interviewed: government policy makers responsible for ASN including a senior government official, an inspector and an Educational Scotland official with responsibility for school improvement; members of the legal community including the President of the Additional Support Needs Tribunal, an officer of the Equality and Human Rights Commission, the Children and Young People’s Commissioner for Scotland and a lawyer specialising in education; managers of the main mediation, advice and information and advocacy services; local

authority staff including principal educational psychologists; health service practitioners; voluntary sector workers; head teachers of an independent special school and a special unit. The interviews were semi-structured, lasted between 60 and 90 minutes, were generally conducted face to face and were digitally recorded and transcribed. A thematic analysis was conducted drawing on the central conceptual issues identified in the research questions and reflected in the operational questions. Themes identified included the following: conceptual underpinning and effectiveness of recent education legislation; understanding and assessment of capacity and wellbeing; operation of redress mechanisms; children's rights in educational planning and in everyday school and classroom practices; position of looked after children; relationship between parents' and children's rights. Before we explore some of these themes, we discuss what official statistics can tell us about the realisation of the rights of children with ASN.

Are rights being realised through the ASfL framework? Messages from official statistics

As noted above, the ASfL Act places a duty on local authorities to open a CSP for children who need significant additional support from services outside education in order to benefit from schooling. This statutory document acts as a gateway to a number of rights and services for children and young people with additional support needs and their parents. These include rights of review and redress, which are likely to represent a powerful means of ensuring that adequate services are delivered.

Figure 1 illustrates the increase in the proportion of children identified as having ASN, which currently stands at about 27% of the pupil population. However, this is likely to reflect an increase in the categories and types of need that are counted, rather than a growth in the provision of additional support in school. Prior to the implementation the Education (Additional Support for Learning) Act 2004, the category of special educational needs included primarily children with learning difficulties and disabilities. The category of additional support needs, introduced under this legislation, includes children with difficulties in learning for whatever reason. As a result, categories of difficulty counted (and types of plan) have increased dramatically and now include

children who have difficulty in learning for whatever reason, such as those living with parents who abuse alcohol or drugs, those with English as an additional language, children of refugees and asylum seekers, those with interrupted learning and those at risk of exclusion. Prior to 2009, the official statistics only counted children with IEPs and CSPs as having ASN. After that point, children with a wide range of plans were counted, including behaviour support plans, child's plans, and a variety of local plans such as multi-agency support plans.

Insert [Figure 1](#) here

Figure 2 shows the percentage of the total pupil population with Co-ordinated Support Plans (CSPs). This plan has a standard format, stipulates the type of support which will be provided by different agencies and requires regular review. It also enables parents, young people and children (aged 12-15 with capacity) to make a reference to the ASN tribunal in order to challenge the type of support which is being delivered and obtain redress if the local authority fails in its duties. As demonstrated by previous research (Riddell and Weedon 2010), and confirmed by key informants in our current project, CSPs are disliked by local authorities because they commit resources to individual children and are underpinned by statutory measures concerning review and redress. Prior to the implementation of the 2004 legislation, about 2% of children had a Record of Needs (a statutory document specifying the nature of the child's difficulties and the measures proposed by the local authority to meet the child's needs). At the time of writing, about 0.3% of children have a CSP, the statutory document which replaced the Record of Needs from 2004 onwards. The number and proportion of children with CSPs has fallen every year since 2011. Since the level of need in the population has not fallen, this suggests that many children who meet the criteria for opening a CSP are not receiving one. Indeed the 2009 Act established a presumption the looked after children had ASN, and placed a duty on local authorities to assess all looked after children to determine whether a CSP was required. This has clearly not led to an increase in CSPs being opened.

Insert [figure 2](#) here.

The increase in ASN identification, however, has not occurred evenly across all categories of difficulty. Figure 3 shows that some expansion between 2010 and 2016 has occurred within non-normative categories such as social, emotional and behavioural difficulties (SEBD), where pupil identification rests on teacher judgement rather than measurement against an established standard of normal functioning (as is the case in relation to low incidence difficulties such as visual and hearing impairment). In other cases, such as English as an additional language, it is reasonable to assume that the expansions in the category reflects demographic change, and is therefore material rather than perceptual.

Insert [Figure 3](#) here.

As shown in figure 4, there is a strong association between social deprivation, measured by the Scottish Index of Multiple Deprivation (SIMD)⁴, and non-normative categories such as SEBD, where rates of identification have expanded dramatically. As we have demonstrated in earlier work, in contrast with categories such as dyslexia which may be actively sought by more socially advantaged parents, SEBD is a highly stigmatised category which is never sought but is imposed by professionals on children and young people (Riddell and Weedon 2017). At a time when youth unemployment and under-employment is again a growing problem following the economic crash of 2008 and its repercussions, it appears that young people who are likely to end up among the precariat (Tomlinson 2013) are being blamed for their own predicament.

Insert [Figure 4](#) here.

As a result of the marked expansion of non-normative categories strongly associated with social deprivation, the majority of children identified as having ASN live in the most deprived parts

⁴ The Scottish Government uses the Scottish Index of Multiple Deprivation (SIMD) to measure disadvantage. This is an area based measure which is based on a set of indicators based on factors such as educational level, crime rates, housing and employment in an area. Each area is ranked and areas can be grouped into quintiles from the most deprived (SIMD 1) to the least deprived (SIMD 5).

of Scotland (see figure 4). There are more than twice as many children identified with ASN living in SIMD1 (least deprived) as opposed to SIMD 5 (most deprived).

Despite the fact that far more pupils with ASN live in deprived areas, pupils with ASN living in more advantaged areas are relatively more likely than those living in deprived parts of Scotland to receive a statutory support plan (figure 5).

Insert [Figure 5](#) here.

As shown in figure 6, children with low incidence normative difficulties are much more likely to have a CSP than children with high incidence non-normative difficulties. Thus only 1.29% of children with SEBD, 2.29% of looked after children, less than 5 young carers and no children affected by parental substance abuse have a CSP. On the face of it, it would appear that these groups should qualify for a CSP on the grounds that they are likely to need ongoing support from agencies outside education, such as health or social work, which would require co-ordination. However, these children are statistically more unlikely to have parents with the social, economic and cultural capital necessary to act as effective advocates, and as a result may lack the statutory support which appears to be more accessible to children from more advantaged areas, irrespective of their difficulty. By way of contrast, 13.73% of deafblind children and 10.39% of children with physical or motor impairment have a CSP. These types of difficulties are less strongly associated with social class, and as a result parents are more likely to be able to ‘do battle’ with the system in order to secure support for their children. In 2009, an amendment to the Education (Additional Support for Learning) (Scotland) Act 2004 placed a duty on local authorities to assess all looked after children to determine whether they had additional support needs and required a co-ordinated support plan. It would appear that most local authorities have failed to fulfil their legal responsibilities, and the onus now lies on children to seek action and redress – a demand that few are likely to be able to meet.

Insert [Figure 6](#) here.

As illustrated by figure 7, there are major discrepancies in the use of CSPs by local authority, with some authorities with high levels of deprivation, such as Dundee and Falkirk, issuing scarcely any. By way of contrast, some authorities with lower levels of deprivation, such as Dumfries and Galloway and East Renfrewshire, have relatively high use of CSPs (while still issuing very few).

Insert [Figure 7](#) here.

To summarise, the ASfL legislation was intended to strengthen the rights of parents and children. One of the main ways of doing this was to ensure that children who needed significant support from services outside education would receive a statutory support plan, clearly stating the services to be provided. This document was to be reviewed regularly, and its contents could be appealed to the ASN Tribunal. The 2009 and 2016 amendments to the legislation have sought to strengthen parents' and children's rights, and the CSP continues to be a central means of guaranteeing resource provision and rights of redress. The data presented above show that CSPs are in decline, and are issued disproportionately to children from more advantaged backgrounds, with particular types of difficulties and in specific local authorities. This suggests that the rights of many children are being overlooked.

In the following section, we consider the way in which key informants make sense of the ASN landscape, and the implications of these understandings for the implementation of the new children's rights agenda.

The advent of a children's rights paradigm? Evidence from key informant interviews

Views of the ASfL Act and GIRFEC

Key informant interviews revealed clear differences in understandings of the existing educational framework in Scotland, with local authority staff tending to express reservations about some of the provisions of the ASfL Act, while those addressing the questions from a rights perspective believed that fundamental rights were in danger of being side-lined. Principal educational psychologists

acknowledged the decline of CSPs, believing that this could be attributed to the refusal of health and social work staff to provide significant educational support. They also believed that CSPs made no difference to the child's educational experience, and that GIRFEC was far easier to implement:

I always find CSPs ... I'm never convinced particularly. The legislative side of it is good, and I think that's the best thing about it, it means that the families are protected to get certain bits of support, you know. I think getting other agencies involved in CSPs is very challenging, and I think that includes health. I think from my own experience it's very difficult to get health to commit to an education plan ... So, even though the issues [are to do with] maybe mental health issues, or an autism issue, or whatever, then they won't input to a CSP because they can't commit to a year, and obviously that's one of the pre-requisites of it. Social work, again more likely to be involved in this local authority ... But ... I'm never convinced by CSPs. Don't think it makes any difference to the kids. (PEP, Council 4)

But people seem most reluctant, at times, to say that their input was significant in meeting the broad educational needs case. Mostly I'm thinking of health colleagues who must have been thinking they were going to get sued. So we have a thing where if it's like, if the speech therapist is involved and their input is high on there but not significant ... And also the occupational therapist is involved and they think that their input is high then the two highs make the significant. So that was to try and broaden it, but it's a struggle. ... Some health professionals would see co-ordinated support plans as education legislation so it's nothing to do with them. Getting it Right for Every Child has largely been successful in this authority without the need for the legislation that's causing all the furore, we're doing it all anyway. (PEP Council 1)

Another PEP believed that CSPs would continue to decline because squeezed public funding meant that fewer children were receiving one to one support:

And, as you know, the criteria for the CSP is not based on the child's needs, it's based on the services that are provided to the child. And, also, a diminishing budget, you know, we're finding that a number of our children are no longer receiving the direct one-to-one input from other agencies to contribute to the CSPs, so we're finding that numbers are decreasing as a direct result of that. Not because there's any change in the child's needs, but because there's changes in the provisions that are being offered to children and young people. So, I think we would always have a small number, and I would say that that will be increasingly reduced. (PEP, Council 5)

These understandings illustrate some of the issues arising from the way in which the ASfL Act was framed. Under its terms, children are entitled to a CSP if they need significant input from agencies other than education, but local authority gatekeepers assume that if the service is not being provided then it is not needed and therefore the child does not qualify for a CSP. Judgements on qualification criteria for a CSP should, in fact, reflect a child's needs, not whether agencies are providing services.

Local authority staff tended to assume that child's plans and CSPs were interchangeable, with the former being more straightforward to produce, having no set format and with no rights of redress attached. A principal educational psychologist expressed the view that child's plans had already eclipsed CSPs, which constituted 'a lot of work for very little outcome':

We would say the child's plan ... is much more of a working document. And I think the feeling is that the, the CSP is a lot of work for very little outcome for the child. And that sort of decision's been made. I think it's reflected nationally. And our GIRFEC officer is certainly saying, you know, 'Should we be really reviewing this?' So there are a number of CSPs. A lot of them tend to be for more complex young people. (PEP, Council 2)

A speech and language therapist commented:

I can't remember the last time I was invited to a CSP meeting. Oh no, I can. I was invited to a review for one where the parent had insisted on having one. But there's a wee bit in there isn't there of 'Do you need a CSP if things are working for you anyway?' Yes I know there's the thing about carrying it through because it's a legal document and if you move house you need it to go with you, I know all that. But it is a difficult one ...because if you've got an individual support plan which is doing what you need it to do and ...things are being managed how you need them to be managed for the child's outcomes, I don't think the parents are going to push for a CSP and I don't think the schools are going to look for the work... And to be absolutely honest I, I would never push for a CSP, well I can't push for a CSP to be opened because I'm not a parent or a school. (SALT manager)

By way of contrast, the perceptions of respondents from a legal or children's rights background was that the declining use of CSPs was a worrying trend:

I think there's still a great extent to which it's not well known or understood, particularly by parents, even where they're going through the system. They might not be aware of, you know, what the legislation is or even if they've heard the name, about what rights it confers or, or anything like that. And I suppose also at the kind of ... school level, that there's not necessarily at the forefront of the staff mind that this legislation is relevant to the work that they're doing. I think there's an extent to which in many teachers' minds, that really GIRFEC has sort of overtaken this somehow even though it doesn't yet have any statutory basis. (Education Law Consultant)

I think [the CSP] ought to be used more. I think the resistance to it is unfounded. I don't think people need to be scared of the CSP. I worry that the child's plan, which presumably if it disappeared would succeed it, would not be sufficiently well-equipped to capture the complexities that we deal with when we're dealing with a child with additional support needs. And my worry is if it were to disappear we would be losing the thing that keeps everyone's attention focused, and gives comfort to the child, the young person and the parent that there are duties here that have to be discharged. (President ASN tribunal)

The Scottish Government acknowledged the declining use of CSPs but believed that this was not a major problem, because other types of plan, including child's plans were taking their place:

I think you also have to recognise the increase in child's plans which sits within the data that you've looked at, the information about IEPs and CSPs. There are also other plans and child's plans in there. And while there are decreases in the CSPs particularly, there is a huge increase in the number of child's plans. So I, I don't think that we're saying that children aren't being planned for, it's just a different type of arrangement that's being used to do that. And that reflects the fact that there have been changes in policy around Getting It Right for Every Child and all of those things. And I don't particularly see it as a significant issue ... If there weren't other rises yes I would have greater concerns but I think they're, that's a particularly narrow focus in the analysis that you do. (Scottish Government ASN Officer)

At the same time, she emphasised that local authorities who failed to open plans for children meeting the criteria were failing in their duties:

What I would say categorically is if an authority has a policy of not providing co-ordinated support plans then they're in breach of the law. And parents, voluntary organisations will challenge them on that. ... The statutory requirement is in place, the plan should be there if the

child's entitled to it ... At the point at which the 2004 Act was going through Parliament, there was a position advanced then that if everything was fine you shouldn't have a co-ordinated support plan. But that isn't what went through in the legislation. And it didn't because that isn't what Parliament wanted. And, you know, it's there as a protection. It's got rights attached to it, ... my position is absolute. If you're entitled to it, if you meet the criteria for it and an authority has a responsibility to assess you for it, ... then the duty is the duty is the duty. (Scottish Government ASN Officer)

Perceptions of the 2016 legislation

Interviewees were all generally positive about the new legislation, supporting efforts to comply with the UNCRC. However, some interviewees were critical of specific aspects of the legislation, believing that it did not go nearly far enough in promoting children's rights.

The Scottish Government ASN officer was very positive about the difference which the new legislation would make to children's rights, but acknowledged that the changes might be slow:

It's the biggest extension of rights in Europe at the moment that we can evidence ... So in that sense, in terms of principles, I think it's massive. And I am pleased that children with additional support needs have gone first because the only other rights that are extended to children in education at the moment is the right to appeal your exclusion. And your parent is informed of your right, you yourself aren't informed of your right as a child. And ... so we've gone from one right to twenty two rights which is huge. We don't know yet what the extent of the actual change will be in terms of ... the numbers of people using the right, we don't know that. But I can already see from discussions we've been having with authorities that the children's rights agenda has come up. You know, they are thinking about, 'Well actually we now need to ask the child about that. I need to think about how a child's going to respond to that'. And that is a different type of conversation to the conversation we've been having before. So I'm hopeful but I think it may be a shift in focus ... I'm sure children will use them. I just don't have a great sense [of how many]. I don't have a sense that there's a hundred thousand children sitting out there waiting to make use their rights on the 13th of January. I suspect it'll be quite a slow grower but ... we've said to committee we'll review. When the Act went through [we said] we'll have to review because we are unsure as to the exact extent of what will be used. You know, bear in mind the experience of Wales where nobody has used their rights at all but we've gone for a far larger extension which is possibly more easy to use. We'll need to just see how that pans out like. (Scottish Government officer)

Similarly positive views were expressed by local authority respondents:

I think the ... the extension of rights of parents to children and young people is only a good thing, and well within the whole children's rights agenda that we would absolutely sign up for. We have a bit of work ... [to make sure] our policies and procedures are compliant with that, and then we need to look at the practice on the ground. As I say, my experience is that children with additional support needs don't know their rights, and are rarely in a position to invoke those rights. Whether that's because of lack of awareness, I think we need to look at addressing. We're certainly looking at our personal and social educational curriculum, and looking at making sure that ... we're taking into account that Act. So yes, I think it's a good thing. (PEP, Council 5)

Those commenting from a children's rights perspective were more cautious, believing that the legislation was too cautious in allowing local authorities to determine which children were eligible to use their rights. The Equality and Human Rights Commission representative was concerned about the inconsistency between the definitions of capacity within the Equality Act 2010 and the Education (Scotland) Act 2016⁵. Whereas the former legislation presumes capacity, the latter requires the local authority to ascertain whether the child has capacity and that exercising a right would not be detrimental to their well-being:

... There are two preliminary ... tests that children have to pass before they can even get to the door to exercise their rights, which is why I hesitate a bit when talking about children's rights ... Our main argument here is that you're not actually giving children a right to make a reference to the additional support needs tribunal. What you're saying is that they can ask an education authority, or in certain circumstances a tribunal, whether they can exercise the right. And that's not giving children rights at all. (EHRC respondent)

This, the interviewee believed, represented a potential conflict of interest because:

⁵ The Equality Act 2010 extended the jurisdiction of the Additional Support Needs Tribunal for Scotland (ASNTS) to include claims of disability discrimination. Under the terms of the Equality Act, discrimination is defined as the failure to make reasonable adjustments for a disabled person or the provision of less favourable treatment to a disabled person on the grounds of their disability.

... it would be the education authority's decisions or actions that the child's challenging. And then the education authority has to carry out an assessment of the child's capacity. And then an assessment of whether the exercise of the child's right would adversely impact on a child's wellbeing. (EHRC respondent)

In its response to the Scottish Government's consultation on the Revised Code of Practice, the Children and Young People's Commissioner Scotland noted reservations about both the legislation and the Code, which he felt were non-compliant with the UNCRC:

The rights for children to be heard, contained within Article 12 of the UNCRC and further articulated within General Comment 12, issued by the UN Committee on the Rights of the Child, apply to all children. In relation to any presumption, the General Comment makes it clear that States parties cannot begin with the assumption that a child is incapable of expressing her or his own views. On the contrary, States parties should presume that a child has capacity to form her or his own views and recognise that she or he has the right to express them; it is not up to the child to first prove her or his capacity.⁶

We believe that the right for children with capacity to refer their case to the ASNTS, introduced by the Education (Scotland) Act 2016, is not compliant with article 12 of the UNCRC and we will continue to call for government to review this process. Scottish Government (2017c)

The Commissioner also commented that:

The current Code of Practice is too lengthy and complex to be of particular use in decision making. It does not take a human rights approach. Although this is the second review of the code, parts are now 12 years old. The language used is inconsistent and in places contradictory. We appreciate that the current version has had to be prepared to comply with recent changes to legislation but feel that it is important that the Code of Practice as a whole be reviewed as soon as possible.

⁶ <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>

It was also pointed out that uncertainty about the future of the ASfL legislation meant that the extension of children's rights might be difficult to realise in practice. The effective operation of the children's service was essential to ensure that the ASfL Act did not become moribund, since this was the main vehicle through which enforceable rights were being realised:

As of January [2018], there will be a job to ensure that young people aged twelve to fifteen have an awareness of the rights that they're about to acquire under that legislation. So, you know, far from being legislation that is done and dusted, it's actually being expanded in terms of its scope. (Education Law Consultant)

Conclusion

We began the paper by asking whether the new raft of children's rights introduced under the terms of the 2016 legislation are likely to be realised in practice, given the competition between discourses of needs and rights within the policy terrain. Are the measures introduced by the Scottish Government likely to be transformative, or are they likely to be subverted by the conditions surrounding their implementation? In the following paragraphs, we identify some of the issues which may impede the stated ambitions of the legislation.

One of our main findings concerns the ongoing tensions between needs and rights in Scottish education policy and legislation. The new rights accorded to children in 2016 depend on the effective implementation of the original ASfL legislation, since many are linked to processes associated with the CSP. Key informants remarked on the low awareness of the legislation among local authority officers, school staff and parents, all of whom are likely to play a major role in helping children realise their rights. They found the legislation unnecessarily complex, with particular issues around CSP qualification criteria. Local authority staff questioned the relevance of CSPs in the light of the work involved in assessment, writing and review. They also pointed out that the scale of public sector cuts meant that individual services identified in CSPs were unlikely to be forthcoming. As a result, vanishingly small numbers of CSPs were being issued, and social inequality was being fuelled by the requirement for parents to agitate before any action was taken.

Local authority staff were also uneasy with the idea that children might be able to challenge decisions through the tribunal and believed that the Children and Young People (Scotland) Act 2014, the legislation underpinning the GIRFEC programme, fitted more easily with the consensual and collectivist culture of Scottish education. Those commenting on the legislation from a children's rights perspective were much more positive about the 2016 legislation. The education law consultant noted that GIRFEC is not rights-based, but focuses on the assessment of needs in relation to wellbeing indicators. There are no clear qualification criteria for a child's plan, which has no statutory status and can be opened by 'anyone who wants to improve matters for a child or young person', including an education, social work, health or voluntary organisation worker, a parent or the child/young person. The format is 'flexible' and there are no prescribed timescales for opening the document or for review (Scottish Government 2007). Even the concept of wellbeing remains undefined. The existence of two parallel education planning systems, one based on rights and one on needs, has led to confusion and weakened the focus on children's rights.

Our respondents were generally positive about the future of children's rights in Scotland, but doubted that the 2016 amendments to the ASfL legislation would have a significant impact. Particular concerns were expressed about the tests of capacity and well-being, and those speaking from a rights perspective felt that this gave undue power to local authorities to determine which children would be allowed to exercise their rights. In relation to looked after children, where the local authority acts as corporate parent, this might be particularly problematic. Further important points were made about the need to ensure that children are not placed in a position of bearing an unfair burden in ensuring that local authorities' statutory duties are fulfilled. Children are being expected to navigate an extremely (many thought overly) complex legal framework devised by adults, where the most vulnerable may end up being blamed for failing to hold local authorities to account.

As we have demonstrated (Carmichael and Riddell 2017), there is a strong association between social class and high incidence non-normative difficulties such as social, emotional and

behavioural difficulties. While far more children from poorer backgrounds are identified as having additional support needs and, by definition, requiring extra resources to benefit from education, statutory support plans are disproportionately allocated to those in the most affluent areas. Some of our key informants pointed out that children identified with SEBD, predominantly from poorer backgrounds, are often accorded little respect in the classroom and are unlikely to have their wishes taken into account when alternative placements are being sought following exclusion. Despite the 2009 amendments, less than 3% of looked after children have CSPs, about the same proportion as children with SEBD, and there have been no cases of tribunal references for this group. Clearly, a major challenge in implementing the new legislation will be to ensure that it does not play a part in reproducing, rather than alleviating, social inequalities.

So what are the lessons from Scotland for an international education community concerned with the task of ensuring that the UN CRC is translated into practice? Now the Scottish legislation is being implemented, there are emerging concerns that it may prove to be well-intentioned but ultimately tokenistic, given professional resistance and practical difficulties in ensuring children's meaningful involvement in decision-making. Addressing this problem, Lundy (2018) concludes that 'tokenism is sometimes a start', and that not listening to children's voices is always wrong – 'a breach of their human rights'. Before we make further progress in ensuring that children's views are listened to, understood and acted upon, this paper suggests that there is an urgent need for clarification of the concepts of needs and rights, and a radical simplification of legislation and policy. The needs agenda is clearly easier for adults to embrace, because it leaves them in a position of power. The rights agenda, on the other hand, is far more challenging, since it involves taking seriously the letter and spirit of the law, ensuring that children's voices are heard and acted upon, and that the route of legal redress remains an accessible option.

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Figures

Figure 1

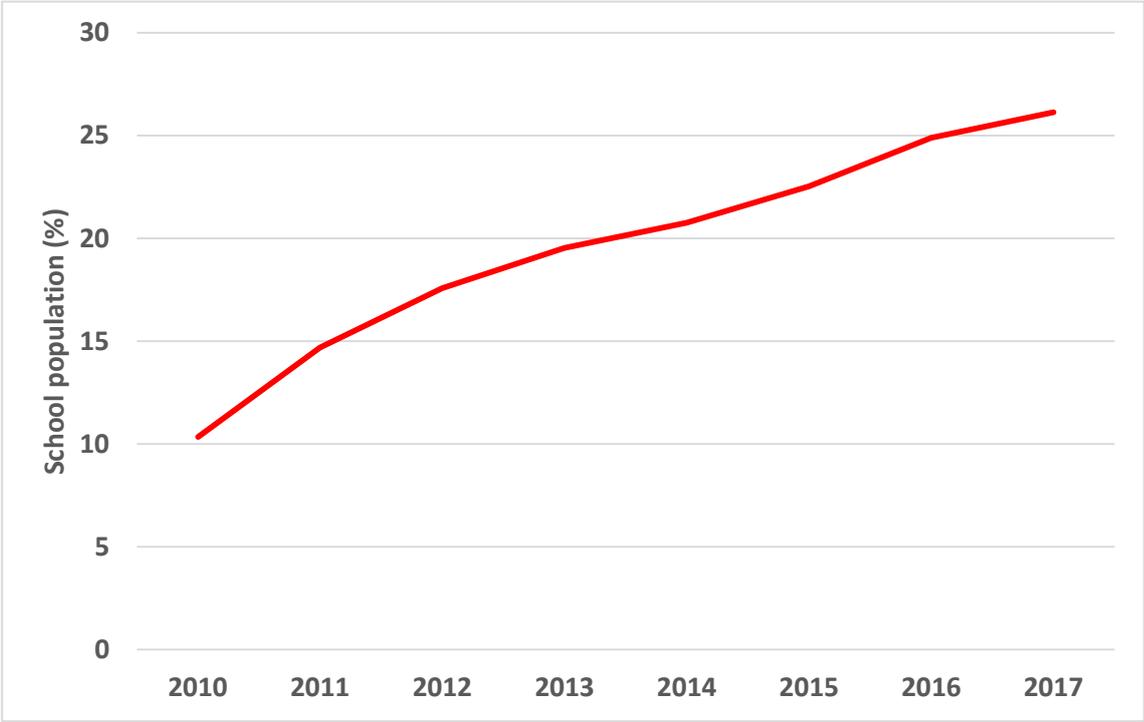
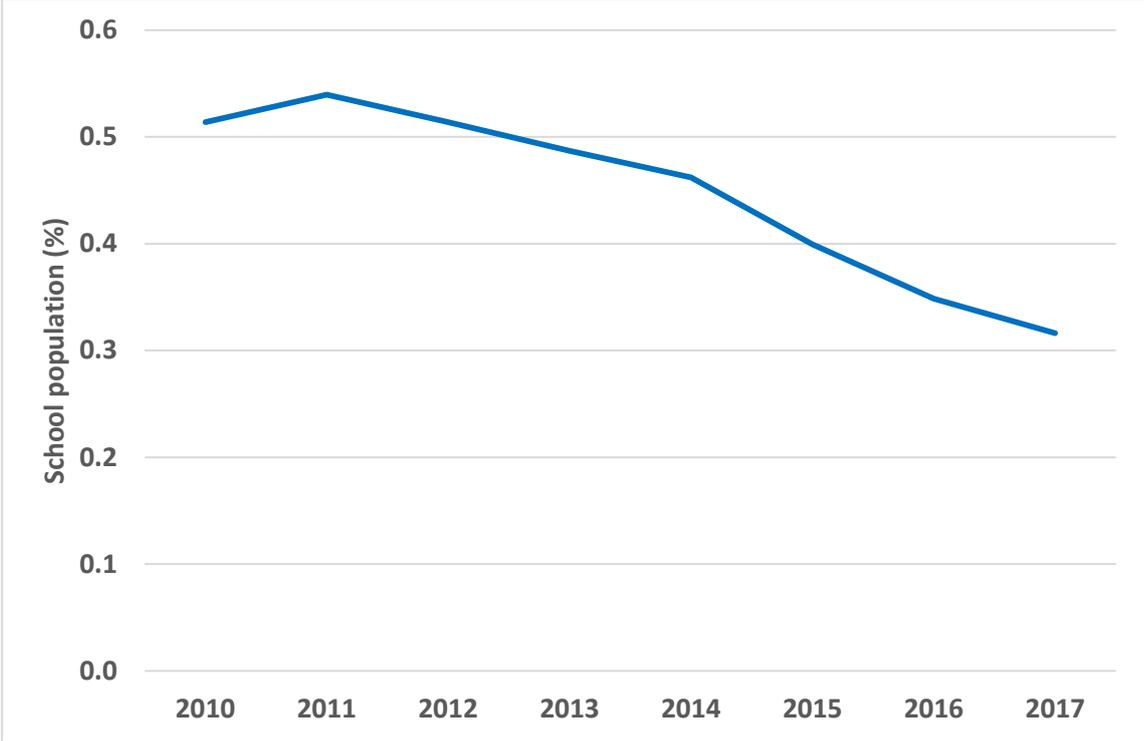
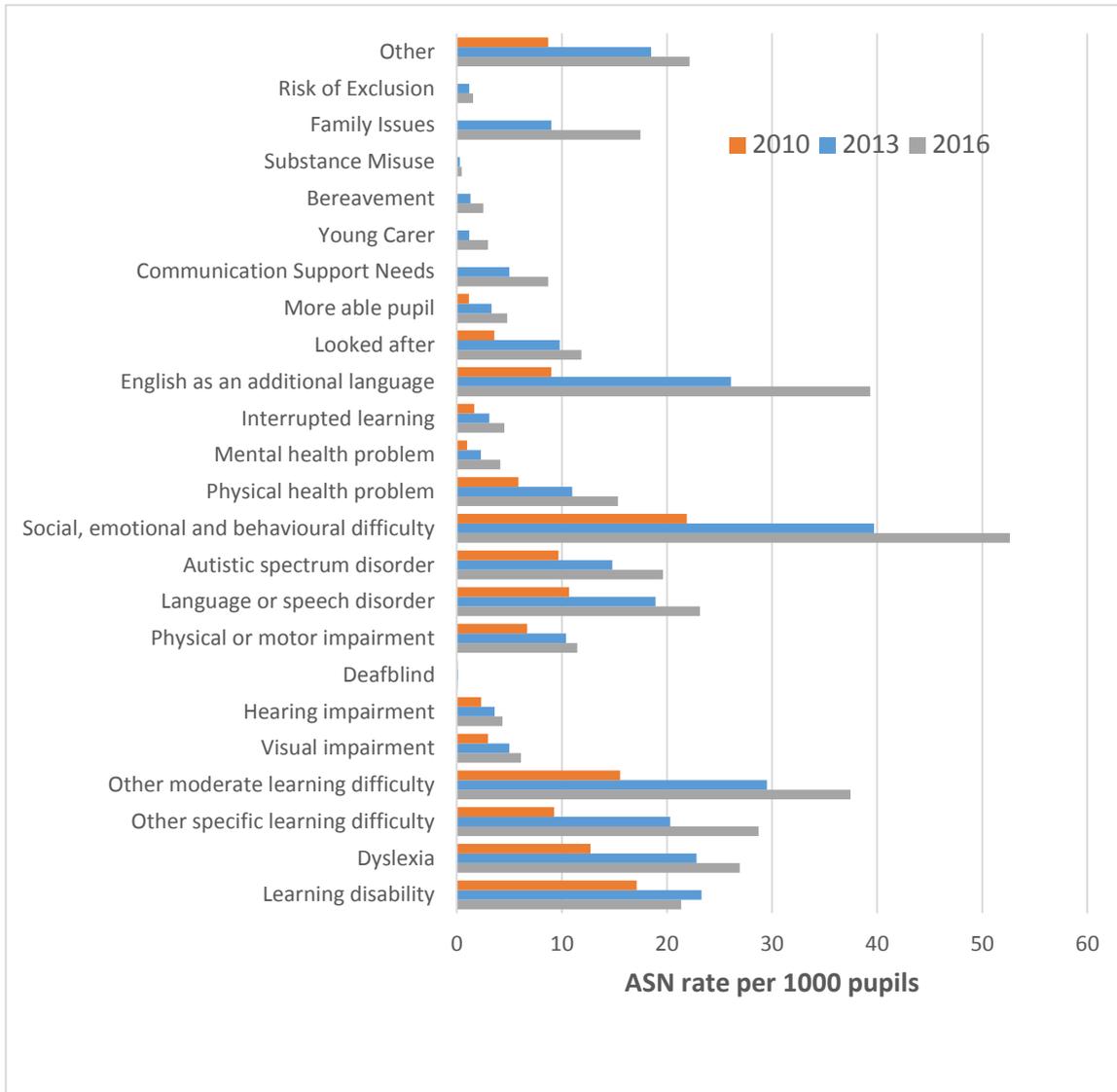


Figure 2



Source: Scottish Government Statistical Bulletin Pupils in Scotland, 2011- 2017

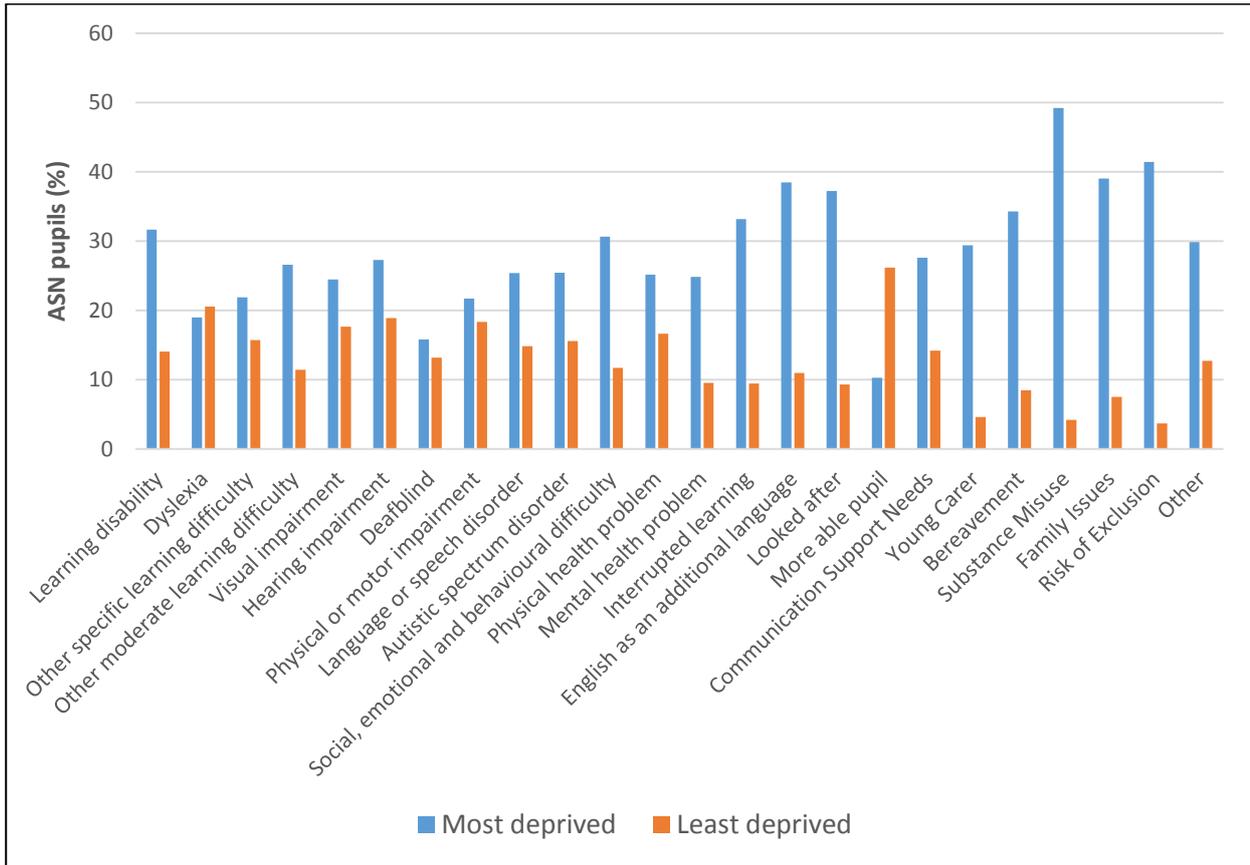
Figure 3



Source: [Scottish Government 2011](#), [2014](#), [2017a](#).

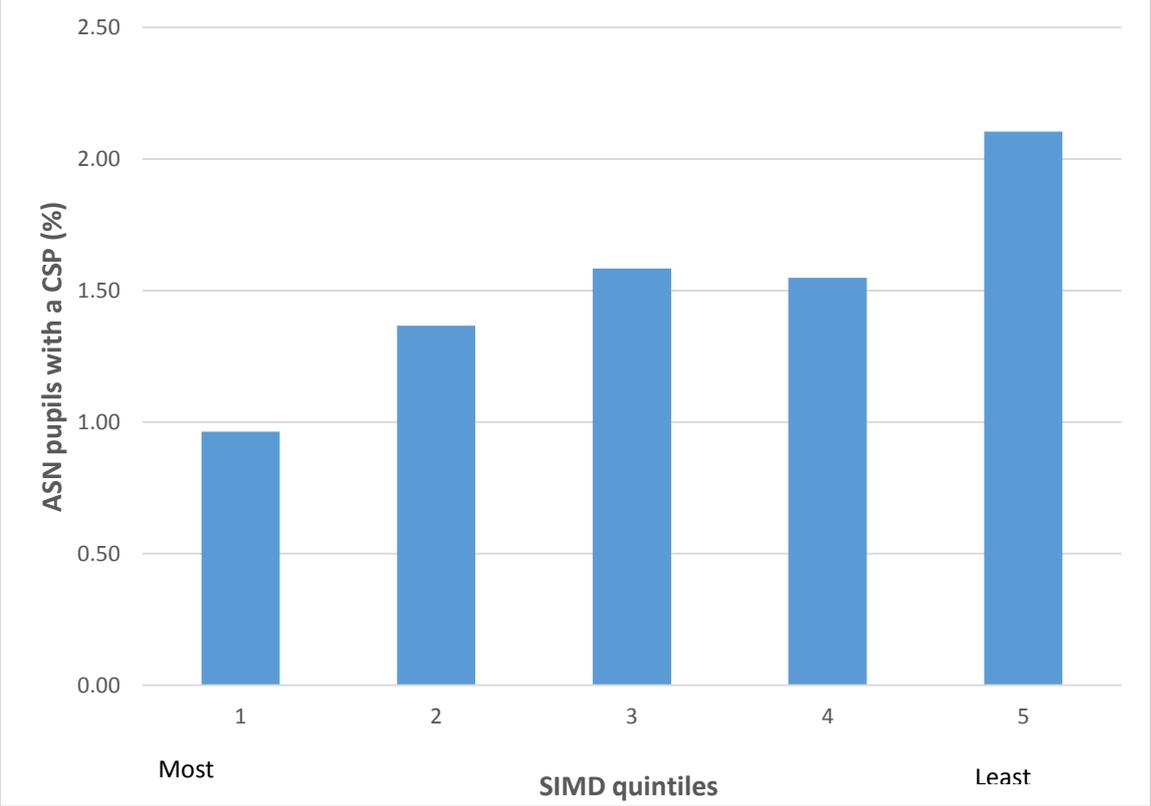
Note: Entries per category are not discrete; a child with multiple needs will be recorded in multiple categories.

Figure 4



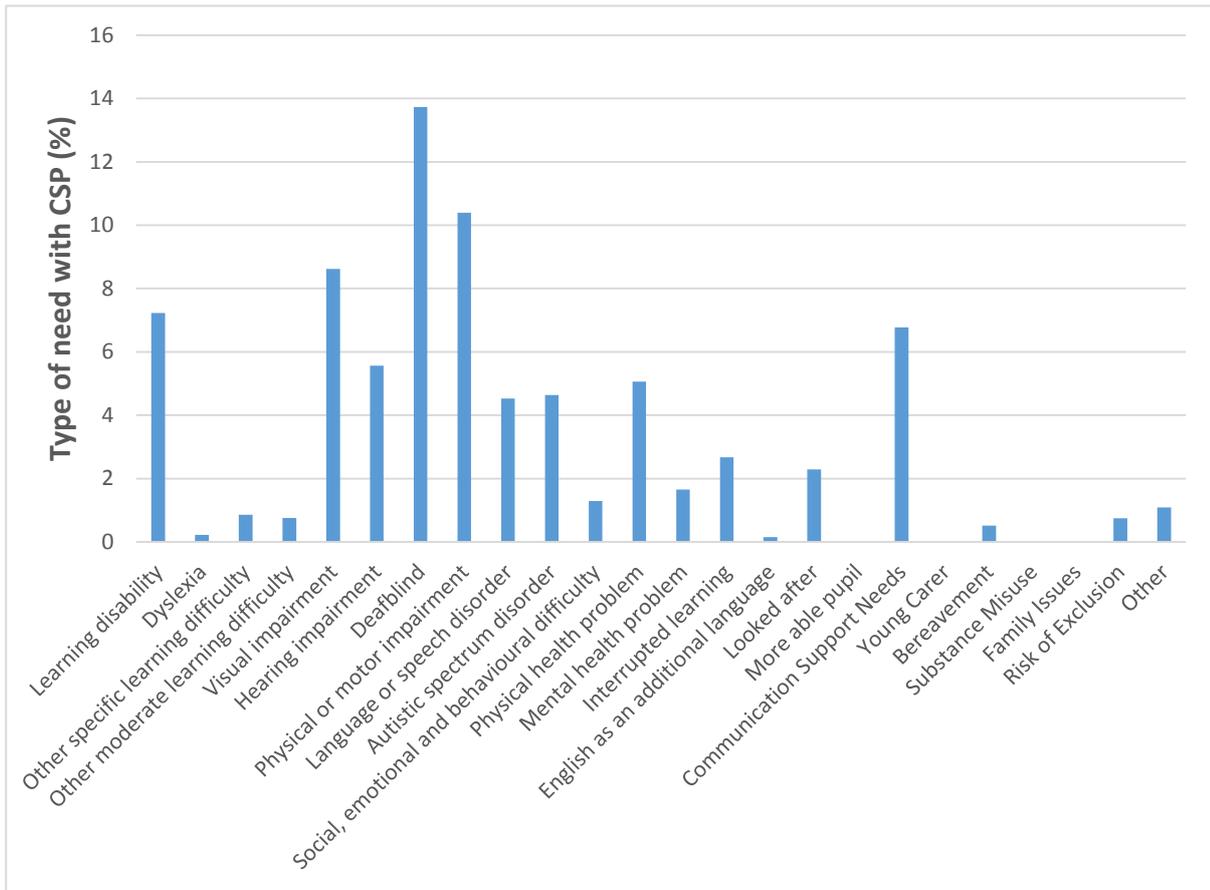
Source: Scottish Government 2017a; special request

Figure 5



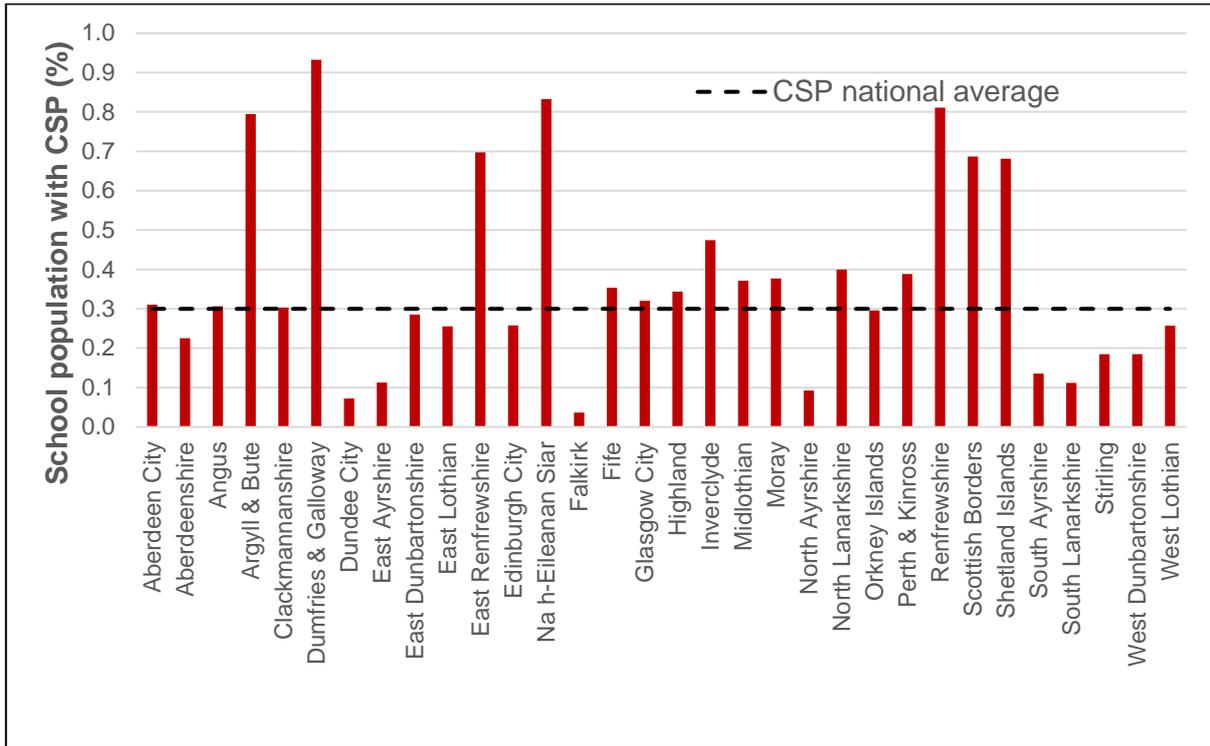
Source: Scottish Government 2017a; special request.

Figure 6



Source: Scottish Government 2017a; special request

Figure 7



Source: Scottish Government 2017a

Figure captions

- Figure 1: Percentage of total school population identified as having ASN 2010-2017
- Figure 2: Percentage of total school population with a CSP, 2010-2017
- Figure 3: ASN pupils by type of need in Scotland, 2010, 2013 and 2016
- Figure 4: Percentage of ASN pupils by type of difficulty in most deprived (SIMD1) and least deprived (SIMD 5)
- Figure 5: Percentage of ASN pupils with a CSP by SIMD quintile
- Figure 6: Percentage of children with CSP by type of difficulty
- Figure 7: Percentage of total school population with CSP by local authority