



Autonomy, Rights and Children with Special Needs: A New Paradigm? Findings from an ESRC funded study

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Research aimed to investigate:



- The extent to which children (defined here as those of aged under 16) and young people (those aged 16-24 inclusive) with SEN/ASN are able to realise their participation rights effectively;
- The degree to which the autonomy rights of such children and young people intersect with those of parents/carers and are driven by, or influence, the decision-making of schools and local authorities;
- The way in which capacity for autonomous decision-making is understood and acted upon in different social contexts;
- The factors which promote or inhibit the realisation of autonomy rights by children and young people with SEN/ASN, including those who are looked after by the local authority;
- The impact of a children's rights-based approach on the broader education and social policy landscape.



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Research Methods



Reviews of policy, legislation and statistics;

Surveys of all local authorities in England and Scotland;

Key informant interviews;

Case studies of 36 children/young people and their families in six local authorities (18 case studies in each jurisdiction);

Each case study involved classroom observation and up to five interviews with child/young person, parent/carer & practitioners.

Various elements of the research written up as Working Papers and Briefings available at: <https://www.ed.ac.uk/education/rke/centres-groups/creid/projects/autonomy-rights-sen-asn-children>



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Policy Background



Government (UK and Scottish) policy agenda included adoption of principles of UN Convention on the Rights of the Child (UNCRC) and Convention on the Rights of Persons with Disabilities (CRPD) in domestic education legislation.

Article 12 UNCRC particularly relevant:

- States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
- For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Also Article 7.3 CRPD: equivalent provision to Art 12 UNCRC for persons with disability but also age-appropriate assistance for realisation of the right.



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Children with SEN/ASN in vanguard of extension of rights



Relevant legislation:

Children and Families Act 2014 and SEND Regs 2014

Education (Scotland) Act 2016, amending ASLA 2004

Scottish Government claims that legislation goes further in advancing children's rights than English equivalent: **'It's the biggest extension of rights in Europe at the moment that we can evidence'** (Scottish Government interviewee).



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New rights accorded to children (C) and young people (YP) with special educational needs in England (Children and Families Act 2014)



Right to request:

- Carry out an assessment or reassessment of their needs (YP)
- Name a specific school in an EHCP (YP)
- Prepare a personal budget if there is an EHCP (YP)

Rights re information and advice:

- Advice and information on SEND (C and YP)
- Info on right to give views to assessment (YP)
- Entitlement to copy of finalised EHCP (YP)
- Info on appeal and other redress rights (YP)
- Non-disclosure of EHCP without subject's consent save in some circumstances (CYP)

Having their views heard and considered:

- CYP's views, wishes and feelings (VWF) and the importance of their participation to be had regard to by local authority (C YP)
- Tribunal to take account of VWF (C and YP)
- Consulted re local provision/local offer (CYP)
- Input into decisions about assessment (YP)
- Comments on content of draft EHCP (YP)
- Inclusion of views in EHCP (C YP)

Resolving disagreements and disputes:

- May select and participate in mediation (YP)
- Attend mediation (YP)
- Attend mediation, provided parent and mediator consent (C)
- Right to appeal (YP)
- Attendance at appeal hearing (C and YP)
- Access to disagreement resolution services (YP)



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New rights accorded to children (aged 12-15) with additional support needs in Scotland (subject to capacity and wellbeing tests) post Education (Scotland) Act 2016



Right to ask local authority to:

- Find out if they have ASN
- Request a specific assessment
- Find out if they need a Co-ordinated Support Plan (CSP)
- Ask for a CSP to be reviewed

Right regarding information and advice:

- About their ASN
- Receive a copy of the CSP
- Be told about decisions about their rights
- Be asked if they are happy for information to be shared when they leave school

Rights regarding having their views heard and considered:

- Be involved in decisions about their support
- Access to support and advocacy to have their views heard (My Rights My Say)

Right to be involved in resolving disagreements and disputes:

- Ask for independent adjudication
- Make a reference to the First-tier Tribunal
- Be asked for their views during mediation

Not included: Mediation, placing requests



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Access and capacity



England

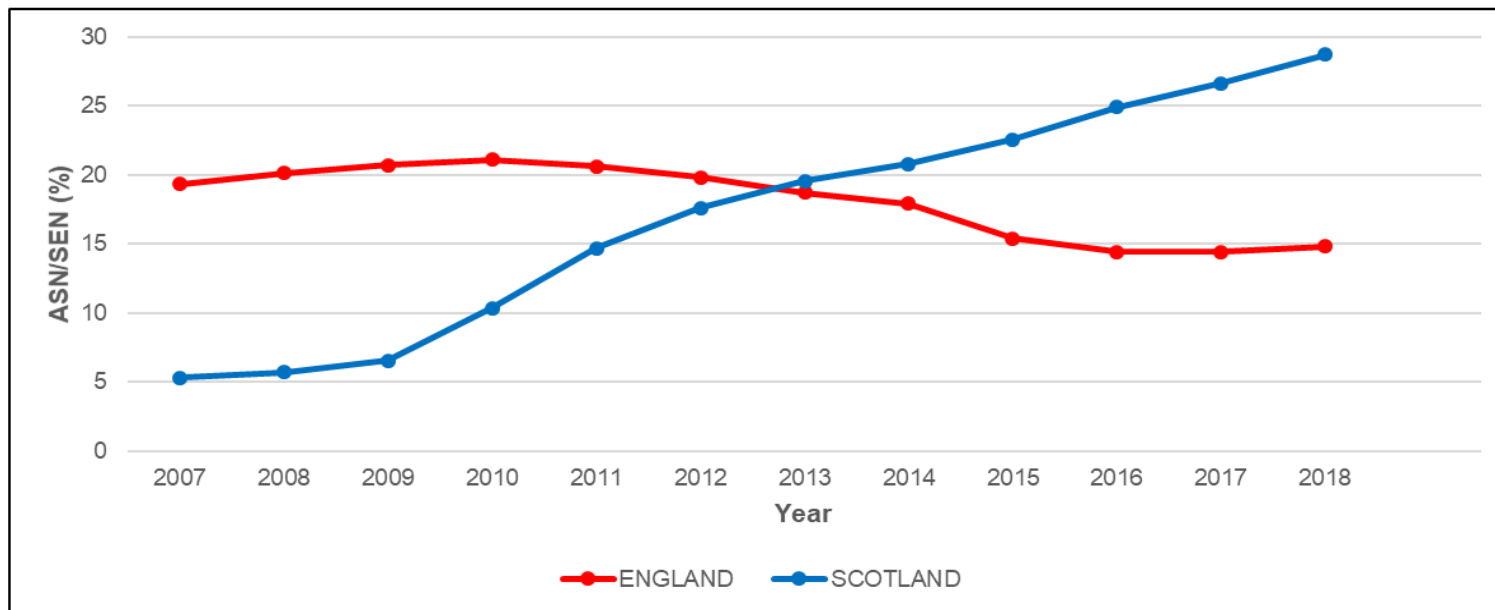
Capacity to be judged on basis of Mental Capacity Act 2005: 'incapacity to make a decision for oneself due to an impairment of, or a disturbance in the functioning of, the mind or brain'. But in relation to an appeal, capacity should be presumed: *Bucks CC v SJ* (2016) and *LB Hillingdon v WW* (2016).

Scotland

Children aged 12-15 must have 'sufficient maturity and understanding' to be able to carry out an act etc. This capacity must be assessed along with well-being question (would doing the act or having the thing done adversely affect his/her well-being?) Child 12-15 cannot act if capacity lacking or well-being would be adversely affected. Young people must have sufficient understanding.

The research found evidence that the test in England was not being applied properly and there was uncertainty in Scotland about capacity.

Children with SEN/ASN as a percentage of the total school population in England and Scotland



Source: DfE, 2018; Scottish Government, 2018

The identification of Additional Support Needs (ASN) in Scotland has increased sharply across the years, with figures quadrupling within a decade, rising from 5.7% of the total pupil population in 2008 to 28.7% of the total pupil population in 2018.

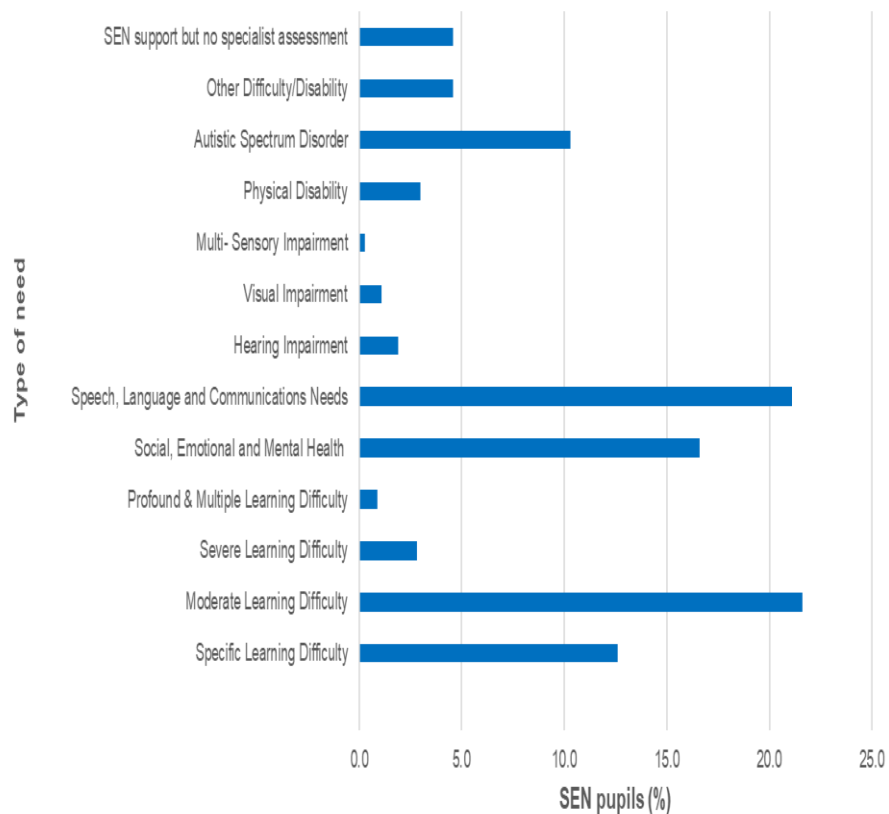
In contrast, the identification of pupils with Special Educational Needs (SEN) in England has steadily decreased across the years, with just under 15% of pupils in England identifying with SEN in 2018.



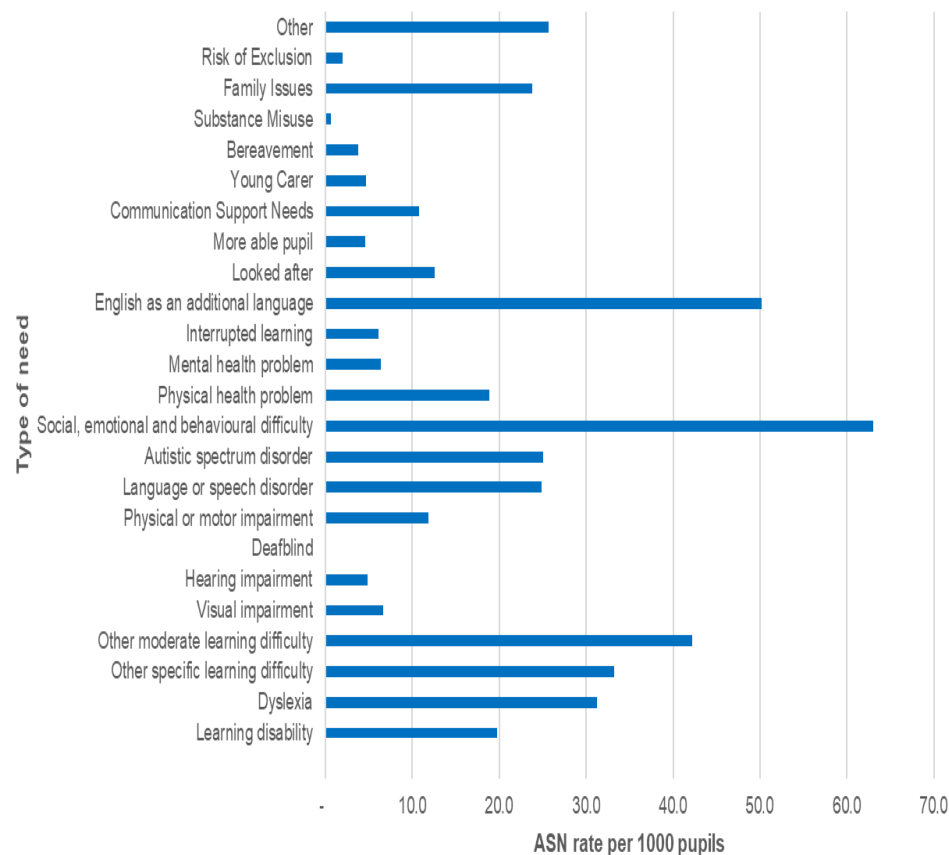
SEN/ASN pupils by each type of need in England and Scotland, 2018: proliferation of categories in Scotland – includes EAL, more able



ENGLAND

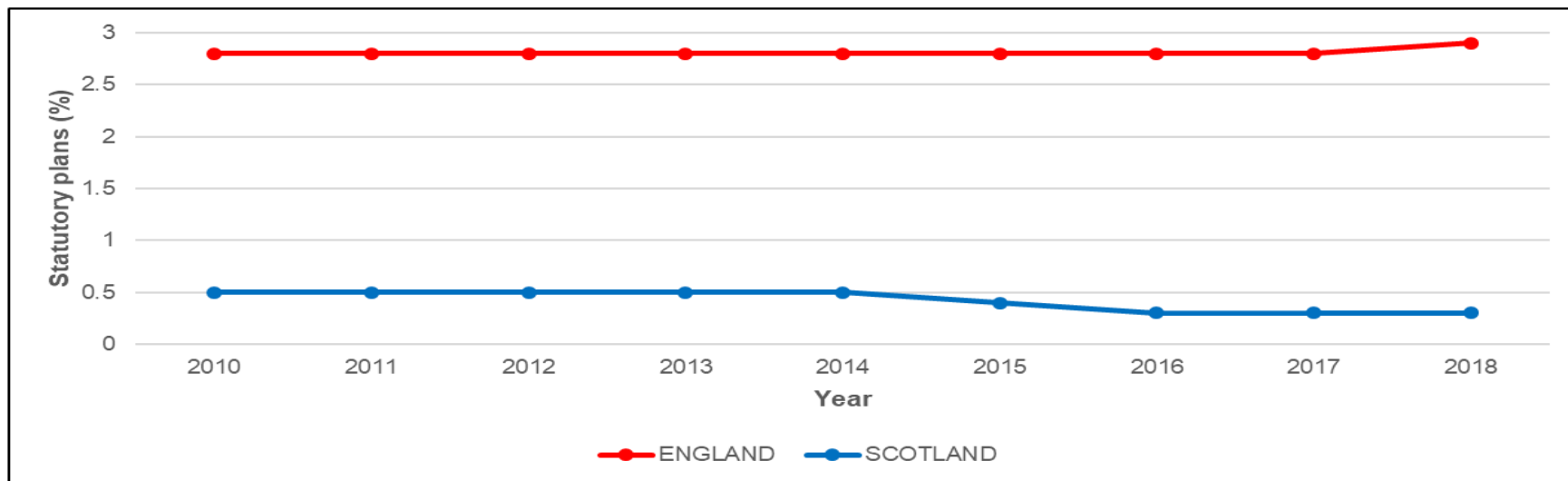


SCOTLAND



While statistics show that ASN identification in Scotland is currently almost double that in England, this difference is predominantly due to variations in the way SEN/ASN are classified and recorded between jurisdictions.

Percentage of whole school population with statutory plans in England and Scotland



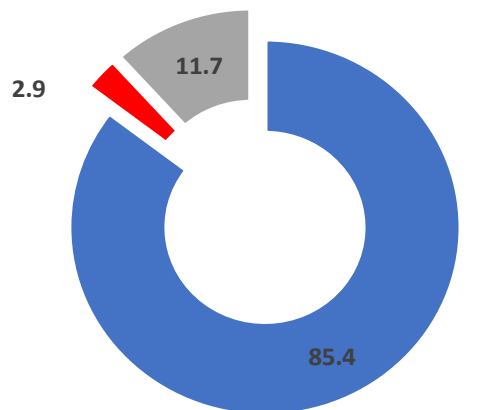
Source: DfE, 2018; Scottish Government, 2018

The percentage of the total school population in Scotland with a CSP has declined from 0.5% in 2010 to 0.3% in 2018, while in England, the proportion of pupils with a EHCP has remained steady at 2.8%, rising slightly to 2.9% in 2018.

Rates of statutory plans differ by category of need, with pupils in high incidence non-normative categories such as ASD and Social, Emotional and Mental Health Difficulties showing higher use of statutory plans than pupils in low incidence normative categories e.g. sensory impairments.

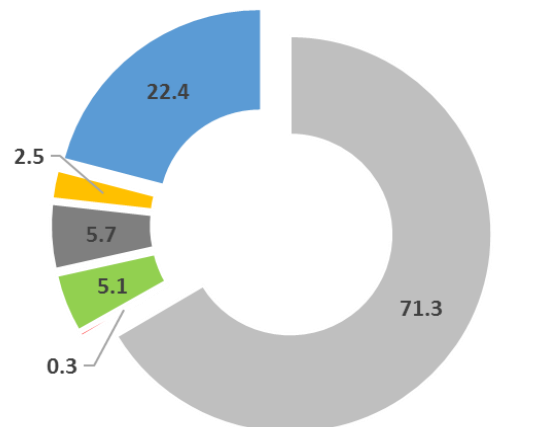
Classification of all pupils by SEN/ASN designation in England and Scotland, 2018: **proliferation of plans in Scotland, but only CSPs have legal status guaranteeing rights**

ENGLAND



■ Non-SEN ■ Statement/EHC ■ SEN support

SCOTLAND



■ Non-ASN ■ CSP ■ IEP ■ Child Plans ■ Disabled ■ Other

Source: DfE 2018, Scottish Government 2019

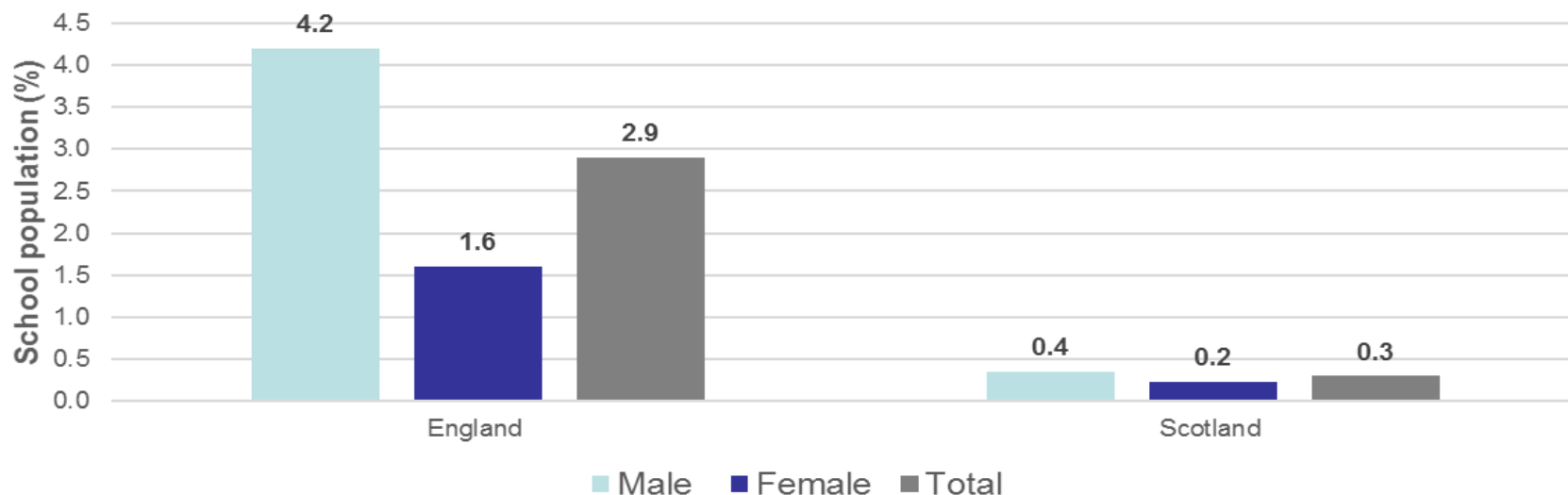
Note: In Scotland pupil numbers are not discrete; a child can have more than one ASN plan.

SEN support and statement/EHC plan are discrete groups; SEN pupils receive either SEN support or a statutory plan.

There has been an expansion in the range of additional support plans in use in Scotland. While only 0.3% of total pupils in Scotland have a CSP, 5.1% have an Individualised Education Plan (IEP), while children with 'Child Plans' and 'Other plans' make up 5.7% and 22.4% of the school population, respectively.

In contrast, there are only two support plans in use in England. 2.9% of the total pupils in England have an EHCP, while 11.7% have a SEN support plan.

Percentage of pupils with a statutory support plan by gender in England and Scotland, 2018



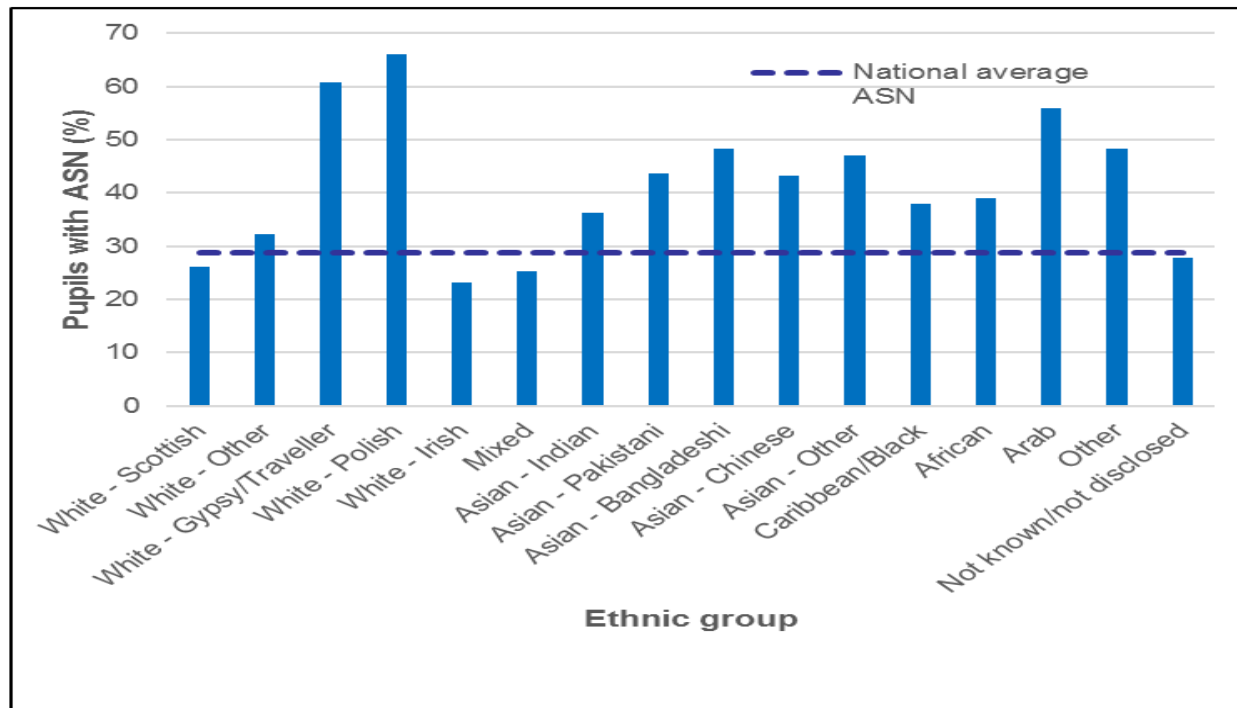
Source: DfE 2018, Scottish Government 2019

There are substantially more males in receipt of statutory support plans than females. This gender disparity is larger in England than Scotland, presumably due to the very small number of pupils in Scotland receiving a CSP.

The magnitude of this gender difference varies between categories of need. In both jurisdictions, the largest gender discrepancy is shown in the Autism Spectrum Disorder category, with approx. 4 times as many males than females. For low incidence normative categories such as hearing impairment and visual impairment, the difference is very small.

Percentage of pupils within each ethnic group identified with ASN in Scotland 2018: **Suggests 66% of Polish pupils have ASN**

- **Indicates problem of including EAL in ASN stats – see next slide**



Source: Scottish Government, 2019

The inclusion of English as an additional language as a category of ASN means that a high proportion of Scottish pupils from minority ethnic backgrounds appear to have above average levels of ASN identifications, although only a minority of this group have a learning difficulty or disability.

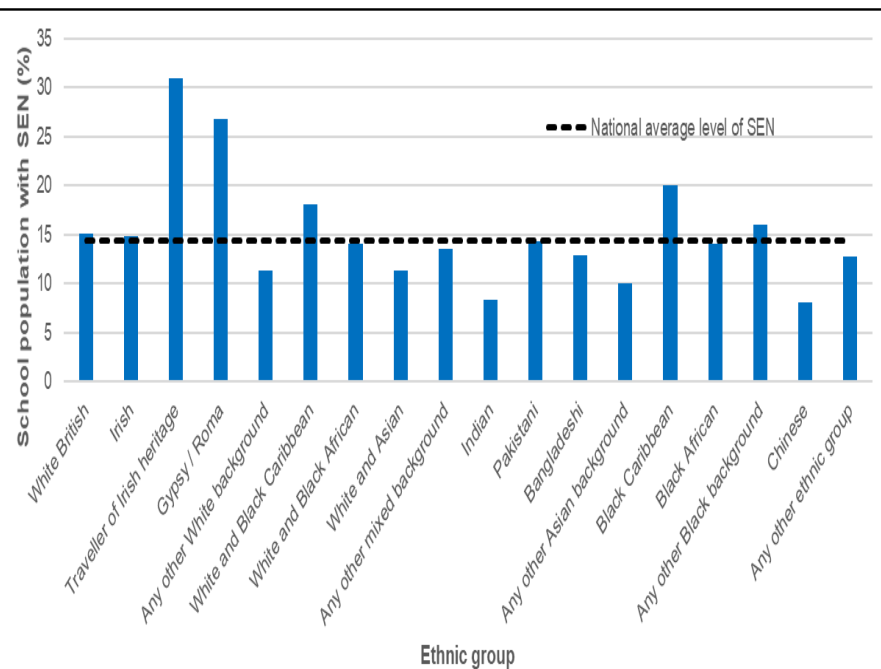


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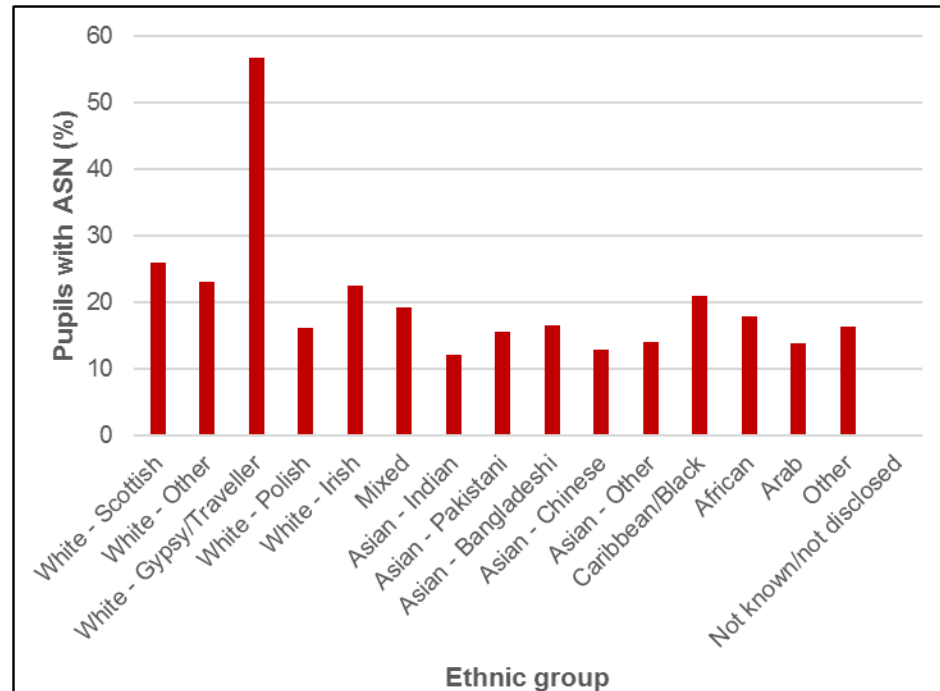
Percentage of pupils within each ethnic group identified with SEN/ASN in England and Scotland 2018: Excluding EAL. **Similar patterns across jurisdictions**



ENGLAND



SCOTLAND

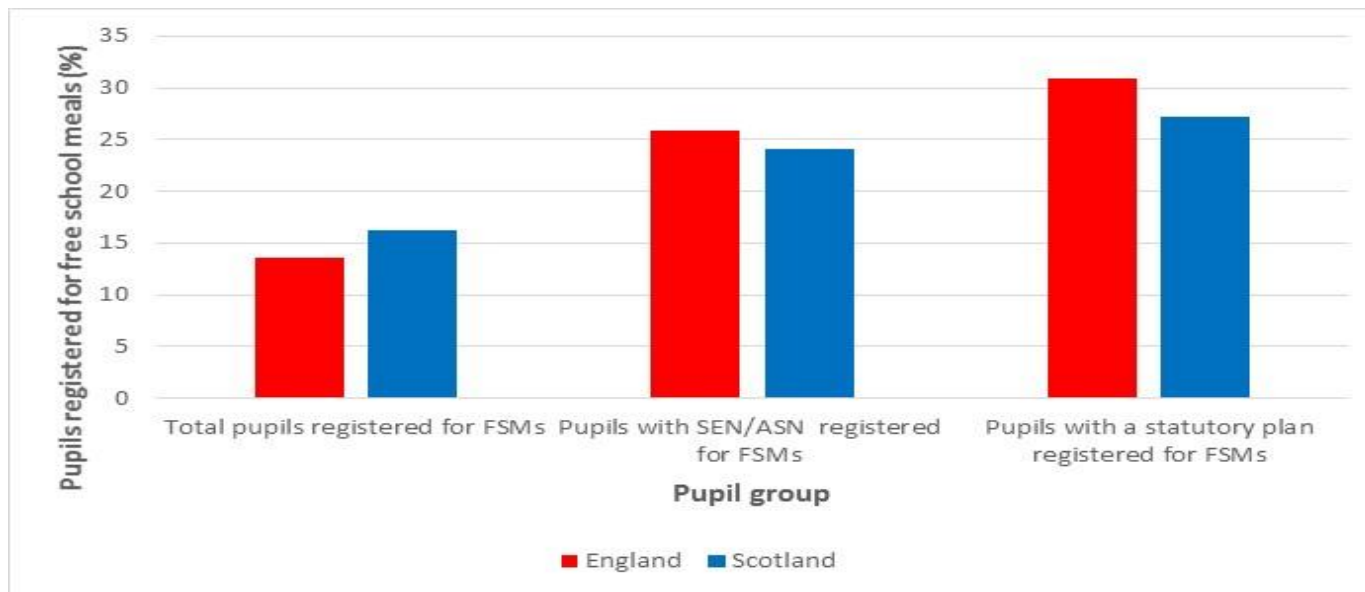


Source: DfE 2018, Scottish Government, 2019

Pupils from Traveller and Black/Caribbean backgrounds had the highest rates of SEN/ASN identification.

Pupils of Chinese and Indian heritage had the lowest rates of SEN/ASN identification.

Percentage of pupils registered for free school meals in England and Scotland by pupil group, 2018



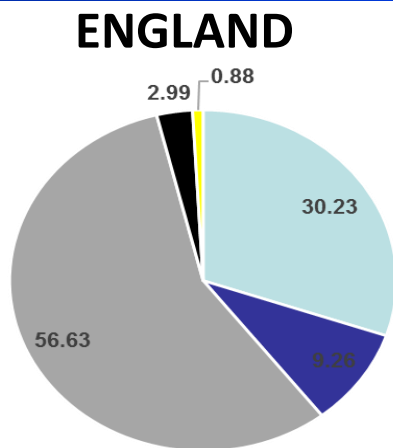
Source: DfE, 2018, Scottish Government, 2019, special request

In Scotland, the statistics refer to the percentage of pupils in state primary and secondary schools between P4-S6 who are registered for FSM (P1-P3 pupils and pupils at local authority or granted aided special schools are not included).

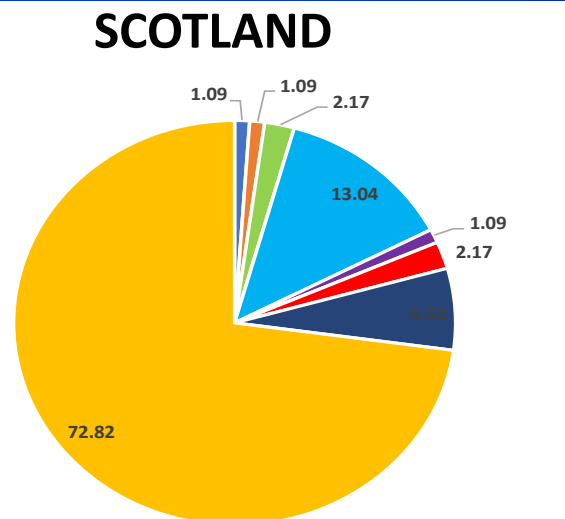
A higher proportion of pupils with SEN/ASN in England and Scotland are in receipt of FSMs (25.8% of SEN pupils, 24.1% of ASN pupils) when compared to the proportion of the overall school population who receive FSMs (13.6% and 16.3% in England and Scotland, respectively).

Similarly, a higher proportion of pupils with statutory support plans are in receipt of FSMs (26.3% in England and 27.2% in Scotland) than the proportion of pupils receiving FSMs in the total pupil population.

Registered appeals by type in England and Scotland, 2017-2018



- Refusal to assess
- Refusal to make EHC
- Against contents
- Miscellaneous
- Refusal to amend after review



- Transitions
- Failure to review
- Deemed refusal of CSP
- Implementation of CSP
- Contents of CSP
- Timescales (Issue CSP)
- CSP not required
- Placing request

Source: MoJ, 2018; ASN Tribunal for Scotland, 13th Annual report, 2018

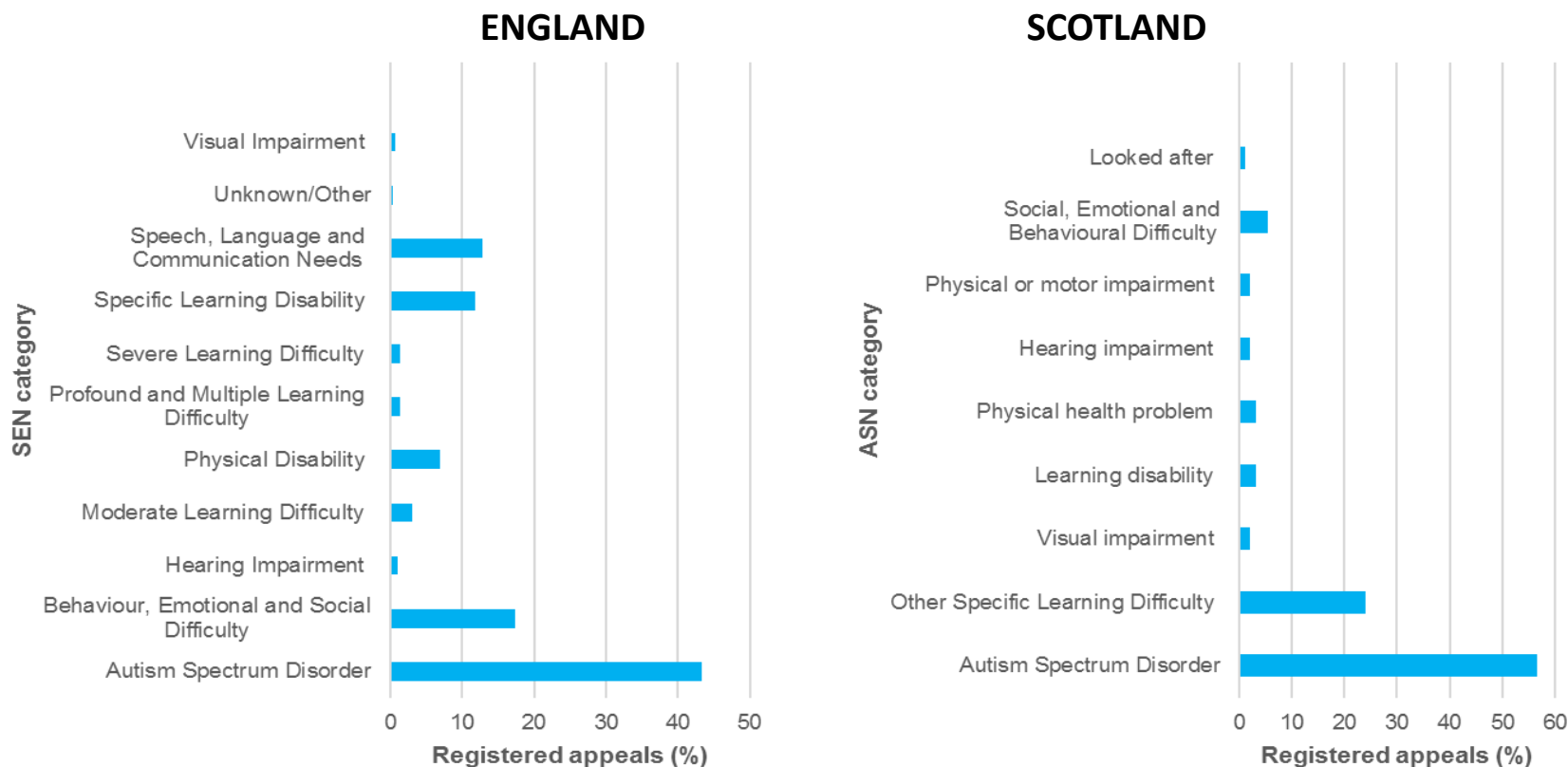
Per head of population there was 5x as many tribunal appeals in England than Scotland between 2017-2018. In England, 5679 appeals were registered by the First-Tier Tribunal (Health, Education and Social Care Chamber) between 2017-2018, compared to 92 appeals registered by the Additional Support Needs Tribunal for Scotland.

The reasons for appeal differed between jurisdictions. Over half (56.6%) of references made in England were raised in objection to the contents of a statement or EHC plan, whereas in Scotland, the majority of references were in relation to a placing request.



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Registered appeals by type of SEN/ASN in England and Scotland, 2017-2018



Source: MoJ, 2018; ASN Tribunal for Scotland, 13th Annual report, 2018

Across England and Scotland, the majority of references concerned a pupil with Autism Spectrum Disorder, representing 43% and 57% of registered appeals in England and Scotland, respectively.



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Local Authority Surveys



Online questionnaire sent to all LAs in both jurisdictions during
Nov-Dec 2017

England

56 LAs completed all or part of
survey (37% response rate)

Scotland

18 LAs completed all or part of
survey (56% response rate)

We wanted to find out more about...

- How legislative frameworks have impacted upon LA practice
- How LAs support children's and young people's rights of participation in decisions concerning ASN/SEND and provision.
- Challenges that LAs may face in putting national policy into practice.



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Local Authority Surveys



Questionnaire was adapted to account for specific responsibilities of LAs in each jurisdiction and included questions regarding:

- 1) The role of local authority professionals, availability of training and impact upon workload
- 2) Reviewing ASN/SEND provision
- 3) Provision of advice and information
- 4) Assessment of ASN/SEND
- 5) Contents of CSPs & EHCPs
- 6) Review of CSPs & EHCPs
- 7) Disagreement resolution; appeals and mediation
- 8) General (future education and training plans, parental involvement in decision making, the potential of new legislative frameworks to enable children and young people's views to influence LA decision making)



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LA Surveys: Key Findings



Roles

57% of LAs in England / **41%** in Scotland have a specific officer that leads on children and young people's participation

Training

Most staff have received some training on participation but little uniformity across LAs in terms of inconsistencies around quality, content, recipient and training provider.



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LA Surveys: Key Findings

Workload

Very clear message about the impact on SEND staff workload in England. 94% of LAs said workload had greatly increased as a result of CFA 2014.

The personalisation agenda has increased the amount of meetings involved in producing a robust plan and the work has to be completed in a shorter timescale. This is against a background of financial cuts impacting on the recruitment of sufficient staff to manage the workload. (English LA)

Majority of Scottish LAs *anticipated* a moderate increase – but too early to gauge full impact...



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Provision of Advice and information



England

- Organised locally
- Almost all LAs said they provide information through a range of media & make efforts to maximise accessibility
- Advice & support through variety of organisations, esp. SENDIAS
- Most local offer webpages have dedicated CYP sections

Scotland

- LAs reported that they provided advice & info but little evidence of this
- Provision of information and services more fragmented and complex
- Most information aimed at parents rather than CYP
- Most LA websites didn't mention 2016 legislation or new rights of CYP

Wide variations in the capacity of different LAs to ensure that ASN/SEND related information and advice is both accessible and appropriate for children and young people



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Consultations with children and young people about local provision



- Widely seen by LAs as a beneficial practice to help improve policy and practice but also recognise this as an area that could be improved

...we have inclusion ambassadors who attend events and we are seeking to further develop the role of young people moving ahead. (Scottish LA)

- Used multiple mechanisms such as, dedicated forums, voluntary organisations, surveys, youth councils, visits to schools
- Around 1/3rd LAs in both jurisdictions not doing this regularly due to cost & lack of time
- Difficulties consulting with younger children

Consulting is very useful but limited to older children would like to find out more from younger children.' (English LA)



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Participation in individual plans



- Children and young people rarely make requests for ASN/EHCP assessments or communicate their views on the contents of statutory plans independently. Common to rely on 3rd party communication from other adults
- Rare for young person to name preferred setting
- Most LAs consider that children and young people's participation in decisions about their education and support are important - BUT - this is often dependent upon capacity and availability of sufficient time and resources
- Survey responses revealed sub-optimal levels of children's and young people's participation in EHCPs and CSPs



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Disagreement resolution



- Most LAs said that they use a range of methods to make young people aware of disagreement resolution possibilities and access advocacy support
- Despite this, LAs reported that it is very rare for young people to pursue dispute resolution, mediation or appeals independently
- Difficulties establishing whether views presented are those of parent or child

It hardly ever happens. Parents/carers always advocate on behalf of the child/young person. Very difficult to obtain views at this stage and get involvement from the young person. (English LA on CYP's participation during Mediation)



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General



- LAs considered young people's views should take precedence over parents/carers
- Views and extra contextual information from parents/carers helpful where a child or young person does not have capacity
- Extension of age in England and need for guidance and support to include and support post -16 age group
- In Scotland, LAs support transition to future education and training through external organisations



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LA views on increased emphasis on children & young people's rights



- Most LAs broadly sympathetic to main aims of reforms and welcomed increased emphasis on children's participation rights.

A difference has been made by including views of the child. However, the quality of how professionals discern those views varies - particularly at annual review. Improving the quality of how professionals support the voice of the child & young person is the key to making further difference. (English LA)

I agree that the possibility is here. We need to ensure however that we don't just play lip service to this and that we really do support and empower children and young people to exercise their rights. Sometimes we confer the rights on children and young people, but they are not confident about how to exercise these rights. (Scottish LA)



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LA survey summary



- Advances in engagement with children and young people in consultations about local provision in England but sub optimal participation in individual planning re education and support
- Challenges in terms of addressing the practicalities of supporting children's and young people's participatory rights in a consistent and meaningful manner
- Major issues around capacity, eliciting views of children and young people with more complex needs, LAs having sufficient resources to adopt person-centred approaches, availability of sufficient information and support for children and young people to be informed of and realise their rights.



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Case study findings: Commonalities between England and Scotland School pedagogy and ethos



- Children had very broad idea of the abstract concept of rights
- Children, parents and teachers generally believed that children's voices were heard in school.
- At times, there was a mismatch between staff perceptions that a strong children's rights agenda was being promoted and parents' perception of lack of communication and awareness.
- Support for children's rights in principle - many schools involved in UNICEF Rights Respecting Schools Programme
- However, teachers expressed reservations about allowing children autonomous rights & some believed children's rights had 'gone too far'.



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Children's knowledge and awareness of legal rights



- *They should have the right tae play. Have the right tae eat. Have the right tae get sleep. Tae clean theirselves.* (Lewis, 14 years, Scottish special unit, identified with SEBD/ADHD, SIMD1)
- *We engage...external advocates. We also have...a...lawyer who comes in to discuss with the boys their rights and entitlements in school and beyond the school.And we also encourage very regular contact with children's rights officers from the local authorities the boys come from.* (Head teacher, residential special school seeking to raise pupil awareness of new rights)



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Many children with SEN/ASN felt included and listened to



- *Very nice teachers who like genuinely care about you. They care about your wellbeing and they always ask about how you are, how your holiday's been. Just actually show an interest. I'm in the DAS Department and I can say for any other people who have disabilities and who want to come here, it's very well organised up at the DAS. Yeah and like I say it's very nice and it's a very inclusive school. (Alan, 17 yrs, Scottish special unit, diagnosis of ASD)*
- *... we also try and include Holly in decision making and give her choices throughout the day. And the pupils have an input into the topics they want to learn so it's balancing their choice along with the curriculum expectations of what our balance for a broad general should be. So she has her own work tray and we try and filter in little things that are a personal interest to encourage her in other areas as well. So yeah I think, I think there's a really good balance. (Teacher of Holly, Scottish special unit, diagnosis of ASD)*



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But teachers had difficulty extending choices to pupils with complex needs



You know, we're always looking at ways to give pupil voice, but a lot of it's on a level of [simple] choosing. So, you know, 'Do you want that for snack or do you want that for snack?' And then they can choose. (Catherine's teacher, Scottish special school)



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Children and parents from socially disadvantaged backgrounds often expressed feelings of exclusion & alienation



- *I don't like the fact that I'm in a class with... two very autistic young people. And it gets a bit annoying. And I think I should be in a different class with the higher functioning people.* (Chloe, 14 years, kinship care, Scottish special unit, identified with SEBD/ASD, SIMD 1)
- *It was like fighting a losing battle. I was sick a' phoning them up and arguing wi' them and having meetings. And it just got me absolutely naewhere so I kinda just gave up. I thought, 'I'm wasting my time'.* (Mother of Colin, identified with SEBD, Scottish special unit, SIMD 1)



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Middle class parents much more able to express their wishes & assert their rights



- *I did get a copy of [LA policy] and ... it's not what every second parent does. So it's not something you can go and chat necessarily to people about. I don't know anybody else who's done that, and I know several special needs parents. David's the only one with a CSP. (David's mother, less deprived background)*
- *They wanted tae put a ... metal filling in but it was at the front. And I said, 'No she'll get a white filling'. And they said, 'No we'll put a metal one in because it's stronger'. ... And I said, 'No'. ... So just because she's got learning difficulties, she deserves a nice smile as well so she's having a white one'. And then she said, 'Well actually you don't have the right to decide that so I'll ask Jeannette'. ... So I didn't know about guardianship until that happened. So that was why we got guardianship. (Jeannette's mother — reasons for legal guardianship)*



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Engaging pupils in educational planning



- Statutory support plans rarely used in Scottish schools - given to only 0.3% of the total school population and 0.2% of pupils in mainstream.
- Also decline in the use of IEPs (Opened for 5% of pupil population).
- Wide local authority variation in educational planning.
- Most parents do not know what type of plan their child has and children are not routinely involved in formal educational planning.
- Children more involved in everyday decisions on teaching and learning than in formal educational planning.



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Engaging pupils in educational planning – parents sometimes think this is tokenistic



- *I guess that, this comes down to the child's capacity actually. Certainly at primary, whenever we had child planning meetings, David would complete the My Views sheet with the help of the Support for Learning teacher but he is not keen to be involved in meetings. And I personally don't think he would have gained much from being involved in something he didn't want to be involved in. And whenever we have a meeting in school I always give him the option to come. And he's quite adamant he doesn't want to come which is him executing his right, I suppose (David's mother)*
- *Nick always attends his meetings. He comes in and tells you what he's been doing and tells you what he would like to be doing. But that's taught. So it's hard to actually know what Nick really does want...It's not really spontaneous. There are little elements of spontaneous sort of reactions from Nick about it and stuff but it's very much what he's being taught. (Nick's mother)*



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Involvement of the case study children and young people in dispute resolution



- None of the case study children had been involved in a reference to the tribunal, adjudication or mediation.
- School staff were generally unaware of the fact that children could mount legal challenges.
- Concerns that right to access the tribunal might be abused.



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Teachers have reservations about children's rights of redress



- *I think [the changes] took me and I think most a' my colleagues aback. I don't think any of us as head teachers ... knew that it was coming. It may well be that some youngsters live in environments where they don't have parents and it's carers who don't maybe care the way they should or they're in an institution. Or simply their parents are, you know, not capable or able to do it for them. I suspect there's a whole raft of areas out there where this might seem to be a good idea, it might be applicable. But I think for the mainstream environment ... we're not so sure. (Head teacher, mainstream secondary)*
- *Carl for example ... he has autism and he's quite literal about many things ... So many times in the past he has accused staff of mistreating him in his old school and so on which might be fair to an extent, I don't know, I cannot tell. However, I can see if it's not true and if Carl would be able to take that to court, I think it would be a very big case and an unjust case in a way, if it's not true to be honest. (Learning support teacher)*



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Children's and young people's experiences of collective participation



- Most schools involve children in collective decision-making via pupil councils, prefect systems and group discussions in class on matters such as rules and curriculum.
- Some schools involve pupils in peer to peer support and advocacy.
- External agencies sometimes used to support pupil involvement.
- Individual pupils valued the experience of being given responsible roles in school.



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- Some schools involve pupils in peer to peer support and advocacy.
- External agencies sometimes used to support pupil involvement.
- Individual pupils valued the experience of being given responsible roles in school – did not see involvement as tokenistic.



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Children's and young people's experiences of collective participation



- *And it was actually a teacher what actually said, 'You know what, go for being a prefect'. And I was always one a' the people like, 'A prefect, I don't know'. And it was due to a teacher, she's a really good teacher ... she says I would make a really good prefect and so I took her advice. I went, like I put myself forward for being a prefect and I just did it since then. (Alan, 17 yrs)*
- *There's a very kind of extensive process of meetings within the school to allow the young people a voice. So all the boys are attached to a house within the school. So there are house meetings which are then fed into the pupil council via the representatives from the pupil council who obviously are elected from the house. We have a peer support system where boys in the school are actually trained as peer. So all a' those processes are quite good at allowing the boys a voice on decisions that are made within the school. (Residential school head teacher)*



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Conclusions



- Teachers support the idea of pupil voice.
- Children and young people with less significant difficulties much more involved than those with complex needs or SEBD.
- Parents act as children's principal advocates – middle class parents have more social, cultural and economic resources at their disposal. Also very involved re young people.
- Questions of access, inclusion and capacity.
- Little knowledge of new rights legislation across the system – LAs have done little to raise awareness.
- Doubts about viability of children's autonomous rights and fears of abuse.