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Professionalisation, rights and children with additional support needs in Scotland: The swarming of conflicting discourses



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<http://bit.ly/CREID-seminar-autonomy-rights-sen-children>

**Presentation to the International Seminar on the Rights of Children with
ASN, 13th June 2018**



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Introduction: structure of the presentation



Drawing on analysis of administrative data and key informant interviews, this paper asks whether new legislation on the rights of children with ASN in Scotland signals a paradigm shift or an uneasy policy pastiche.

Structure of presentation:

Competing policy frameworks in the field of ASN and the nature of policy making

Evidence from analysis of official statistics

Tensions between rights and professionalisation: key informant perspectives

Conclusions



Six Models of Administrative Justice

Model	Mode of Decision Making	Legitimizing Goal	Mode of Accountability	Characteristic Remedy for User
Bureaucracy	Applying rules	Accuracy	Hierarchical	Administrative review
Professionalisation	Applying knowledge	Public service	Interpersonal	Second opinion. Complaint to a professional body
Legality	Weighing-up arguments	Fairness	Independent	Appeal to a court or tribunal (public law)
Managerialism	Managerial autonomy	Efficiency gains	Performance measures	Management Sanctions. Complaint to ombudsman
Consumerism	Active participation	Consumer satisfaction	Consumer charters	'Voice' and/or compensation through Charter
Markets	Price mechanism	Private sector-profit. Public sector-efficiency	Commercial viability	'Exit' and/or court action (private law)



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Inherent policy tensions: The ASfL Act strengthens rights but local authorities continue to act as gatekeepers



ASfL legislation attempted to strengthen parents' rights by according greater rights of appeal and redress - new dispute resolution measures included tribunal, adjudication and mediation – but used mainly by relatively socially advantaged.

2009 & 2016 amendments to ASfL Act strengthened rights of looked after children & those over 12 with capacity – described by Scottish Government as making Scotland the most progressive country in world with regard to implementing UNCRC.

22 new rights, including right to request specific type of assessment, request a CSP, appeal to tribunal etc.

However LAs remain gatekeepers in terms of deciding which children get CSPs & have capacity to exercise new rights



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Inherent policy tensions: GIRFEC



Places duties on LAs to ensure implementation of UNCRRC

Uses language of needs rather than rights

Does not have statutory status and lacks routes of redress

Many local authority staff believe that GIRFEC has superseded ASfL –

Problematic because additional children's rights based within ASfL legislation



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Inherent policy tensions: Equality Act 2010



Within equality paradigm –prohibits discrimination against those with ‘protected characteristics’, including disabled people.

Requires LAs/schools to know which children are disabled

Requires LAs/schools to make reasonable adjustments (policies and services) & avoid less favourable treatment for a reason associated with child/young person’s disability

Redress mechanism – complaint to ASN Tribunal (before 2009) to Sheriff Court)

Other dispute resolution routes include Section 70 complaints to Scottish Ministers and complaints to Public Ombudsman

VERY CONFUSING FOR ALL!!!

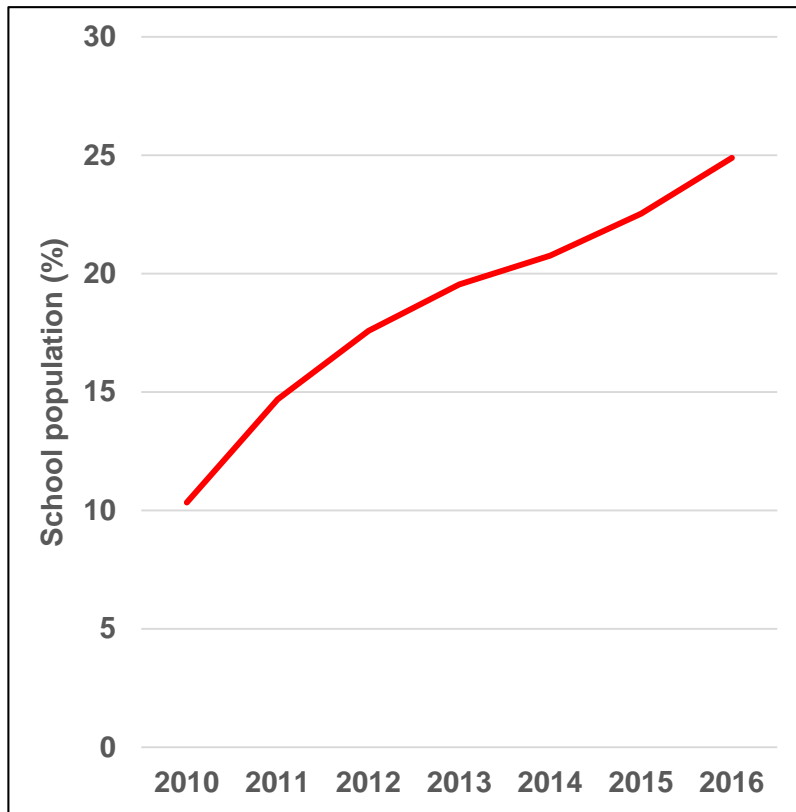


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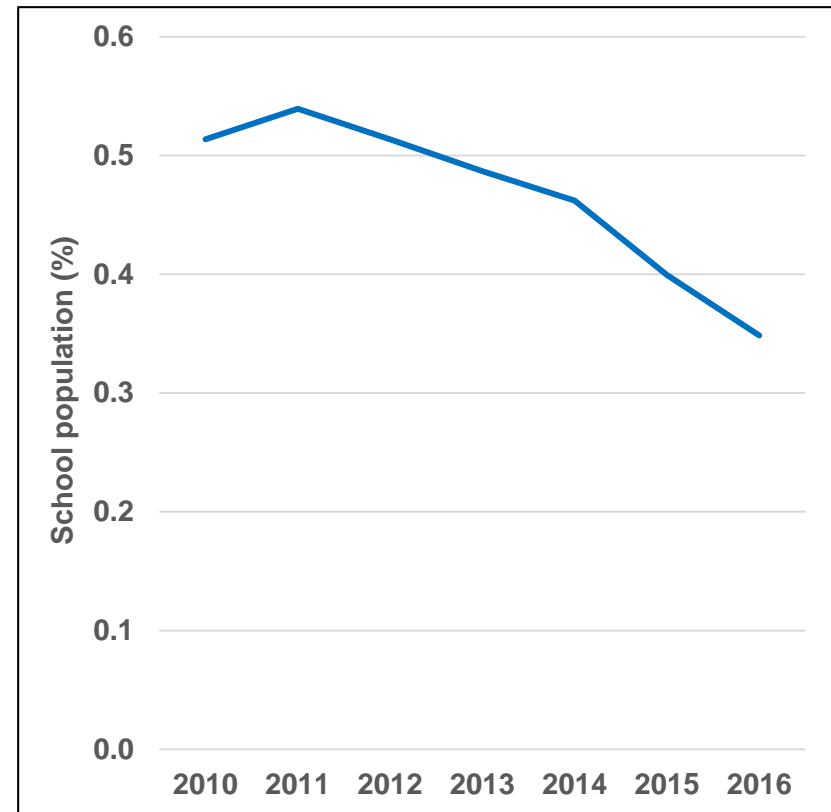
Increase in identification of ASN over time, alongside decrease in CSP



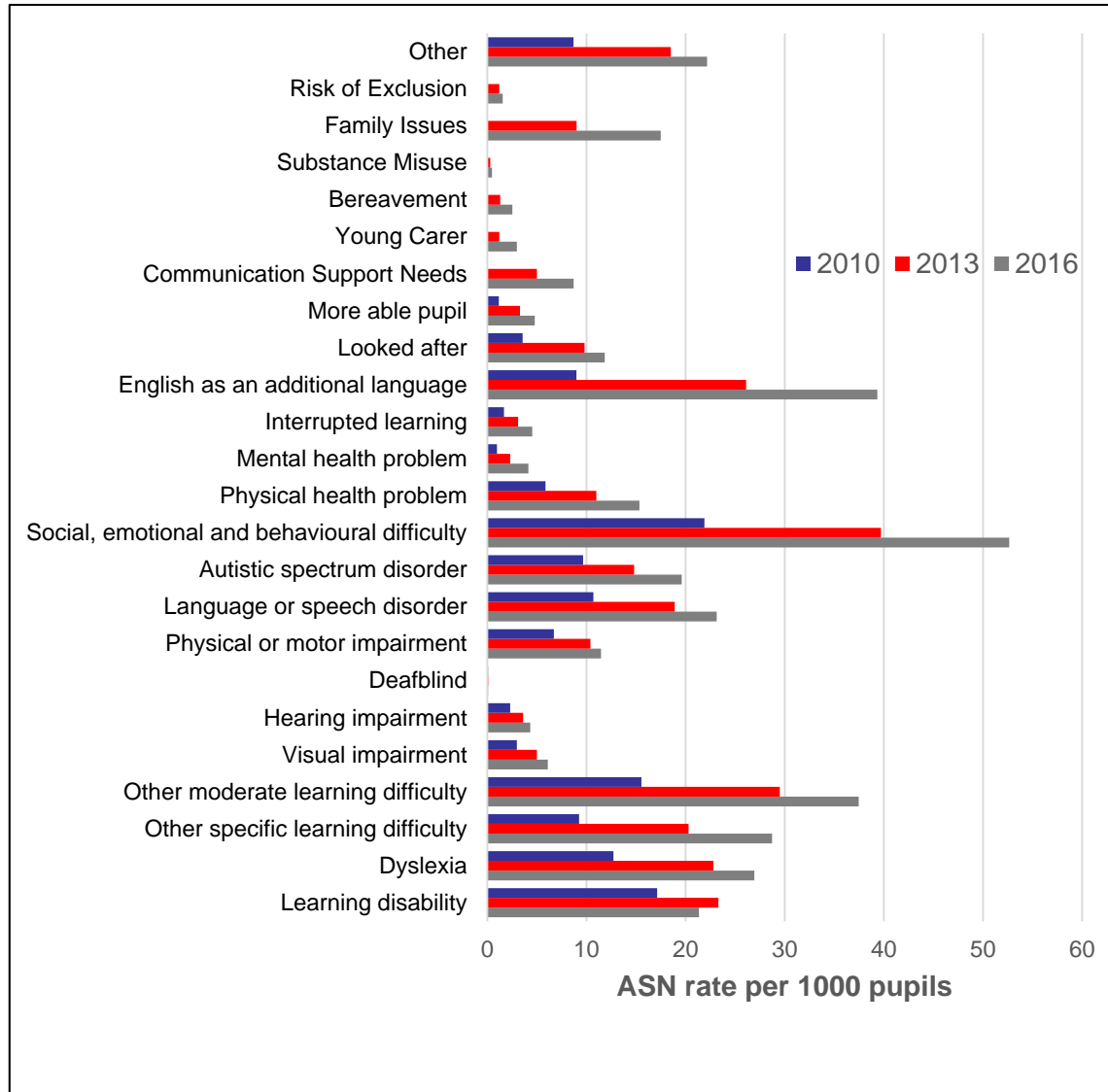
ASN increasing..



CSPs decreasing..

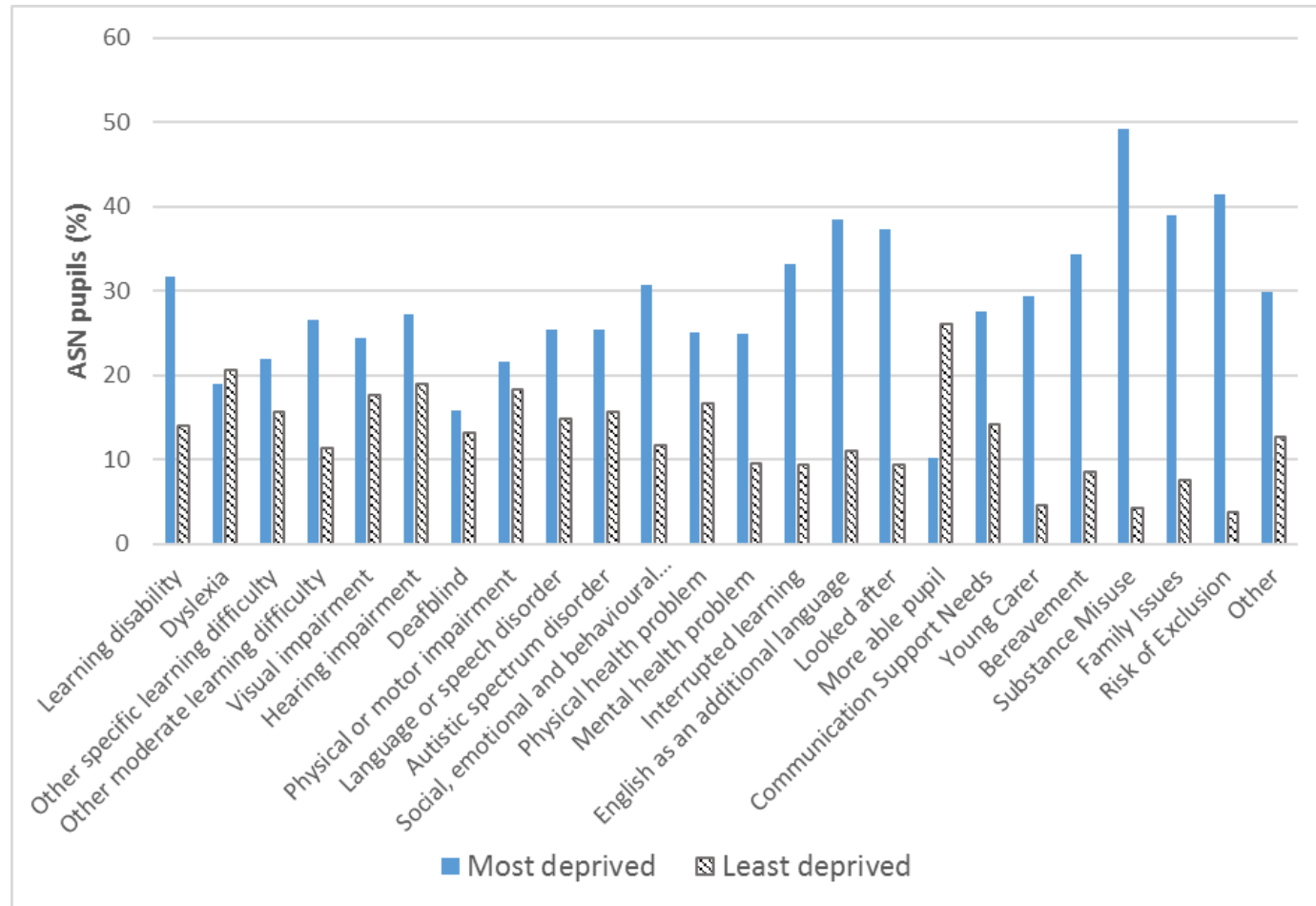


ASN pupils by each type of need in Scotland, 2010, 2013 and 2016



Source: Scottish Government, 2010, 2013, 2016.
 Entries per category are not discrete; a child with multiple needs will be recorded in multiple categories.

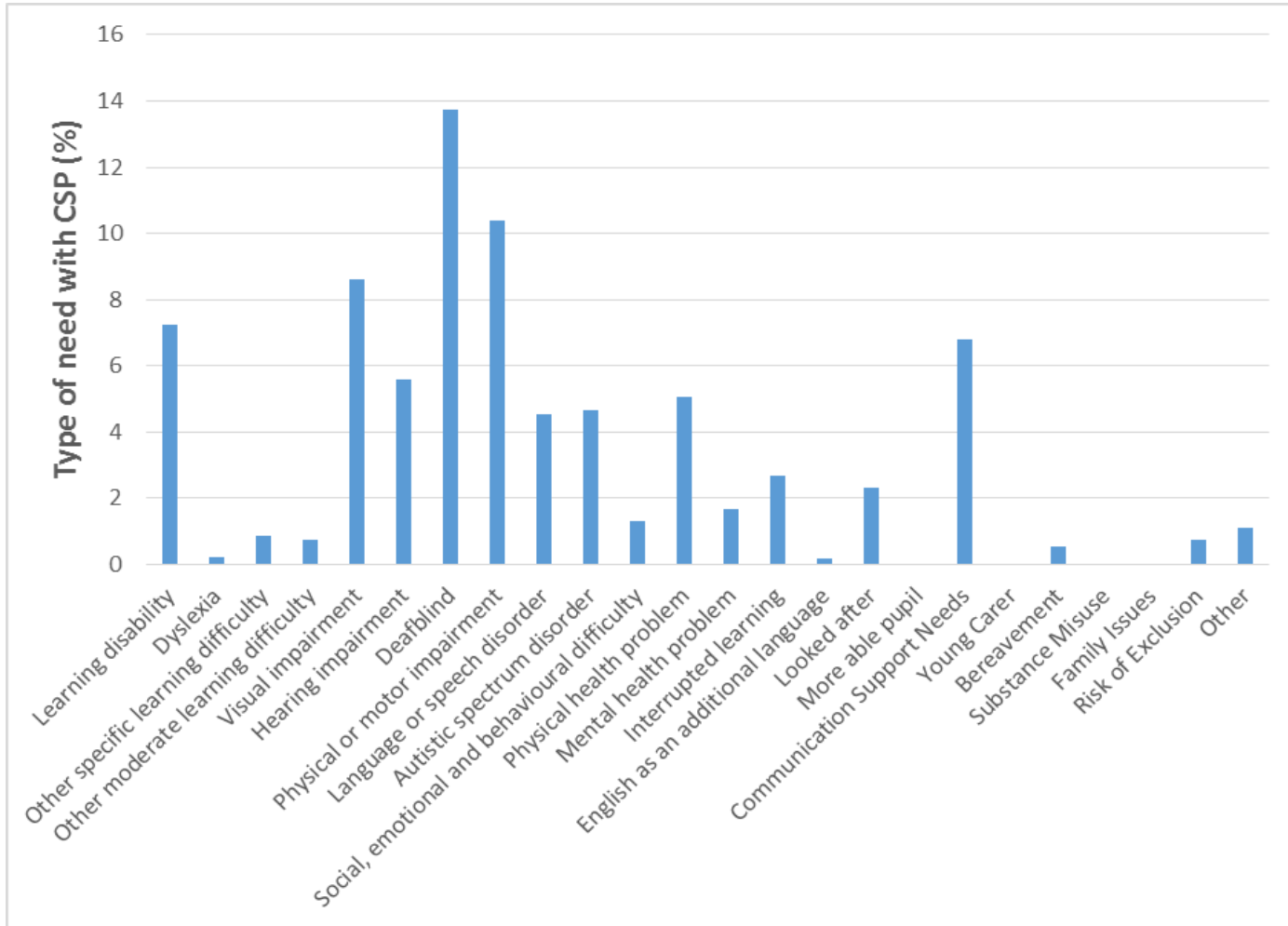
Percentage of ASN pupils by type of difficulty in most deprived (SIMD1) and least deprived (SIMD 5)



Source: Scottish Government, 2016; special request.

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

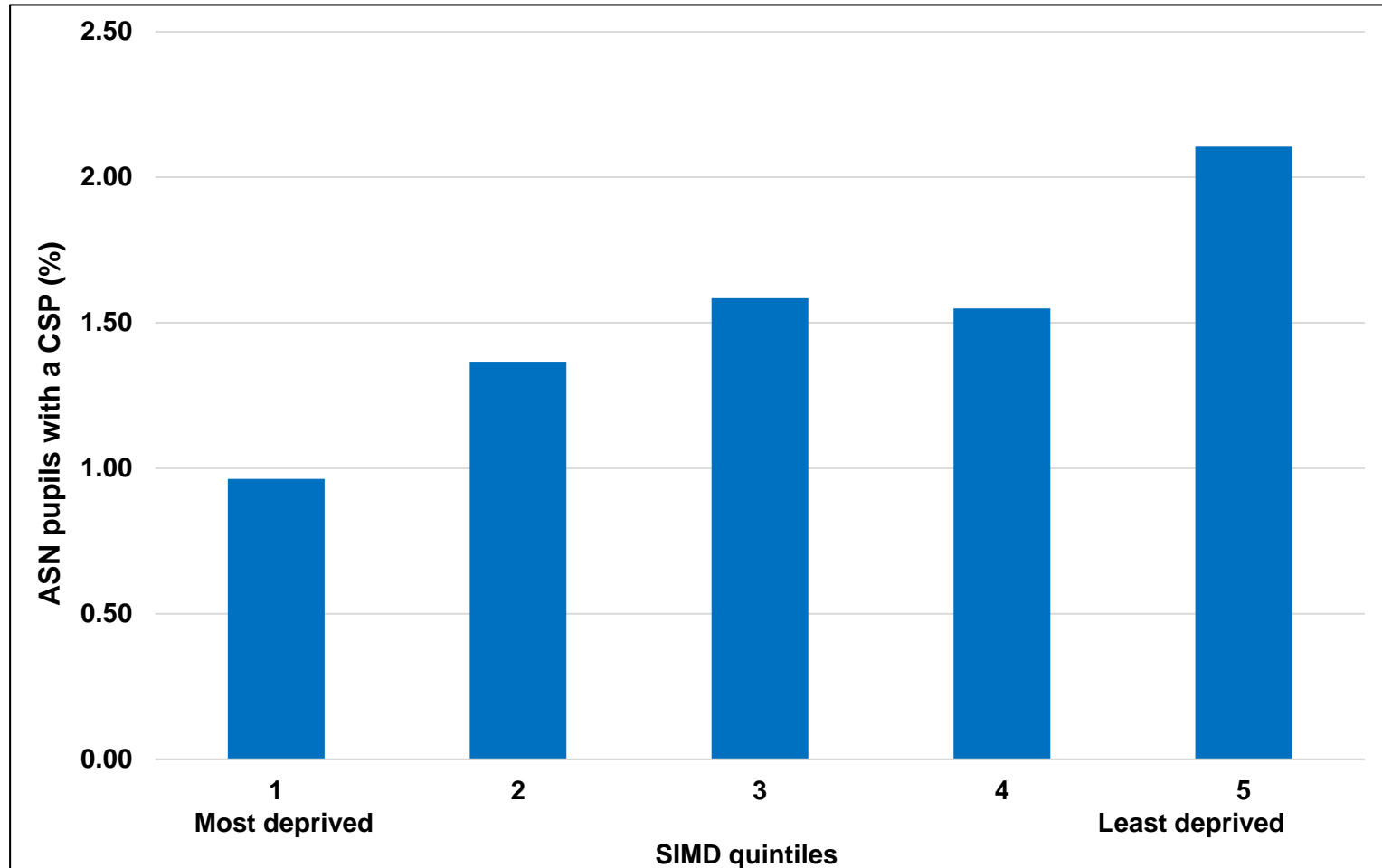
Percentage of children with CSP by type of difficulty





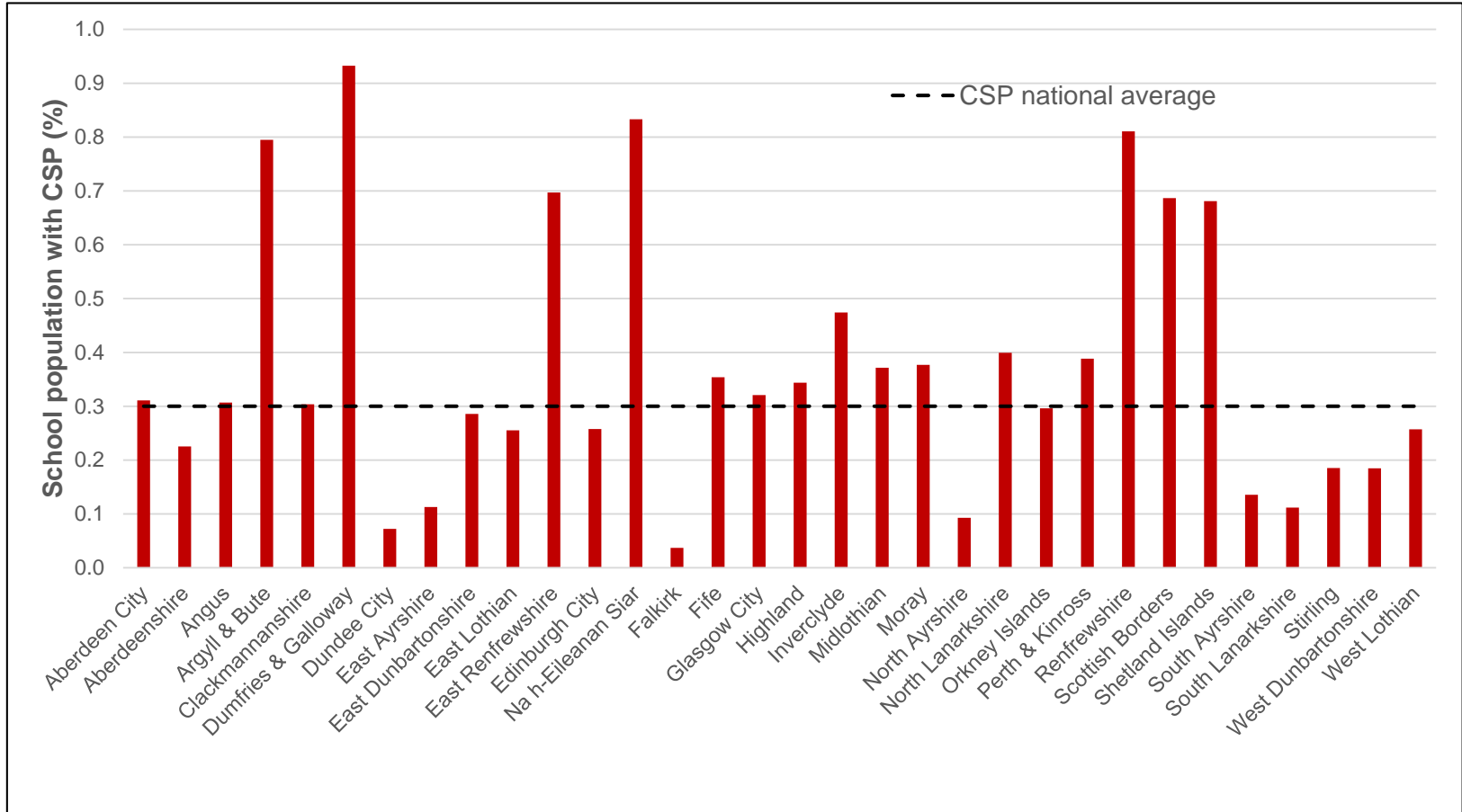
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Percentage of ASN pupils with a CSP per SIMD quintile



Source: Scottish Government, 2016; special request.

Use of CSPs by LA



Source: Scottish Government, 2016; special request.



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Perceptions of the ASfL framework: the local authority perspective



PEPs acknowledged decline in use of CSPs – linked to diminishing budgets which reduce individual services. Illustrates widespread misunderstanding of legal framework:

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)

Classic Catch 22 – Budgets cut so child is deemed to no longer qualify for service – but needs are the same



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GIRFEC seen as more 'workable'



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)



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Perceptions of the ASfL Framework: health perspective



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 as far as, you know, parents and schools are concerned 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)



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Perceptions of the ASfL framework: the rights perspective



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)



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Perceptions of the ASfL Framework: the rights perspective



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)



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Reduction in CSPs due to LAs' resistance to statutory duties which underpin parents' and children's rights



Quite a number of education authorities ...appear to strongly resist the provision of a CSP, mainly on the grounds it's a statutory document, and there are statutory responsibilities, so we don't want to go near that, we'll do everything but. And their defence in those circumstances is we don't need it because we're doing all of this. And there's a real resistance to be attached to something that has statutory duties. And the other aspect is where there's a placing request there can be considerable financial implications. Not just in relation to the one child for whom a tribunal may grant the appeal, but as one education authority individual said to me a few months ago, 'The decision of your tribunal in relation to that one child, sets a precedent amongst the parents in my education authority. They're going to be seeing that you've agreed that this child should go to this very expensive, school. It's going to cost us five million pounds over the secondary school life of the child, and they're going to want what she's got'. Now, what I say to that is, 'Tough'. You know, we make decision based on needs, not resources. And the reason there is a resistance to us is the reality out there is that decisions are being made in relation to children's education based on resources. That is the harsh reality, and we'd be fools to deny it. (President ASN Tribunal)



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Scottish Government Perspective – not concerned about decline in CSPs because of increase in other plans



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. (Scottish Government ASN Officer)



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Scottish Government Perspective – the duty still remains



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)



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Perceptions of 2016 legislation on children's rights: Scottish Government optimism



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 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 but 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 clean 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. We'll need to just see how that pans out. (Scottish Government officer)



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Reservations from rights organisations – tests of capacity & 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)



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Summary

Official statistics reveal major decline in use of CSP - key document which guarantees resources, rights of review and redress. Most new rights for children associated with CSP & ASfL legislation more widely

Statistics also reveal inequality in use of CSP by social deprivation, local authority and nature of difficulty, suggesting the rights of some groups are being prioritised

Three separate bodies of policy/legislation co-exist uneasily – ASfL, GIRFEC & Equality with attendant confusion

Radically different perceptions of new legislation by different policy actors - rights community, professionals, parents and young people's voluntary organisations



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Conclusion: factors impeding promised paradigm shift



- **Policy confusion and tension**
- **Power imbalances between central actors (children, parents & professionals)**
- **Public sector austerity leading to rationing of resources**
- **Uncertainty about practicality & accessibility of new rights**