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The biggest extension of rights in Europe? Opportunities and challenges in realising the rights of children with ASN



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Introduction: structure of the presentation

New legislation on the rights of children with ASN in Scotland is described by the Scottish Government as the most progressive in Europe – but what is the gap between rhetoric and reality?

Structure of presentation:

- **Competing policy frameworks – tensions between needs and rights**
- **Messages from official statistics & key informant interviews**
- **Conclusions**



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The Additional Support for Learning (ASfL) Act 2004: Growing emphasis on the rights of children with ASN



2004 legislation strengthened parents' rights redress – new dispute resolution measures established including 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.

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

Important exclusions – children do not have the right to request mediation or make a placing request.

However LAs remain gatekeepers in determining needs – they decide which children get CSP & have capacity to exercise new rights.



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Parallel equality legislation also promotes children's rights



Equality Act 2010 prohibits discrimination against those with 'protected characteristics', including disabled children.

Competing definitions of ASN & disability

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



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Children and Young People (Scotland) Act 2014 (GIRFEC): located within a **discourse of needs**



Places duties on LAs to progress implementation of UNCRC – but only general duty

Places duties on LAs to assess children's needs using wellbeing indicators.

Needs to be recorded in Child's Plan.



Child's Plan has no set format, no timescales, no routes of redress – seen as preferable to CSP by LAs.

Many local authority staff believe that GIRFEC has superseded ASfL.



ASfL legislation is framed in such a way that child must have statutory document (CSP) to access rights.

But CSPs are effectively disappearing – only 0.1% of primary school children now have CSP, compared with 2% with Record of Need.



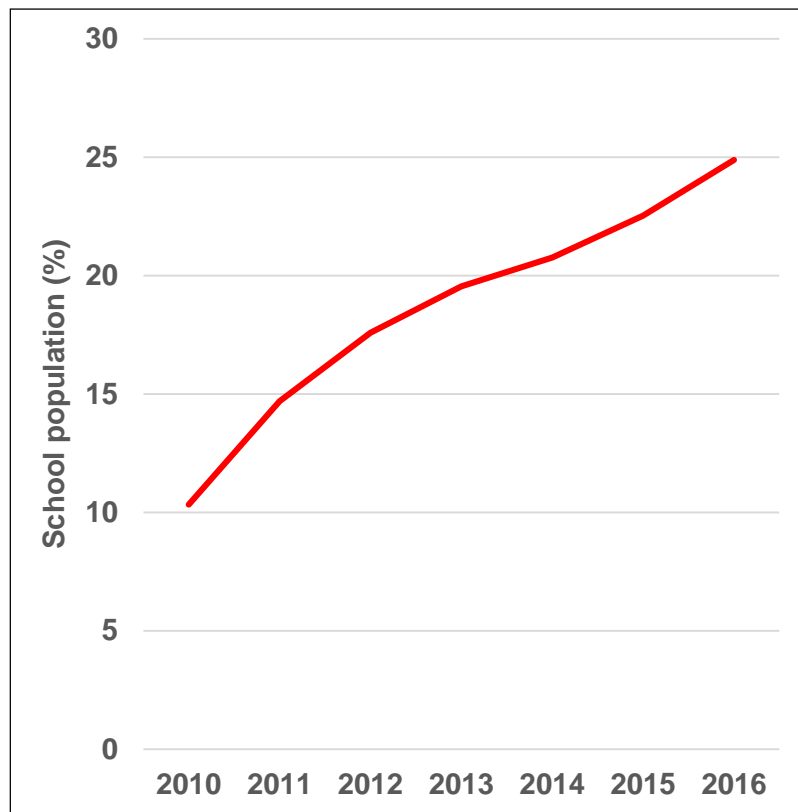


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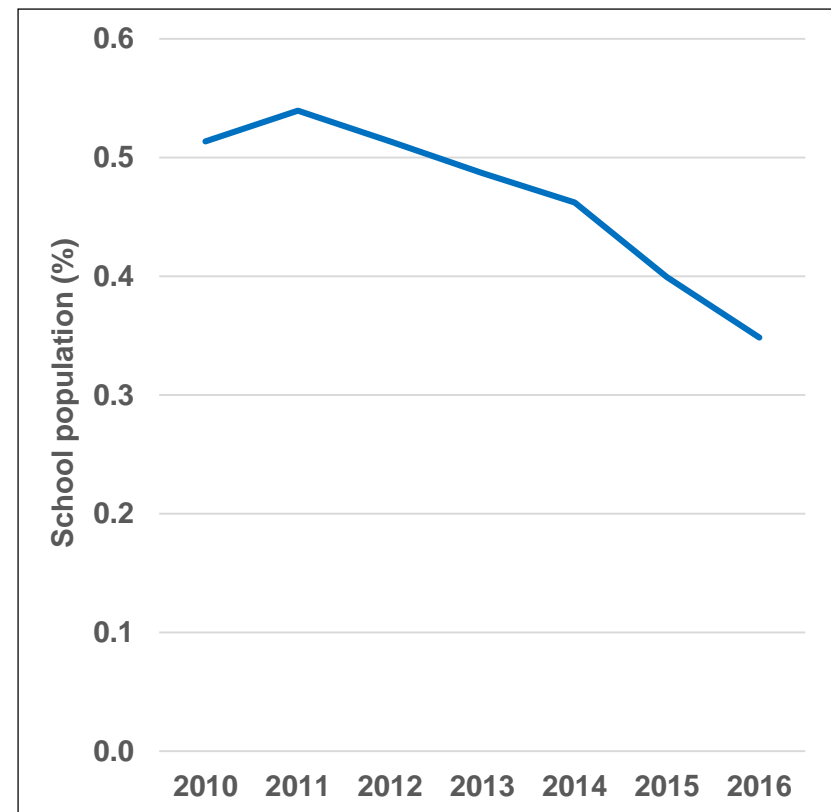
Increase in identification of ASN over time, alongside decrease in CSP



ASN increasing..



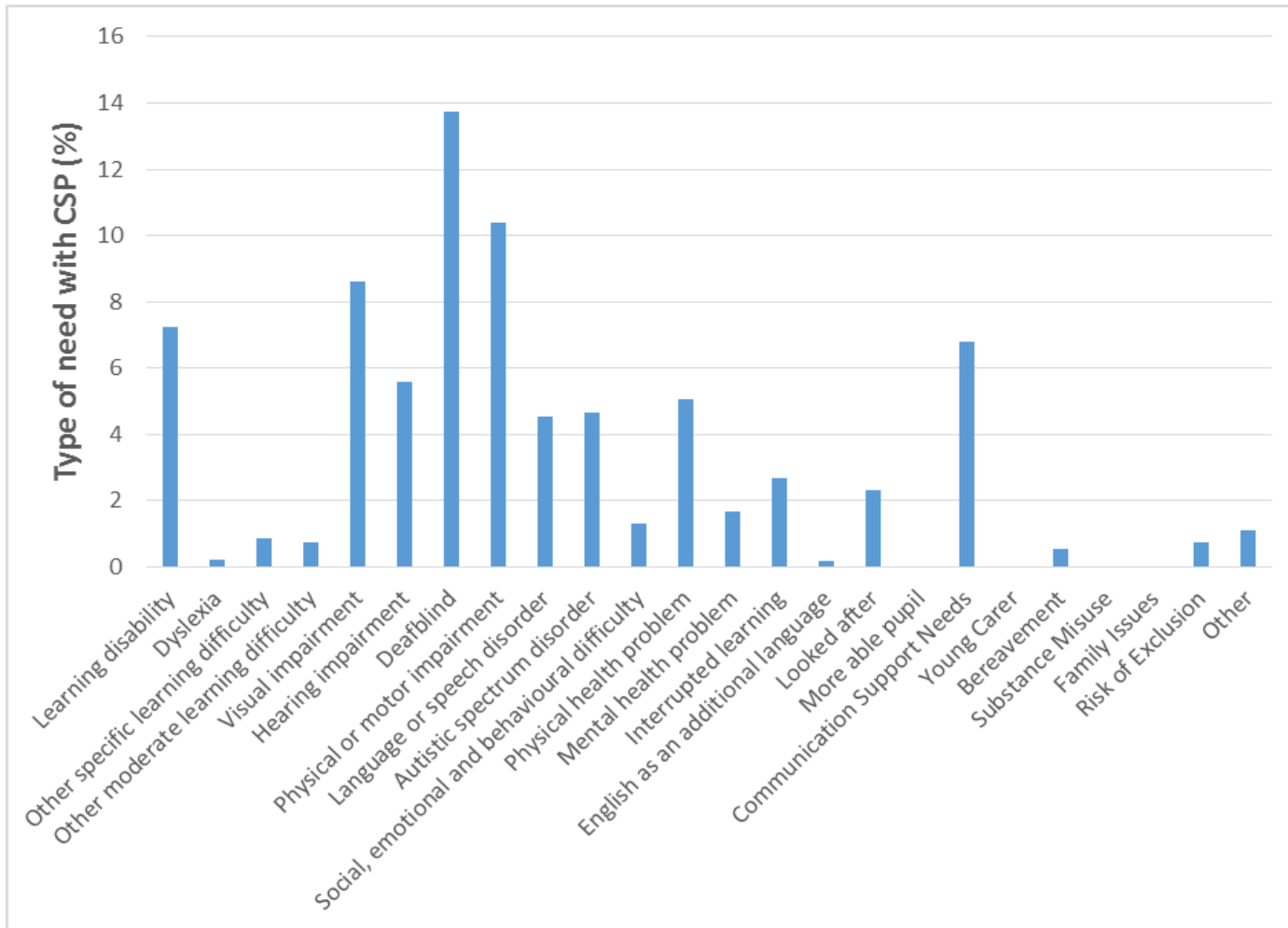
CSPs decreasing..





Major differences in use of CSPs by type of difficulty.

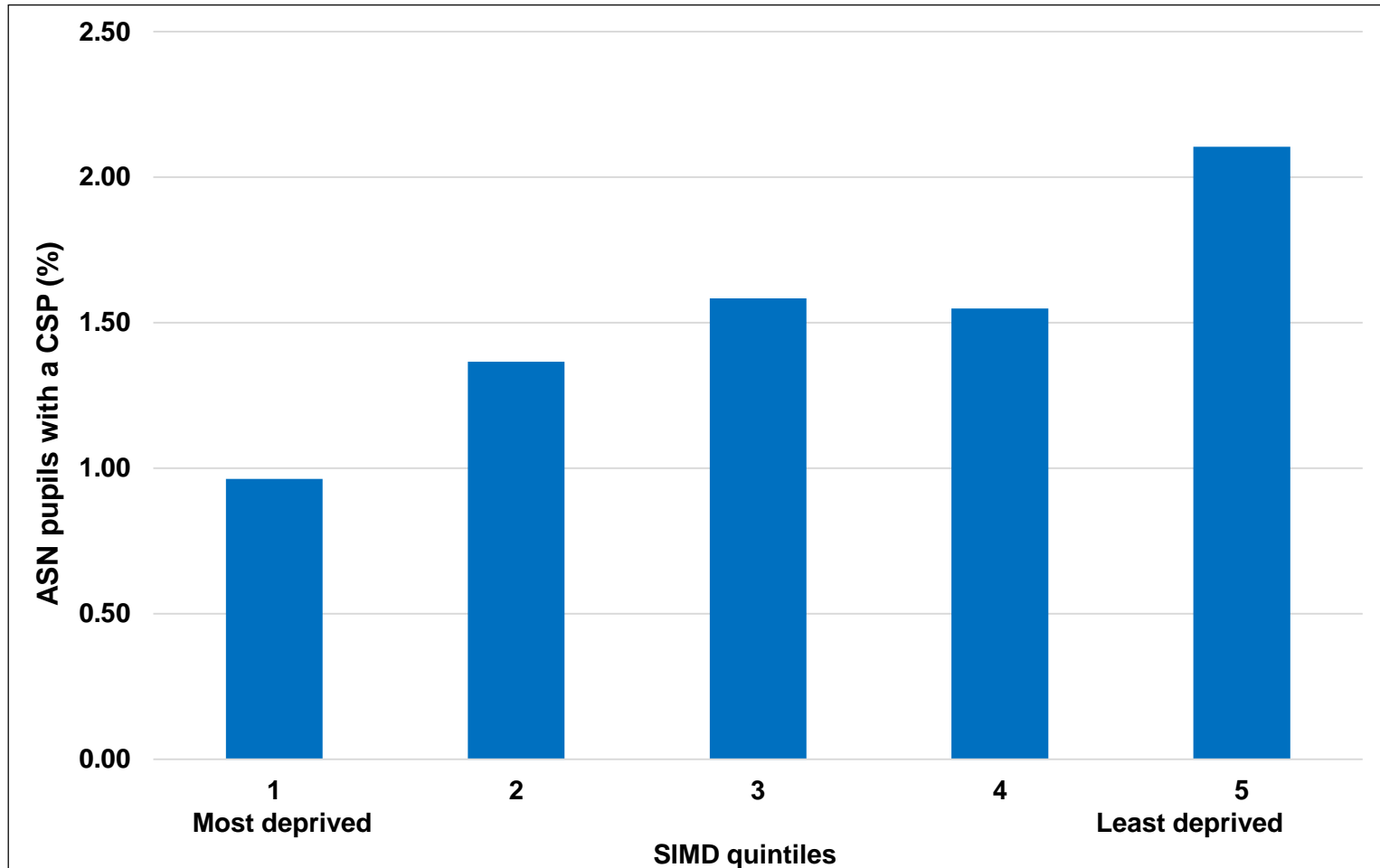
Only 1% of children with social, emotional and behavioural difficulties & 2% of looked after children have CSP, c.f. c.14% of deafblind children.





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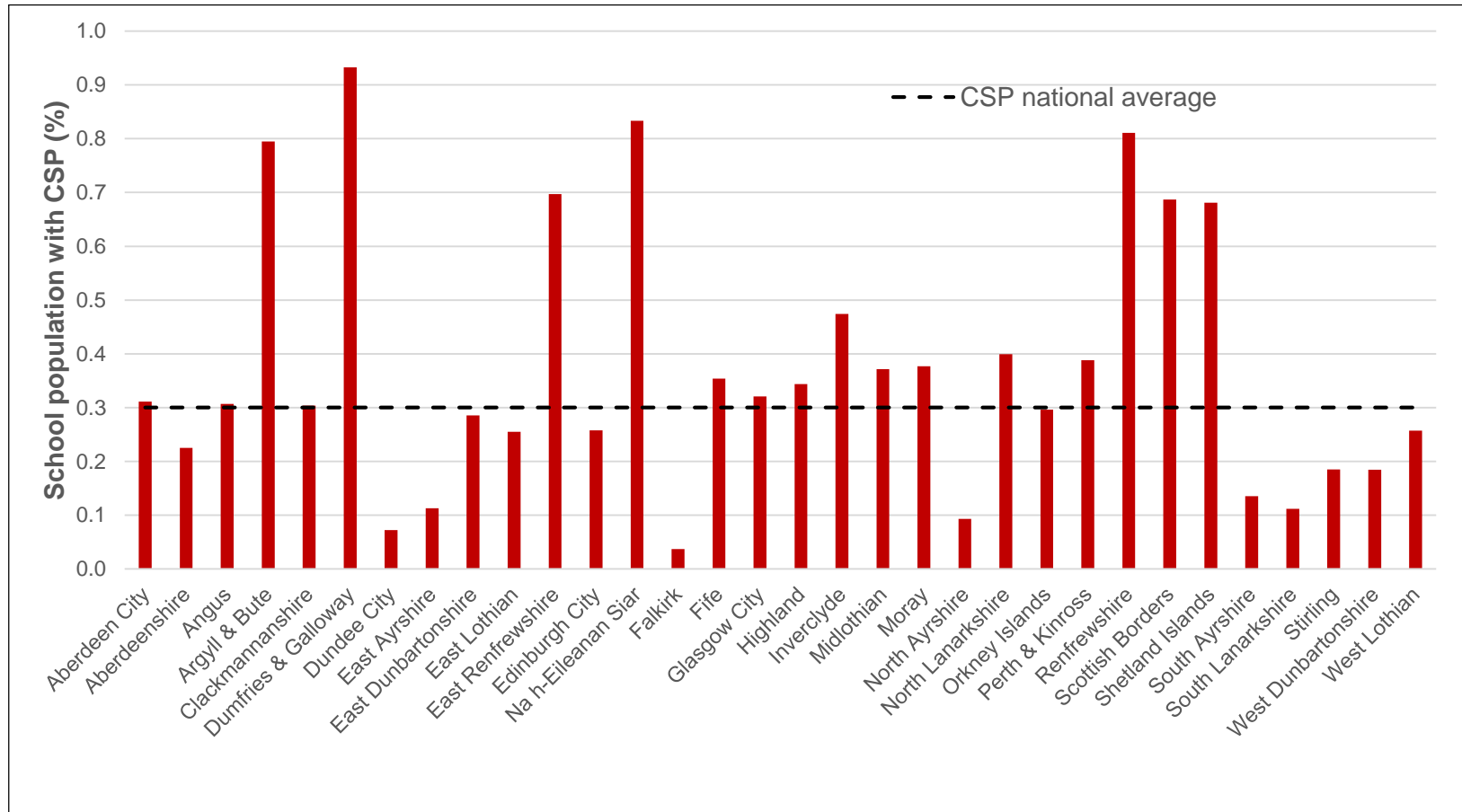
Children in areas of deprivation more likely to have ASN, but less likely to have a CSP – determined by parental insistence rather than level of need



Source: Scottish Government, 2016; special request.



Use of CSPs by LA varies greatly – nearly 1% in Dumfries & Galloway c.f. less than 0.1% in Falkirk, N. Ayrshire & Dundee



Source: Scottish Government, 2016; special request.



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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 in terms of ... the numbers of people using the right. But I can already see from discussions we've been having with authorities that the children's rights agenda has come up [the agenda]. (Scottish Government officer)



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LA perspective: CSPs are ‘too much work’ 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?’ (PEP, Council 2)



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Education law consultant – parents & teachers don't understand rights agenda



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. ...And I suppose also at the school level, it's not necessarily at the forefront of the staff mind that this legislation is relevant to the work that they're doing. I think in many teachers' minds GIRFEC has sort of overtaken [the ASfL legislation], though it doesn't yet have any statutory basis. (Education Law Consultant)



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Equality and Human Rights Commission – critical of the 2016 amendments because they are circumscribed



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. (Equality and Human Rights respondent)

Summary

Three complicated bodies of policy/legislation, placing different emphasis on needs or rights.

Official statistics reveal major decline in use of CSPs – key document describing provision to be made by different agencies & guaranteeing rights of review and redress. New children's rights contingent on CSP.

Children in more advantaged areas with low incidence disabilities more likely to have CSPs – dependent on parental advocacy.

Radically different perceptions of new legislation.

Scottish Government claims legislation is most progressive in Europe, Scottish Children's Commissioner thinks it doesn't conform to UNCRC.

Conclusion: Factors impeding realisation of rights

- Policy confusion and tension – Parallel bodies of legislation placing different emphasis on rights & needs
- Power imbalances between central actors (children, parents & professionals)



- Public sector austerity leading to rationing of resources – children's civil rights increasing but social rights decreasing.