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The biggest extension of rights in Europe? Opportunities and challenges in delivering rights to children with ASN



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University of Burgos, 20th February 2019

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**
- **Two brief vignettes**
- **Conclusions**



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Explanation of terms



- **Local authorities (LAs)** – there are 32 in Scotland (150 in England) – each LA is responsible for the state maintained schools in their area
- **Coordinated Support Plans (CSPs)** – a plan which sets out the support a pupil with ASN is entitled to and which is legally binding; it is only available to pupils who require significant additional support from other agencies such as health.
- **Individualised Educational Programmes (IEPs)** - is a non-statutory document used to plan specific aspects of education for learners who need some or all of their curriculum to be individualised
- **Placing requests** – a parent/carer or a young person aged 16 to 17 can request a place at any state maintained school. It is also possible to request a place at an independent special or grant aided school. There is no guarantee that a placing request will be granted



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Mechanisms for resolving disputes



Prior to new legislation of 2004:

- Section 70 Appeal – parents take the local authority (government) to court over failure to fulfil its legal duty to provide adequate education for a child

New mechanisms after 2004 – intended to be less adversarial


- **Tribunals** – a ‘court’ but intended to be less intimidating than ordinary courts specifically set up to deal with disputes in the provision for children with ASN/SEN – only available to children with complex need requiring – outcome is legally binding
- **Adjudication** (Scotland only) – a written submission about the dispute by parent/carer to the government who has to appoint an independent adjudicator to assess and make recommendations for a solution – not legally binding
- **Formal mediation** – each local authority has to appoint independent mediators whose role is to bring together both parties to seek a solution - outcome is not legally binding



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'Ask Us, Hear Us, Include Us — Young Ambassadors for Inclusion'

by Education Scotland



ASK US, HEAR US
INCLUDE US!



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<https://education.gov.scot/improvement/self-evaluation/young-ambassadors-for-inclusion>



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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.

Children with ASN now have the right to request specific type of assessment, request a support plan, appeal to tribunal etc.

But how much has actually changed? Is change cosmetic or systemic?

Danger of virtue signalling?



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Confusing policy landscape – overlapping education, equality & children's legislation



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



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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.

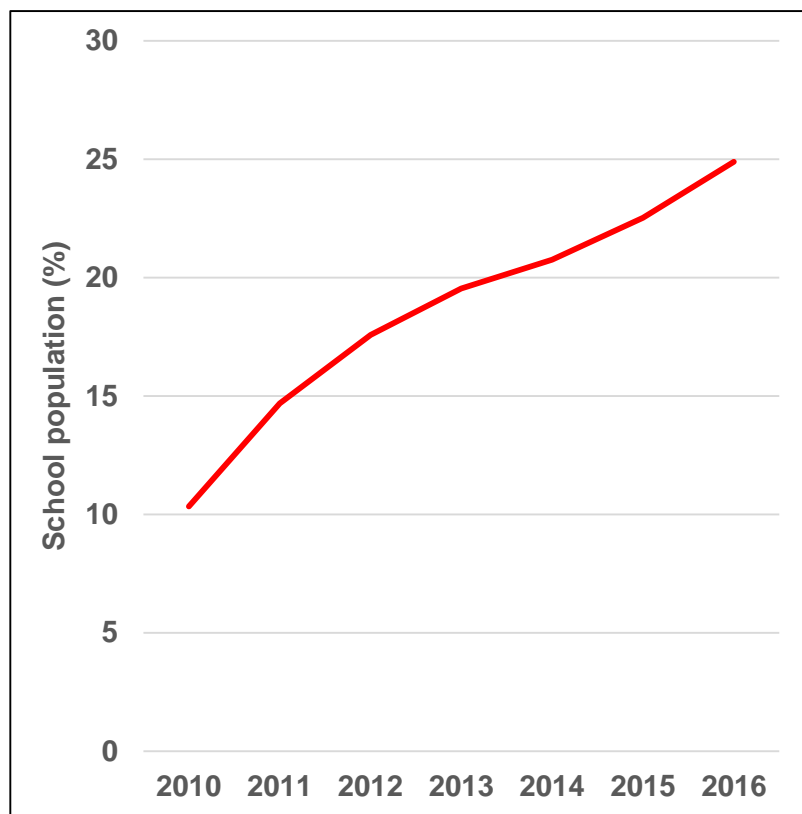
ASfL legislation is framed in such a way that child must have statutory document (CSP) to access rights.

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

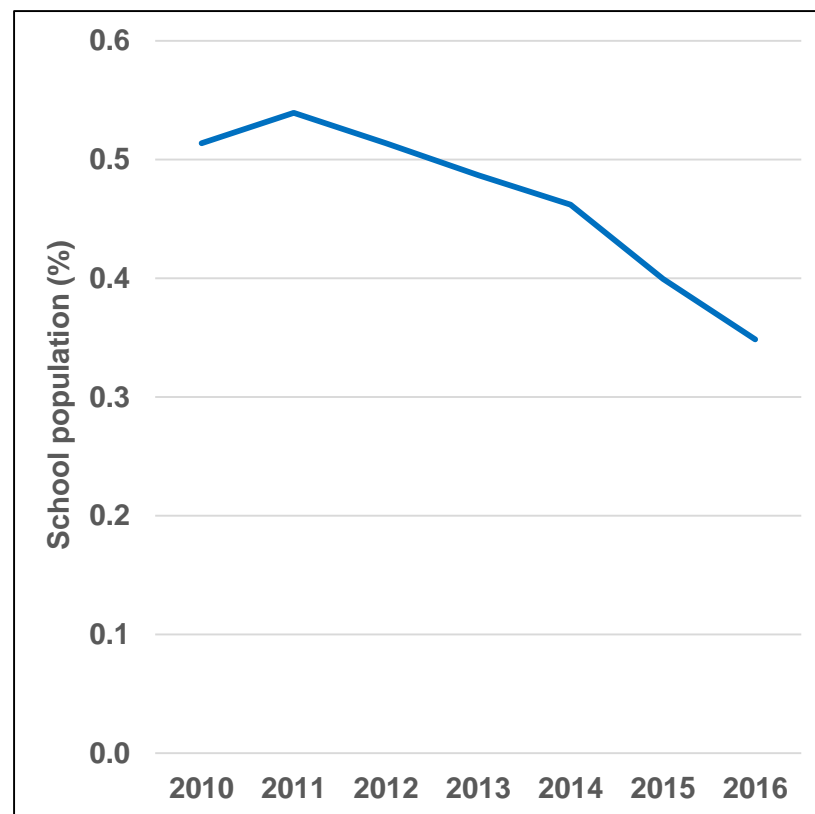


Increase in identification of ASN over time, alongside decrease in CSP

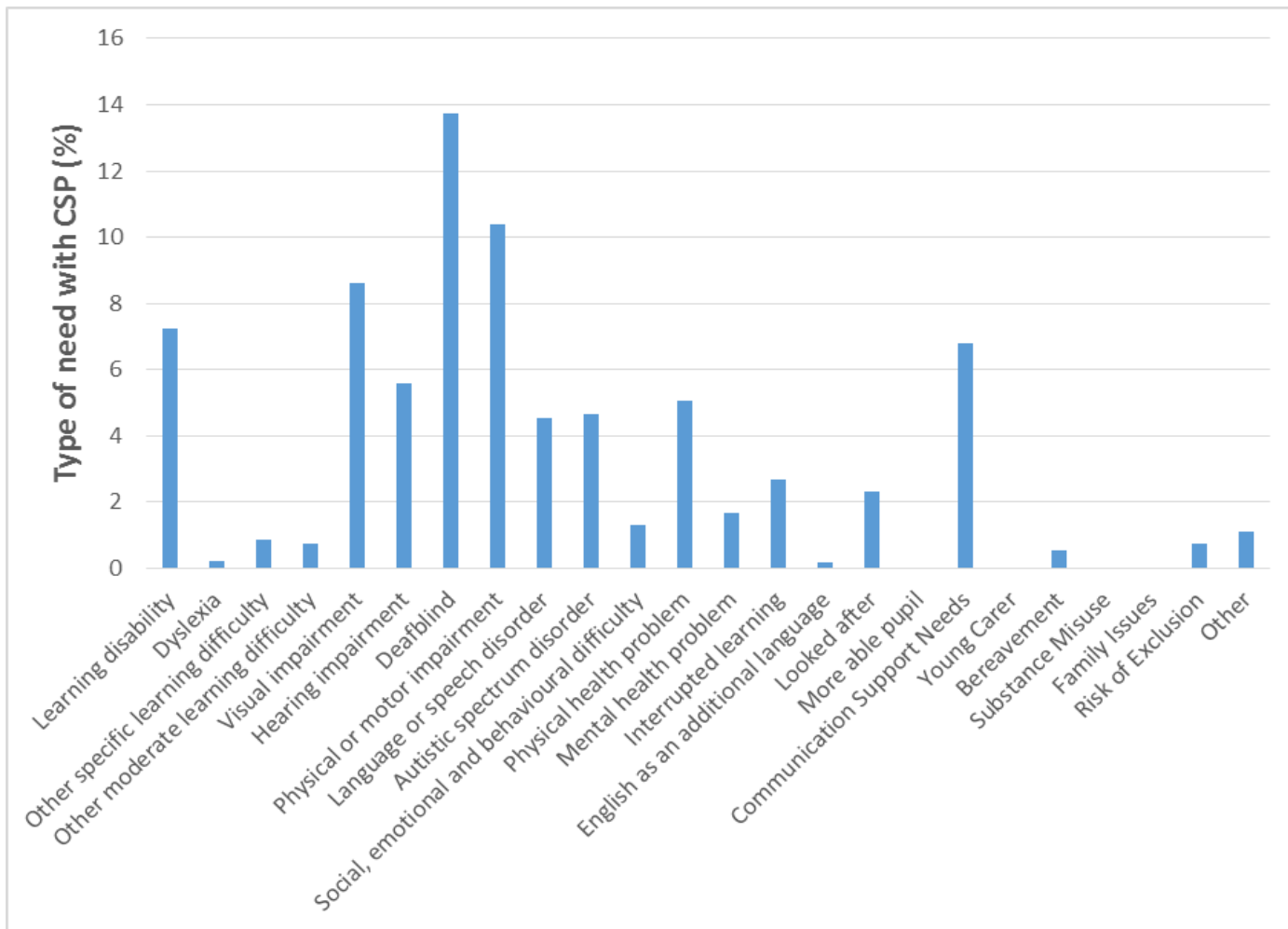
ASN increasing..



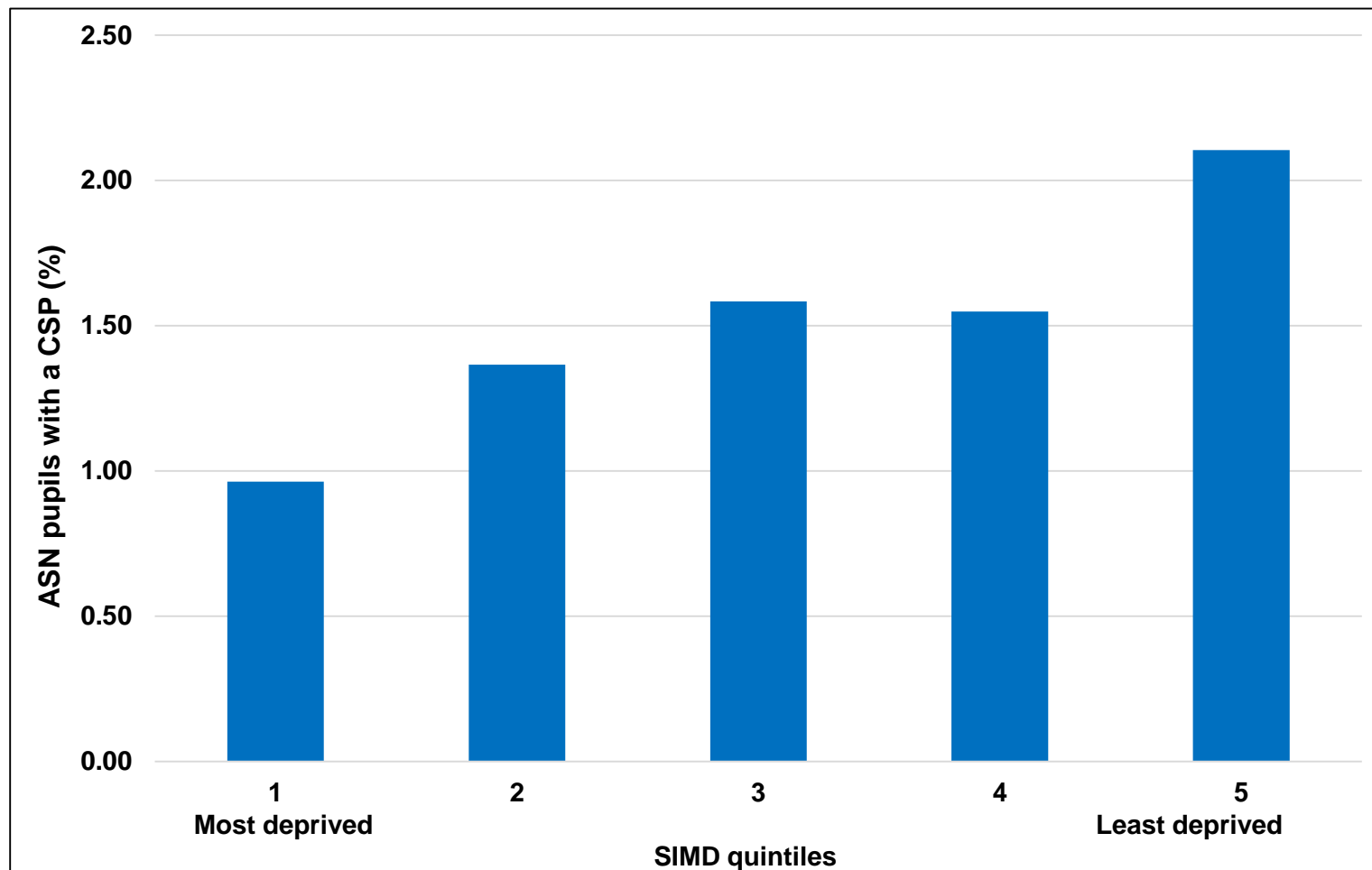
CSPs decreasing..



**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.**

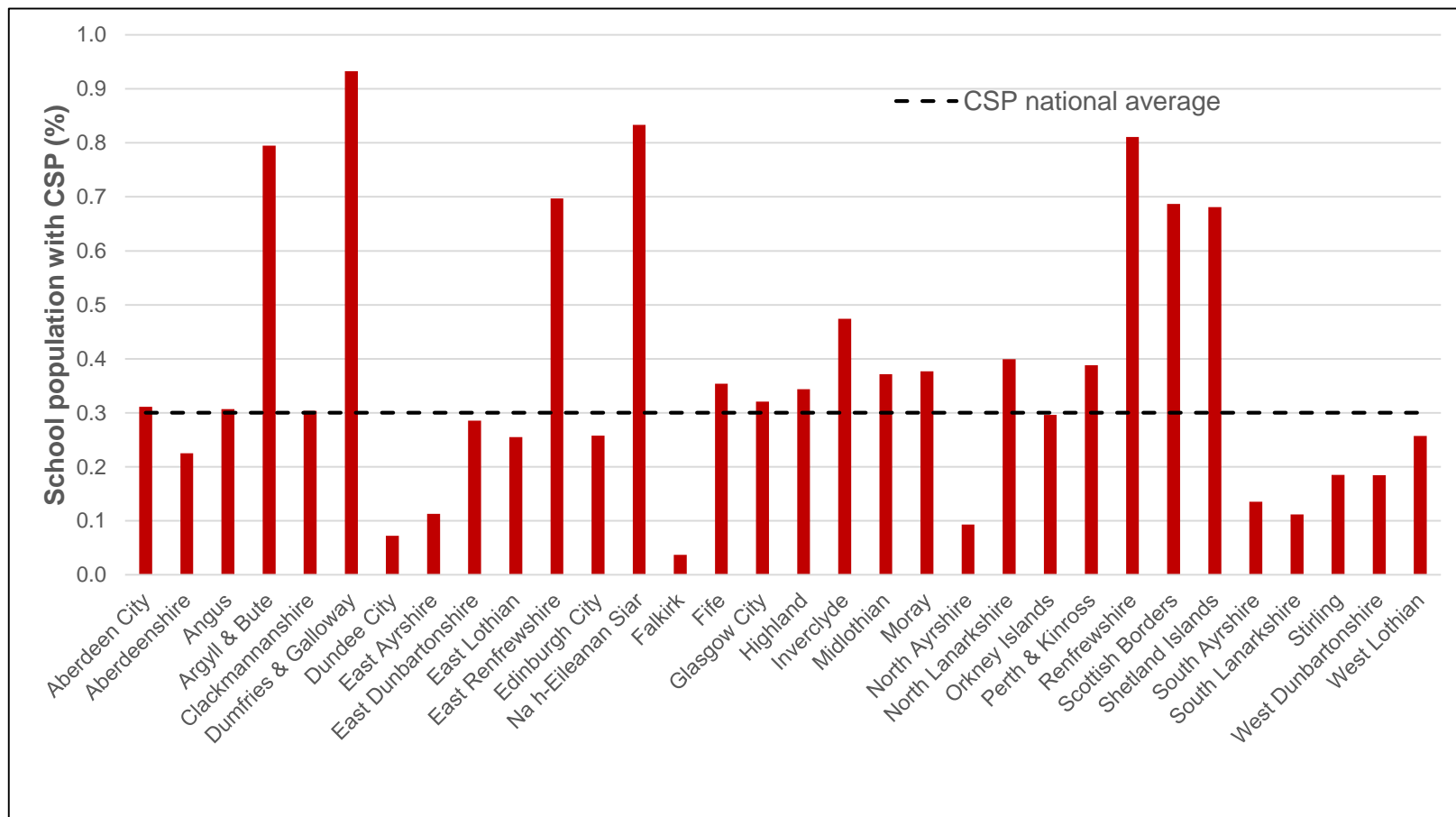


Children in areas of deprivation more likely to have ASN, but less likely to have a CSP – determined by parental insistence rather than level of need



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





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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)



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Case studies: using rights of voice and participation



- David
- Jeanette
- Lewis





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David: 12 years old, physical & learning difficulties, mainstream





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David's story 1

- School is in a middle class area & is trying to improve provision for children with ASN
- D. is seen as relatively easy to include because he is small, well-behaved and cheery. He spends a lot of time in the support base & does not participate in many academic subjects.
- His mother wishes him to be in an inclusive environment so that he can maintain contact with his primary school friends, but is concerned about how long the school will be able to meet his needs.
- A CSP was opened for D. at primary school, and was reviewed by the LA in 2016. It included a commitment that health would provide physiotherapy, SLT and OT.
- Since D transferred to secondary, both the CSP & IEP have lapsed and support from health is no longer being provided.



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David's story 2



- Mrs B. recognises that she may have to make a complaint to reactivate the CSP (previous requests have been ignored).
- Mrs B is a very pro-active parent - at her request, mediation was provided by the LA because the primary school was failing to include D. in school trips.
- The adults around D. believe that he has limited capacity to make meaningful choices about his education and future life. His mother tends to make these decisions on his behalf.
- The HT questions aspects of the inclusion and children's rights agenda, which 'may have gone too far'.



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Lewis: 14 years old, Department of Additional Support/Flexi-schooling



- School is in area of high deprivation. L is member of large blended family.
- Literacy difficulties due to lack of school attendance; School thinks he has ADHD – CAMHS about to begin assessment. No CSP.
- Has spent large amount of time out of school.
- Currently being 'flexibly' educated – half time at home where mother has responsibility for his education.
- During home days, both Mum and Lewis say that he watches TV & tidies the house.



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Lewis' story



- L. presents as a bright and engaging boy who finds it difficult to concentrate.
- Was frequently absent at primary & went on to the local secondary, but was excluded.
- Has been at current school for 18 months.
- He is in a small group (6 boys) & has an individualised curriculum – often 1:1 teaching.
- He is very behind with his learning due to school non-attendance, & is just learning to read – intensive work on phonics.



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Lewis' story



- The school has encouraged Ms C. to agree to an ADHD assessment, which is currently underway – but L only has a few months left in school.
- The original flexi-schooling arrangement was that L. would work in a hairdressers in his non-school time – but this quickly broke down.
- L. is quite a vulnerable boy who has fears about local gangs.
- Adults worry about his future – his mother describes him as 'easily led'.
- Flexi-schooling is increasingly used but raises issues about relationship between children's rights & LA duties to educate.
- Fears that it may be used as a form of covert exclusion.



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Janet: 23 years old, learning disabilities, lifelong learning centre





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Janet's story 1



- Mr and Mrs C. have devoted their lives to supporting their daughter and see parents as the most effective advocates of their children's rights – worry that the rights agenda may be misused.
- Describe a 'constant struggle' over resources with the Local Authority, particularly social work.
- Have used a range of dispute resolution mechanisms, including the threat of legal action.
- Have also fund-raised to get what they believe is the best from the system.



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Janet's story 2



- Mr & Mrs C. are J's welfare guardians on the grounds that their daughter lacks mental capacity to make decisions on their own behalf.
- J. has clear ideas about her future and wants to achieve normative markers of adult status – a house, a job, a permanent relationship, becoming a parent.
- Parents have reservations about some of her ambitions
- They are strong supporters of the lifelong learning project – but the future is uncertain.

A grayscale background image showing two children, a boy on the left and a girl on the right, looking down at a document or book they are holding together. The boy is on the left, and the girl is on the right. They are both looking intently at the document.

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.