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Autonomy, Rights and Children with Special Needs: A New Paradigm?

Working Paper 5

Analysis of Key Informant Interviews: Scotland

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Sheila Riddell, Duncan Carmichael, Neville Harris, James MacAllister and Kevin Wright
Centre for Research in Education Inclusion and Diversity
University of Edinburgh



Table of Contents

SECTION 1: INTRODUCTION.....	4
Methods.....	4
Background	5
ASN Policy and Legislation	5
The Children and Young People (Scotland) Act 2014	6
The Education (Scotland) Act 2016.....	7
SECTION 2: SCOTTISH GOVERNMENT AND EDUCATION SCOTLAND.....	9
Perceptions of the ASfL and GIRFEC legislation.....	9
Perceptions of the Education (Scotland) Act 2016	11
Assessment of capacity and wellbeing	12
Operation of redress mechanisms.....	14
Children’s rights in everyday educational practices	15
Looked after children.....	16
Relationship between parents’ and children’s rights	16
Will the 2016 legislation make a difference to children’s rights?	17
SECTION 3: PRINCIPAL EDUCATIONAL PSYCHOLOGISTS (PEPs) AND SALT (SPEECH AND LANGUAGE THERAPY) MANAGERS	18
Perceptions of the ASfL and GIRFEC legislation.....	18
Perceptions of the Education (Scotland) Act 2016	20
Operation of redress mechanisms.....	21
Children’s rights in everyday educational practices	22
Looked after children.....	23
Relationship between parents’ and children’s rights	24
Will the 2016 legislation make a difference to children’s rights?	24
SECTION 4: LEGAL, MEDIATION AND ADVICE SERVICE REPRESENTATIVES	26
Perceptions of the ASfL and GIRFEC legislation.....	26
Operation of redress mechanisms.....	28
Perceptions of the Education (Scotland) Act 2016	29
Assessments of capacity and wellbeing.....	30
Advice, information and advocacy services.....	32
Looked after children.....	33
Will the 2016 legislation make a difference to children’s rights?	33
SECTION 5: VOLUNTARY SECTOR ORGANISATIONS	36
Perceptions of the ASfL and GIRFEC legislation.....	36
Perceptions of the Education (Scotland) Act 2016	37

Operation of redress mechanisms.....	38
Advice, information and advocacy services.....	40
Children’s and parents’ rights and the policy process.....	41
Will the 2016 legislation make a difference to children’s rights?	42
SECTION 6: SUMMARY AND CONCLUSION.....	44
Perceptions of the ASfL and GIRFEC legislation.....	44
Perceptions of the Education (Scotland) Act 2016	44
Operation of redress mechanisms.....	46
Children’s rights in everyday educational practices	47
Advice and information services.....	47
Relationship between parents’ and children’s rights	47
Care experienced/looked after children.....	48
Conclusion.....	48
Ongoing tensions between professionalism and rights	48
Tensions between professional roles and paradigms	49
The future of children’s rights in Scotland.....	51
References	52

SECTION 1: INTRODUCTION

In this paper, we report on findings from our analysis of interviews with Scottish key informants. The purpose of the interviews was to investigate policy maker, practitioner and voluntary organisation perspectives on the educational rights of children with additional support needs (ASN). In particular, we were interested in respondents' views of the current additional support for learning legislation, as well as their perceptions of the new legislation (The Education (Scotland) Act 2016), which aims to place the rights of children with ASN on an (almost) equal footing with those of parents and young people. Finally, we asked for respondents' wider perceptions of the extent to which children's rights, as reflected in the UN Convention on the Rights of the Child, were being realised in practice in Scottish education and what further changes might be necessary for this to happen.

Methods

Twenty two interviews were conducted with representatives from the following groups: 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 Scottish Commissioner for Children and Young People and a lawyer specialising in education; managers of the main mediation and advice and information 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. A full list of the 22 interviewees is provided in

Table 1.

The semi-structured interviews, which lasted between 60 and 90 minutes, were generally conducted face to face. A small number were also carried out by telephone. They were digitally recorded and transcribed. In one case, two people from the same organisation were interviewed together. Children and young people were not interviewed as key informants – these interviews will be conducted as part of the next stage of the research involving case studies of children and young people with ASN and their families in their home and school environments.

The precise questions varied in relation to the role of the interviewee but the same basic ground was covered in all of them. Before we report on some broad themes from the interviews, we provide a brief overview of the policy and legislative context which informed our questions.

The report is structured as follows. [Section 1](#) outlines the methods and provides an account of the Scottish policy and legislative context. In [Section 2](#), the perspectives of Scottish Government and Education Scotland representatives are presented. These are followed in [Section 3](#) by the views of principal educational psychologists and speech and language therapists. [Section 4](#) presents the views of those working for legal and statutory bodies, advice and information services and mediation providers. Voluntary sector workers' perspectives are summarised in [Section 5](#). Finally, [Section 6](#) provides a horizontal analysis, comparing and contrasting the accounts of different groups in relation to the central themes of the research. The perspectives of children and young people, parents and schools are not presented here but are explored in family case studies.

Table 1: Scottish Key Informants

Commissioner	Children and Young People’s Commission Scotland
Officer	Equality and Human Rights Commission
Lawyer	Education law consultant
President	ASN Tribunals for Scotland
Practitioner	Royal College Speech and Language Therapists
Practitioner	Royal College Speech and Language Therapists
Consultant	Independent special schools
Head teacher	Special unit, Council 6
Head teacher	Head teacher Independent Special School
Director	Voluntary organisation: parents
Officer	Voluntary organisation: children with learning disabilities
Communications officer	Voluntary organisation: looked after children
Manager	Mediation Service
Manager	Advice and Information Service
Principal Educational Psychologist	Council 1
Principal Educational Psychologist	Council 2
Principal Educational Psychologist	Council 3
Principal Educational Psychologist	Council 4
Principal Educational Psychologist	Council 5
Senior Officer	Scottish Government
School Improvement Officer	Education Scotland
Senior Inspector	Education Scotland

Background

ASN Policy and Legislation

In the following paragraphs we provide a summary of the Scottish policy and legislative framework which provides the backcloth to our key informant interviews. The Education (Additional Support for Learning) (Scotland) Acts 2004 and 2009, along with the *Supporting Children’s Learning Code of Practice* (Scottish Government, 2005, 2010) established a more rights-based framework, although the focus at this point was still on the rights of parents rather than children. The legislation, which emerged from a consultation process undertaken by the Scottish Government, has been described as a ‘trade-off between the demands of different interest groups’ ([Riddell & Weedon, 2010](#)). The Act replaced the terminology of special educational needs (SEN) with the concept of ‘additional support needs’ (ASN), which was intended to cover difficulties in learning arising as a result of social disadvantage, as well as disabilities and learning difficulties. The record of need was replaced by the ‘co-ordinated support plan’ (CSP), which was associated with stringent qualification criteria. It was stated that a CSP was required where a child or young person had ASNs which were likely to continue for more than a year and which arose from one or more ‘complex factors’ or from ‘multiple factors’ which had a significant and adverse effect on their ability to benefit from education. In addition, a CSP would only be opened if the needs required significant additional support to be provided by the education authority and certain other agencies (another local authority, a health board or other prescribed body), and if this provision required

coordination¹. Local authorities were given duties to identify children and young people with ASN within their area and those with ASN requiring a CSP. Young people and the parents of children were given a right to request an assessment and the authority had a duty to comply with the request unless it was considered 'unreasonable'.² If the authority concluded that the child or young person had ASN or would require a CSP, it was obliged to provide appropriate information and advice about the additional support that might be available. While children did not have an independent right to request an assessment or the opening of a CSP, the education authority had a duty to take their views into account.

Importantly, the 2004 legislation extended parents' and young peoples' opportunities for redress, establishing the following three additional routes: (i) Additional Support Needs Tribunal; (ii) independent adjudication (dispute resolution); and (iii) independent mediation.

The rights of young people (and parents) were strengthened and extended as a result of amendments made by the Additional Support for Learning (Scotland) Act 2009 in part to address failings identified in a 2007 review of the Act by Her Majesty's Inspectorate of Education. Particular problems identified included the failure of local authorities to provide accessible information for parents and young people and to engage with them effectively. A failure to make adequate provision for looked after children was also noted.

The Children and Young People (Scotland) Act 2014

In 2014 the Scottish Government launched its *Getting it Right for Every Child* ('GIRFEC') programme designed to improve children's wellbeing and prospects. It places a focus on the right of children and young people to be listened to and be assured that their wishes have been taken into account in relation to a range of services including education and social care, drawing for its underpinning rationale on the UN Convention on the Rights of the Child. The Children and Young People (Scotland) Act 2014 provides, inter alia, for a 'child's plan' setting out the additional support – 'targeted intervention'³ – that the child needs, identifying a lead co-ordinator for the support. There will be a 'lead professional' drawn from one of the services supporting the child, whose role will be to ensure the support is provided. The 2014 Act imposes a duty on the Scottish Ministers to keep under consideration and implement any steps to give better or further effect to the implementation of the UN CRC in Scotland.⁴ In complying with this duty, the Ministers must 'take such account as they consider appropriate of any relevant views of children of which they are aware'⁵ (a duty which has an unfortunate passive character to it). There is also a duty to promote public awareness and understanding of children's rights.⁶ Both the Ministers and other authorities are under a duty to report every three years on their progress in securing better or further effect of the Convention requirements.

The named person provisions in part 4 of the Act (which stipulated that every child in Scotland should have a named person to have overall responsibility for their well-being) were due to be brought into force on 31 August 2016, but were postponed following the litigation which culminated in the ruling by the UK Supreme Court in *The Christian Institute and others v Lord Advocate* in July 2016. At the time of writing (March 2018), the named person provisions are still

¹ ASLA 2004 s.2.

² ASLA 2004 s.7.

³ Children and Young People (Scotland) Act 2014, s.34.

⁴ Children and Young People (Scotland) Act 2014, s.1.

⁵ Ibid, subs (2).

⁶ Ibid, sus.(3).

on hold, pending the publication of a Code of Practice specifying data-sharing arrangements and safeguards. As a result of the named person's impasse, the child's plan also lacks statutory underpinning.

The Education (Scotland) Act 2016

The Education (Scotland) Act 2016, commenced in January 2018, has advanced children and young people's rights further through changes made to the 2004 Act. Broadly speaking, children aged 12 or over with ASN judged to have capacity ('sufficient maturity and understanding') now have almost the same rights as those currently held by parents and young people. The age threshold of 12 is intended to align with Age of Legal Capacity (Scotland) Act 1991. However, the education authority must be satisfied that it would not 'adversely affect the wellbeing of the child' to exercise the particular right. If the child does not want to exercise those rights independently, their parents have a right to do so. 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 wellbeing would not be adversely affected. Disputes over questions of capacity and wellbeing have been brought within the tribunal's jurisdiction.⁷

Children now have the right to:

- Request the education authority to establish whether they have additional support needs;
- Receive advice and information about additional support needs;
- Request at any time a specific type of assessment and/or examination for the purpose of considering their additional support needs ..., or to establish whether they require a co-ordinated support plan;
- Make use of dispute resolution arrangements for matters about additional support needs that are specified in regulations – generally matters that are not eligible to be considered by the First Tier Tribunal for Scotland Health and Education Chamber;
- Request the education authority to establish whether they need a co-ordinated support plan or to review an existing plan;
- Receive a copy of the co-ordinated support plan, and any amended plan and be asked for their views and have then taken into account in the co-ordinated support plan.
- Refer to the Tribunal specified matters relating to co-ordinated support plans;
- Have a supporter with them or an advocate to present their case at any meeting with the school or education authority in connection with the exercise or the education authority's functions under the Act and at tribunal hearings;
- Have access to a free advocacy service at Tribunal hearings

In order to raise knowledge and awareness of the legislation, in January 2018 the Scottish Government launched its Children's Service *My Rights My Say*, involving information and advice provided by Enquire, legal support provided by Cairn Legal and advocacy provided by Partners in Advocacy. The ASN tribunal also recognised the importance of creating accessible information for 12-15 year olds. In early 2018, a separately branded section was created on the tribunal website which directed children to information on claims (under the Equality Act) and references (under the ASfL Act). The website also explained legal terms and provided links to the different arms of the children's service <https://www.healthandeducationchamber.scot/needstolearn/home>.

⁷ Via amendment of s.18(3).

Despite clear efforts to simplify, the reference form to the ASN Tribunal is still very complex. This indicates the difficulties in making an opaque legal system accessible to a child, even when help is available:

<https://www.healthandeducationchamber.scot/sites/default/files/publications/215/Make%20a%20Reference%20%2812-15%20years%29%20FORM.pdf>

In the following sections, we report on key informants' views of the extent to which the 2016 legislation represents 'a significant development in the landscape of children's rights', which, according to the Policy Memorandum 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'.⁸

⁸ Ibid para. 56.

SECTION 2:

SCOTTISH GOVERNMENT AND EDUCATION SCOTLAND

Three people were interviewed from this group. They were the Scottish Government lead on ASN, an inspector with responsibility for ASN and a school improvement officer in the inclusion and equalities team.

Perceptions of the ASfL and GIRFEC legislation

According to the school inspector, teachers had a poor understanding of the ASfL legislation generally and particularly the purpose of CSPs because it did not seem to be related to immediate learning objectives:

Well I've had a local authority background because I was an ASN manager and used to be responsible for signing off CSPs. So ... what you have with a CSP is sometimes practitioners, again I'm giving my personal opinion rather than Education Scotland's, don't always understand the purpose of it. ... It's about understanding what you're actually trying to do with this support. It's about co-ordinating the work of external agencies. These are all quite difficult tasks in schools but fundamentally I'm not terribly confident that teachers actually can see the impact of the CSP. Possibly because I often think the impact of a CSP is seen later, it's, you know, if you looked at it in a longitudinal survey you would see the impact ... (School inspector)

She also believed that there were weaknesses in curriculum planning, reflected in a decline in the use of IEPs. Some schools had decided to only use a child's plan, which was often light on detail:

I have to say there's weaknesses, as you know, around the IEPs as well. Curriculum planning, I think it's going back to basics and fundamentally understanding that planning is essential if you want to improve outcomes for young people full stop. ... I have come across example where they stopped using IEPs, which doesn't help Mrs Johnstone in the maths department to know what she's doing next week with somebody that's got, you know, severe dyscalculia. (School inspector)

The inspector felt that parents' input into CSPs tended to be superficial:

Parents commenting [in CSPs is mandatory] and that's quite often the box that I find missing, or it's a support for learning teacher that has filled it in. Occasionally I can clearly see something that's maybe been cut and pasted and in the parent's own hand. And it's because the language parents use is never the language that a support for learning teacher [uses], so it's very easy to spot. (School inspector)

The Scottish Government officer acknowledged the declining use of CSPs but did not think this was a problem because of the increased use of child's 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 but I think they're, that's a particularly narrow focus in the analysis that you do. (Scottish Government ASN Officer)

She believed that the important issue was not whether the child had a particular type of plan, but whether the desired learning outcomes were being achieved:

[Ministers] don't want ... us to look in a granular fashion at one aspect. They want to know whether the whole thing is working, and it's not necessarily about whether the plan exists or not. It's whether or not the child's being supported in achieving outcomes.

At the same time, she noted that the statutory requirement to open a CSP for children meeting the criteria was still in place:

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)

The official was asked whether she believed that the criteria for opening a CSP were too stringent, excluding the majority of children with ASN and allowing local authorities many 'get out clauses'. She replied:

No because we've got a statutory Code of Practice which goes through that in detail, you know. Different if it was just an Act sitting on its own and you've got to decide what ... all the different terms mean. But we've got statutory guidance which has been in place since 2005. I think there's no excuse. (Scottish Government official)

She did, however, note that local authorities questioned the utility of the ASfL legislation because it placed responsibility on the local authority to meet children's educational needs, rather than recognising the duties of other agencies. One of the virtues of the child's plan was its intention to be multi-disciplinary and recognise shared responsibility:

Authorities, I think, historically have had a concern that the ASL Act places all of its responsibilities on authorities even when other parties have duties. Ultimately the authority is still responsible. And the child's plan approach is actually more shared. So I think that might be [why there is a preference for child's plans, and there have been] further developments in that area. And, you know, we say that ASL is delivered in the context of Getting It Right for Every Child. So the fact that there are more child's plans, that's not a bad thing, you know, from my perspective. (Scottish Government official)

The official was asked what evidence would be used to decide whether local authorities were fulfilling their duties under the terms of the ASfL legislation. She noted that there was a legal requirement to report to the Parliament every five years, drawing on evidence such as HM inspection reports. She was not aware of any authority deciding to phase out CSPs, and the onus was on parents to make the authorities comply with their duties by adopting the role of critical consumer:

We report to Parliament every five years and in that report Ministers are required by law to comment on the number of children with additional support needs, the support that they receive and the plans that they get. So in order to prepare that report we have to do the analysis. So it's not like we don't know. And ... Education Scotland or HM Inspectors haven't come and said yet,

'Actually you need to look at this'. ... We're aware of the issue. 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. You know, they're a very vocal lobby group. (Scottish Government official)

Perceptions of the Education (Scotland) Act 2016

The Scottish Government interviewee explained that the impetus for the legislation was the recommendation by a UN CRC reporting team to place children's rights on a par with those of their parents, specifically with regard to rights of appeal associated with the ASfL legislation. In 2009, the Minister, Adam Ingram, gave a commitment to do a consultation on the issue:

And we then did that and the consultation was incredibly favourable and we followed ... that through. [The Minister] was Adam Ingram who's a particular champion of children's rights. Our Ministers are champions of children's rights. They, you know, they want to move that agenda forward. And it, it was almost, for me ... a sequence of events. You know, the Minister at the time gave that commitment. We then followed that commitment through. The consultation said that children should have rights. They said that they should have all of the rights under the Act if they can, that they should be supported to do that. And that's, in effect, what the legislation does. So for me it's quite a straightforward sequence. (Scottish Government ASN Officer)

She subsequently clarified that the extension of rights was only to the ASfL legislation, and not to the GIRFEC legislation, and that two exceptions were agreed:

So the rights that I'm talking about, for absolute clarity, the extension of rights that I am talking about are the extension of rights under the Additional Support for Learning Act and under that rights extension we have extended every right that young people or parents have with the exception of the right to have mediation because the mediation process that we use is that it's a round table. It's not shuttle, it's round table. So the child would be in the discussion around the people that they're trying to resolve their issue with. Usually ... they go back to the school the next day without having processed or having resolved any of their feelings or any of those things. And we felt that was potentially harmful so we didn't do that one and we didn't do placing requests because a child could have a successful placing request without the agreement of their family and be in a different part of Scotland or the United Kingdom. And we felt that was inconsistent with the right to family life. And therefore those two exceptions were put in place but everything else has been extended. But it's all about ASL, it's not about Getting It Right for Every Child. (Scottish Government ASN Officer)

The Scottish Government officer was asked whether she believed that children were going to be able to use many of the rights which were granted, such as requesting an assessment, requesting a copy of the CSP and making a reference to the tribunal. She replied:

To undertake the policy instruction for the legislation we took every single right and analysed what the process was associated with that. And then what were the risks and benefits. And therefore we were able to identify in relation to each of the rights what the support was that would be required, to enable someone to achieve the use of that right. And to a man, every single one of them came out with four different functions. You need advice and information. You need to know you have the right and you need advice and information about how it is that you use those. You need advocacy support in order to help you to prepare for the use of those rights and to also to understand the consequence of having used your rights, whether that goes for you or against you. You need legal advice if you are going to go to the tribunal. And finally, we also established that all the way through the ASL legislation, we have children's rights, we have parents' rights and we also have the duties on education authorities. And that creates quite a tight triangle. We recognised that, or the consultation responses indicated that they felt that children may be manipulated

potentially by an authority to ... adjust support favourably or unfavourably and to use their rights to do that. And equally the parents may do the same. And one of the things that was essential is to being able to have the child's view expressed independently of other parties. And so the fourth part of what is going to be the children's service is an independent [advocacy] service to take children's views. (Scottish Government ASN Officer)

The Children's Service described above was in part as a result of learning from the situation in Wales. Here, children have had the right to access the SEND tribunal for a number of years, but no child has used this right:

When we were doing this extension of rights, we obviously learned from the Welsh experience where, you know, children in Wales have had for some time the right to go to tribunal and none have. And so if we were only extending to right to the tribunal we would probably expect exactly the same. In our learning from that experience we've put in more support than there is in the Welsh system and we have far more rights. And not all the rights are as challenging to use as tribunals. Some of them are the right to consent to information being shared. It's a yes or no. (Scottish Government ASN Officer)

It was acknowledged by the Scottish Government respondent that using the tribunal was likely to be very complicated for a child, but even if there were few cases, the principle was important:

I was speaking to the tribunal president about technically a child could take their case to tribunal and represent themselves. How's a tribunal going to handle that? And, you know, obviously we'll discourage that, we want them supported. But, you know, ... whether or not there will be huge numbers of children and young people ... That was our evidence to committee when the Act went through that we didn't know that there would be hundreds. The principle is correct that children with additional support needs should have rights. And this allows you the opportunity to influence rights from the start. And that's quite an important distinction. (Scottish Government ASN Officer)

The school inspector believed that the 2016 amendments added an additional layer of complexity to a body of legislation which was already poorly understood. She believed that an extensive training exercise was required to improve inspector and practitioner understanding of the legal context:

I do a lot of training with inspectors about helping them to understand legislative duties which are, as you know, are becoming increasingly complex. I mean the law is around a lot more in education. There's also practitioners' understanding of legislation. So I think in the local authorities there will actually be ...an important training need here for all staff because I, I have to say, ...I think there's a very mixed understanding about the ASL legislation in general. And then this is adding yet another complication. So I think authorities are going to have to....go back to basics and just reinforce. You know, the role of CSPs, for example, we could have a debate around that but it isn't clear. I don't personally believe it's clear. And it's something that's often picked up in inspection. (School Inspector)

Assessment of capacity and wellbeing

The Education Scotland school improvement officer felt that local authorities were still unsure about how they would assess capacity and wellbeing, and that greater clarity was needed:

I mean we've looked into this a little bit, I suppose. And some of it is around, you know, the wording of whether they have capacity...and how you assess that. I suppose that's an issue and I think that'll be an issue for local authorities, who does that assessment and how they measure that. And also the idea of assessing ... the impact on the wellbeing of children and young people, we will also look at that aspect of it, you know. And I think that the wording around that needs to be

teased out quite a bit, to really look at how we do it in a way that's going to be meaningful and not going to put an added pressure on the local authority or the schools to be able to assess those capacities or wellbeing aspects. But also, you know, the impact on the young people themselves and the way that we do that. So I think there's still quite a lot of things to be teased out around that. (School Improvement Officer, Education Scotland)

The Scottish Government officer felt that the assessments of capacity and wellbeing were essential safeguards, and would not be difficult for local authorities to undertake, particularly in light of published guidance ([Scottish Government, 2017b](#)):

I don't know that we do put a lot of emphasis on [the assessment of capacity and wellbeing] if I'm being honest. In other pieces of legislation there's a presumption of capacity. We went through a very very thorough process of assessing what needs to be done. And every time we did it we went round in a circle which said, 'Yeah but what if you can't do that? How do you know that you can or can't do that? And are we potentially putting a situation in place where if we don't know that, are we actually potentially creating a situation where we're causing either potential harm is the worst case scenario but actually more needs?' And so we've taken quite a different route. The use of the term 'test' is not helpful. It's an assessment and a decision. The reason that it's an assessment and a decision is because if there is a decision that you don't have capacity that impedes your right and therefore there must be an appeal attached to that for access to justice. So therefore someone must make a formal decision. And so it's all technically in terms of law but there are decisions made and then appeals associated with that which allow access to justice. So there shouldn't be harm caused to an individual because they don't have capacity. The adverse impact on wellbeing is to capture the [possibility] that something that may come out which would be negative as a result of a child using their rights ... It's there as a safeguard. We also have to respect the fact that parents have responsibility to educate their child. It's not the child's responsibility to educate themselves. And again there's a triangle of responsibility there and it just reflects that ... (Scottish Government officer)

She continued:

... authorities have told us they do it all day every day anyway. And so for them it's actually a bigger issue for us than it is for them ... We've been trying deliberately to not use the term 'test' because it isn't as if, 'You will sit down and you will complete a form and you will do this'. It's about what do people know about this child and from their lived experience day to day working with that child which would lead them to say, 'Yeah that will be OK but that won't be'. ... that's why I'm hammering home that it's not a test. (Scottish Government officer)

It was acknowledged, however, that local authorities would have to present firm evidence to support their assessment of capacity and wellbeing, and the published guidance was intended to help them in this:

What we've done is suggested a number of sources of people and information. So one of the things that we talk about is 'What's the level that they're at in their learning? What are the lived experiences ... where someone's made decisions and how have they coped with that? How have they coped with responding to decisions? When they've had other experiences of participation, what's that been like for them?' ... Ultimately ... all we're actually really asking for is an evidence based decision. And we want that evidence to be presentable. What we're worried about is people using undue influence potentially. What we're looking for is, is for people to be able to say, 'OK, I reached this conclusion, this is why I reached this conclusion and now it's open for debate and discussion'. And so it is meant to be an open discussion. It's not meant to be behind the child's back ... There ... is, of course, information that children in some cases may not have about themselves. And we need to respect that also. (Scottish Government officer)

The official did not appear to recognise a conflict of interest in the role of the local authority as both a party in the appeal and the arbiter of whether the child should be able to exercise their right of appeal:

So if a child is going to be able to have consent to medical treatment it's the medical practitioner who decides capacity. If a lawyer is going to take instruction, it's the lawyer who decides. The education authority is going to be challenged, so it's the education authority who decides whether the child has capacity. So it's totally consistent but to be absolutely clear, we went right round to see who is best to make that decision and then concluded it was the education authority. (Scottish Government officer)

Operation of redress mechanisms

The Scottish Government interviewee felt that the tribunal was an integral part of the Scottish ASN system and was now accepted by initially sceptical local authorities:

I think they recognise it as the legal backstop. I think that they recognise it for what it is but I think they find it quite a tough, tough experience. And at the end of the day I think we've got to recognise it's a legal decision that's being made. You know, we're not turning up for a chat. So it is quite technical, it's very legally technical. The tribunal members rightly go into significant detail about the decisions and why decisions are being made. And I think that's quite taxing. I think they respect it, I'm not sure they like it. But would anyone, you know? (Scottish Government officer)

She was not concerned that the tribunal dealt with a relatively low volume of cases:

It isn't meant to be the first place you go to resolve a concern, it's meant to be the last place you go. And I think it performs that really well. ... I think the tribunal's doing what it was intended to do. And we don't measure it by things like how many cases it has or anything like that. That's not what it was about, it's meant to have low caseload because actually you're meant to be using mediation and [resolving issues at] the lowest point possible in the system. And I think that that works very effectively. Our reports to Parliament show that the system's probably in about the right shape. (Scottish Government officer)

She did not anticipate that extending rights of appeal to children would have an impact on its workload:

That is because children and parents must choose who will use their rights in future. So we think the same issues will come forward, it may just be a different person who brings it forward. So we're not expecting a dramatic increase. (Scottish Government officer)

Asked why the Tribunal in England dealt with a higher volume of cases, the Scottish Government official said that in Scotland, unlike England, the emphasis was in resolving disputes at the lowest possible level via formal and informal mediation:

Our policy position all the way through from 2004 has been the tribunal is the last resort not your first resort. And ...we want you to go to the authority first, resolve it as quickly as possible. Bearing in mind all the time that someone's in dispute, rightly or wrongly it will be impacting on the child's support and that's what the focus is. And so we don't want people to spend time in protracted complaints if they're able to resolve it. And so the tribunal is there as the backstop and that's how ... it's been implemented consistently all the way through. So we don't place the same focus on it [as is the case in England]. Actually our focus is on mediation because it's mediation that we've seen the best outcomes from. So ... we know that if a case goes to tribunal that has been through mediation, the case is shorter at tribunal and the issues are more crisply understood. So the

emotional stuff, all the emotional things that go along with having to bring forward a complaint are actually resolved in mediation. So we actually try ... and encourage, it isn't a requirement that people use mediation before a tribunal but we try and encourage it because it's actually better for the people involved to have done that. (Scottish Government official)

The Scottish Government interviewee was asked about whether it was important to encourage the use of CSPs because of the associated opportunities to seek redress through the tribunal, which were not available through the child's plan. She commented:

But there are complaints, there are formal complaints mechanisms in place to hold someone to account. It's not that there's nothing. (Scottish Government ASN Officer)

As noted by the education law consultant in the section below, prior to the commencement of the Children and Young People (Scotland) Act (2014), a complaints system using the Public Ombudsman had been implemented, which would have been accessible to children as well as young people and parents. However, because parts 4 and 5 of the Act have not been implemented, the complaints system has also been suspended.

By way of contrast, Education Scotland representatives believed that there was very low use of the tribunal in Scotland because of lack of knowledge and awareness. They believed that very few children with ASN knew of the existence of the ASN tribunal and would be unlikely to use their new right unless great efforts were made to raise awareness.

Children's rights in everyday educational practices

The Education Scotland interviewees reported that most work on children's rights in Scottish schools was being done via the UNICEF Rights Respecting Schools programme. They recognised difficulties in involving children in educational decision-making, but felt that staff attitudes were crucial:

... the two factors I think are very important are the quality of the leadership in the school. If the head teacher believes in this it will happen. Everything comes back to the head teachers, almost everything invariably. And also staff's understanding and beliefs and that the children's views matter. That, again that's all from the leadership. ... that removes the tokenism where, you know, 'Let's get them to nod their head that this is an okay plan'. (School inspector)

The particular difficulties faced by children from less advantaged backgrounds and with particular types of additional support needs were acknowledged, but these were not seen as insurmountable:

I suppose, the point about ASN, there will be children with autism where [there will be difficulties], there'll be non-verbal children where we will have to find a way to ... facilitate those views in a visual way or whatever it may be. And children with complex learning needs would be a similar thing that, so there will be particular kinds of need. ... Behavioural needs, I suppose, some of those young people, it's about a kind of power imbalance in some ways. You know, that they have found a way to express their needs in a way that's often quite confrontational and difficult for teachers. So we've kind of almost tried to suppress their views sometimes and so they will find a way of communicating it in a way that's not always helpful. But there usually will be views there and things that they want to express. (School improvement officer)

One of the difficulties in mainstream schools was to find enough time to communicate effectively with children with ASN, a problem which was perhaps less acute in primary and special schools:

... it's getting through to maybe those that need more time to communicate. Those who don't always understand a quick survey. Those, and I suppose maybe the heart of it comes down to relationships, the key adult role. If a child feels comfortable with the adult asking the question is a huge consideration. Now in primaries they have that relationship often with the class teacher. Now on the whole I think relationships are good. Well I know relationships are good from evidence from inspection in primaries. I think it's more complex sometimes in secondary where you're moving every forty minutes or whatever and it's a different person and guidance do it. (School inspector)

Often, according to the school inspector, neither parents nor children were closely involved in educational planning because of time constraints:

... there's time involved and you have to have time and commitment to be able to allow children to do that meaningfully. But at the moment partly because of time pressures and partly because people are maybe just not very sure of how to do it effectively, then what tends to happen is that schools will write up the plans, you know, with teachers, sometimes with parents but, you know, the parents are usually involved in the process but whether they're actively involved [is another thing]. And then children get asked at the end if they're happy with it and they kind of sign something off. So I think that what really needs to happen is for schools to really invest time ... to give children the language to be able to actually participate in a way that, that they're actually participating in how they learn. ... There are examples, very good examples of schools, that do that but I don't think it's common and consistent across the board. (School inspector)

Looked after children

The school inspector noted that the additional support needs of looked after children were often not routinely identified and this was noted in her reports:

I may say that there's a number of looked after children who ... 'appeared to have a range of additional support needs but had not been identified as such' because I can't, I'm not assessing these young people. I do that with CSPs as well. 'A number of young people appeared to meet the criteria for a CSP but did not have the required plan'. That's all I can say. (School inspector)

The Scottish Government official believed that looked after children and young carers were the groups who were most likely to benefit from the new rights:

Our tribunal president ... is focused on looked after children and young carers. I should say to you that the people who are going to benefit most from these rights are actually looked after children and young carers. People whose parents are not available to advocate. So I think the tribunal's doing what it was intended to do. (Scottish Government officer)

Relationship between parents' and children's rights

The inspector spoke about the possibility of conflict between parents and children, particularly if the child disagreed with a course of action that the parent believed to be important:

I think the challenge always is where you have a conflict between the child or young person exercising that right and leading to conflict with parents. And that may happen. I mean, a typical example would be where parents are seeking for some kind of assessment around additional support needs, for example. And then the fifteen year old tries, you know, the young person is clearly saying, 'I don't want it'. I think that will be quite difficult and I think the schools will therefore have to manage the tension because parents can get very concerned. ... In fact it's quite hard for parents, I think, as, as their young people begin to get older to realise that they have less control. And I think probably enshrining it in legislation is emphasising that point increasingly. I

could see it particularly around Asperger's, autism type difficulties, which tend to be identified later. (Inspector, Education Scotland)

The inspector felt that issues with children could be easily resolved through negotiation, but disagreements evolved into full-blown disputes when parents became involved. The new emphasis on children's rights might provide the opportunity to negotiate directly with children, who 'did not want a fuss':

I do feel that head teachers do take cognisance of children and young people when there is a dispute. I mean they do listen to their views and they'll try to mediate some difficulties but in my experience the most difficult disputes are when the parents are [getting involved]. Often they can work round a young person and get some resolution but the parents will come in and they will often ... have a very set view. So I think often a lot of the disputes, if we could just work with the child, we could resolve them. If we could get that out of [children's] right of participation that would be powerful, because often they don't want the fuss the parents are making. [School inspector]

The Scottish Government official noted that the parent and the child would now have to work together to decide which was going to initiate an appeal, but believed that in most cases this could be resolved through a 'mature discussion':

The biggest difficulty will be that families have to make a decision about who's going to use their rights. Now ... some families will sit their child down and they'll have a mature discussion about that. And, you know, a consensus will be reached in the best of situations. In others either children whose parents are not available to do that for them or unable to do that for them will just take the decision to do it themselves. Other parents will just decide that they're not going to have that discussion and the parent's just going to do it. There's a tension in there ... and we'll see how that will play out. (Scottish Government official)

Will the 2016 legislation make a difference to children's rights?

The Scottish Government official felt that the new legislation was likely to represent a sea-change in the rights of children and that Scotland was leading the way in Europe:

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 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 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 what that pans out like. (Scottish Government officer)

SECTION 3: PRINCIPAL EDUCATIONAL PSYCHOLOGISTS (PEPs) AND SALT (SPEECH AND LANGUAGE THERAPY) MANAGERS

In this section, the perceptions of five principal educational psychologists (PEPs) and two speech and language therapists (SALTs) are presented.

Perceptions of the ASfL and GIRFEC legislation

It was evident from interviews with principal educational psychologists that, while recognising their duties under the ASfL legislation, they regarded the GIRFEC framework as more salient, despite its lack of statutory underpinning. One PEP commented that although there was a section in the CSP that required the child's view to be recorded, this was rarely informative and children were often more involved in compiling the child plan:

You know, there's a section in CSP where you have to record the child's views. And again that'll vary depending on capacity and so on. I would be honest and say that having been involved in the CSP process since its inception, I think it's a pretty dry process. I think that the move towards integration of planning is a welcome one in terms of children and young people. In fact I know that the CSP still has to exist as a stand-alone retrievable document under ASL legislation but I think that probably, if I'm honest, I think that in terms of the practice I've seen, that children and young people are possibly a bit more involved in drawing up their child plan than they would be for a CSP, you know. And I think that's because the drivers around engagement have come more out of the Children and Young People's Act possibly than they have under the ASL act. And I think that's because the emphasis in the ASL Act around rights and responsibilities, rightly or wrongly, sat too much within a legislative framework. Whereas I suppose GIRFEC came before the Children and Young People's Act and therefore the principles were in place first. (PEP, Council 3)

The PEP felt children were unlikely to know whether they had a CSP or a child's plan, and that this distinction was immaterial:

... most children wouldn't know whether they've got, whether it's a CSP or a child's plan. What they ought to know is 'What are the outcomes that people want for me and I want for myself? And what approaches and strategies and actions are being taken?' Now there might be others who would disagree and say that in terms of children's rights and awareness and certainly the capacity issues, that they should know what the difference is between the two. But I think, does that make a difference ultimately to a child's development and the progression of their wellbeing? Probably not, you know. So I think that, you know, what a child would and ought to know is: 'Did somebody sit down with me?' So again back to the point I made at the beginning, generally: 'Am I involved in decisions that are being made about me?' And, for a child with complex needs, how are we taking account of how they communicate around changes that are made to their ...moving and handling routine or changes that are made to how transitions in their day are managed? So there's a bit about how that's communicated and how their views are taken into account. (PEP, Council 3)

Another PEP described the way in which the local authority was implementing the named person elements of the Children and Young People (Scotland) Act 2014 (despite the fact that these lacked legal force). As a routine part of assessment, a child would be asked to evaluate their progress in relation to the SHANARRI indicators of wellbeing⁹ ensuring that the child's voice was contributing to educational planning:

⁹ The acronym of SHANARRI is formed from the 8 GIRFEC indicators of wellbeing: safe, healthy, achieving, nurtured, active, respected, responsible, included.

... all children will have the named person to be their kind of key person in school. We're starting to use the named person terminology in our authority. We'll have a key person in the school that meets with the person on a regular basis to look at that child's wellbeing. And as part of that, under the wellbeing indicators we'd be looking at achieving, [they would be asking] 'So how is your learning? What's going well? What's not going well?' That'll happen on a daily routine basis in our schools with the relationships that the staff have with our young people. And in my experience it's that key adult that tends to be the main contact that collects, you know, it allows that pupil voice to be heard in the planning process for the children. (Principal Educational Psychologist, Council 5)

By way of contrast, she felt that there would continue to be a decline in the use of CSPs as a result of a deliberately strict interpretation of the qualifying criteria, the lack of specialist provision in the local authority and the decline of one to one services due to reduced public spending:

I: Do you have many CSPs in the local authority?

R: I think, not compared to other local authorities. Part of that will be our context. ...we're a very inclusive local authority; we have very small numbers of specialist provisions and specialist services. 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)

Another local authority confirmed that the sparse use of CSPs was to do with the reluctance of health and other agencies to identify their support as 'significant':

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 and then because 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. ... Some health professionals would see co-ordinated support plans as education legislation so it's nothing to do with them. (PEP Council 1)

The utility of CSPs was questioned by another principal educational psychologist, who explained that the local authority had developed its own support plans based on the GIRFEC wellbeing indicators which they tended to use instead. He believed that little benefit flowed from having a CSP, although he did acknowledge that existence of a CSP might facilitate access to resources:

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)

This view was echoed by another principal educational psychologist and a speech and language therapy service manager, who believed 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)

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 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)

These responses highlight the 'Catch 22' element characterising the criteria for opening a CSP. According to this local authority's interpretation of the legislation, if agencies outwith education are unable to deliver 'significant' individual support, then the child is deemed not to qualify for a CSP, irrespective of the severity and complexity of their difficulties and the extent to which these can be met by education alone. This interpretation has implications for access to justice, because in the absence of a CSP, the child is unable to use many of the new rights which flow from the 2016 legislation, including the right to challenge educational provision by making a reference to the ASN tribunal.

Perceptions of the Education (Scotland) Act 2016

Principal Educational Psychologists generally supported the extension of children's rights, but expressed concerns about the inherent difficulties in obtaining the views of children with ASN:

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 yeah, I think it's a good thing. (PEP, Council 5)

However, they also emphasised their responsibility to assess the child's wellbeing before allowing them to exercise a right as stipulated under the 2016 Act, such as requesting an assessment or making a reference to the tribunal:

So when we're talking about young people asking for their rights for an assessment. And then you've got to assess what impact might that have on their wellbeing. I think again you've got to think sensitively and carefully that, you know, when you're investigating aspects of complaint, whether it's related to bullying or anything else, we've got to be mindful of what impact might this

have on a young person's wellbeing. So we've got a duty to investigate, we've got a duty to find out what happened. (PEP Council 3)

There were also concerns that, by providing children with new rights to request assessments and make references to the tribunal, traditional forms of assessment were being seen as having greater validity compared with qualitative methods such as classroom observation:

I think there's a risk that because it's then entering into a formal ... arena in terms of legislation and potential dispute, that people resort to more formal discrete means of assessment and gathering of views which goes against all of the first principles that I've just spoken about. (PEP Council 3)

Operation of redress mechanisms

In line with earlier research findings ([Riddell & Weedon, 2015](#); [Riddell & Weedon, 2017](#); [Riddell, 2016](#); [Riddell et al., 2010](#)) PEPs were critical of the dispute resolution services introduced in 2005. The tribunal, in particular, was criticised on the grounds that it was initiated by and focused on the parent and tended to exclude the views and wishes of children and young people:

I: So, in terms of complaints procedures, mediation, or tribunals, ... how much are children's rights and children's voices present in dispute resolutions?

R: Not a lot. And that's not because there's not any will to take that into account, but often when we've reached that stage, there's difficulties within the relationships. It tends to be between the local authority employees and the parents, often based on a decision that's been made that they're not happy with. And it often ends up in just toing and froing of information and legalities.

I: OK.

R: ... there's been a number of ones recently where, you know, we've tried to ask for children's voice to be heard, and there's been difficulties with either access to the children from the parents' side, or difficulties in the child being able to express any view on the situation, or indeed professionals who are not able to get the child's view. (PEP, Council 5)

The world [of the tribunal] tends to be dominated by the view that this is what the parent wants ... so the child must want that too ... If somebody's trying to push a residential school type agenda for their child, they want to really check that what [the child] wants. (PEP, Council 1)

Another Principal Educational Psychologist criticised the formal assessment methods which informed the decisions of the tribunal:

... at the moment in the tribunal process people go off and gather a discrete autism assessment or a discrete mental health assessment or a discrete IQ assessment. None of which should carry any significant weight on their own. You know, they have to be triangulated with good robust sources that have been formative and on-going. ... Assessment is not a standalone discrete activity. It is an on-going formative process. It can have summative points in time, if you like, where we gather that information at a point in time. But, ...good robust reliable assessment should be something that is triangulated from different sources over a period of time that looks for trends, that looks for themes and patterns, that is informed by the child's view of themselves as well as others. It has some relation to national benchmarks and so on but also drills down into qualitative information and so on and so forth. The risk is that that gets lost somehow the minute you get into a formal process. And every tribunal I have been at, the appellant's side brings out, they rarely bring out what the child's school report said or so on and so forth. There's always a clinical psychologist's

report in there or a mental health report in there or an IQ test in there that is somehow perceived by the appellant, and I'm using formal language here, to carry greater weight. (PEP, Council 3)

With regard to placing requests, one interviewee believed that some parents became 'obsessed' with achieving their goal of a residential school placement, believing that the local authority was simply trying to save money. It was the responsibility of the local authority to remind them of the consequences of an unsuccessful placement. The chances of a local authority achieving a compromise depended on:

...how obsessed the parents have become about this and how much they might think the authority is trying to save money when in fact we're just trying to meet the need least intrusively. Sometimes that costs us more money. And ... you're kind of saying, if child X doesn't want to engage in this agenda it's going to end up being a failed placement, you know. ... It's going to be a lot of travelling for you and going and getting them if you want it to work. You know ... it could easily fail if you don't do that work ... (PEP, Council 1)

Another questioned the motivation of parents who made a reference to the tribunal. He felt that less specialist provision was available, partly because of moves towards inclusion and partly because 'budgets are in freefall'. The solution was to manage parents' expectations:

Certainly some of the tribunals that I've been involved in, you have to look at what the motivation of the parent is. I don't have any issue with the actual set up of a tribunal service. It just seems at some points that ... there is a different agenda because I think to get to a point where you have to be at a tribunal, something's gone very very wrong in a relationship. They should not be adversarial. I think there are fundamental issues around parental expectation. And I think that also comes down to the remits of professionals that some people go over. We're running quite a high inclusion agenda within Council 2. Traditionally we had a lot of provision, specialist provision that came from the old region. So when the region went in 1997 we inherited a lot because it was central so a lot of the authorities came into Council 2. It's very difficult to shut down a standalone provision because once a child is in there the parents are happy so how do you move that to more inclusive provision. We've certainly been doing that. But again it's parental expectation about what they can actually get. And it's colleagues, for example, colleagues within CAMHS making comments about, 'Your child should be within specialist provision'. Where is the research evidence to indicate that the child is going to benefit in the longer term?

Children's rights in everyday educational practices

Principal Educational Psychologists acknowledged that 'children don't know they have rights until we tell them that they have rights' and the UNICEF *Rights Respecting Schools* programme, which many schools had purchased from discretionary funds, was perceived as raising awareness. For example, one PEP said that, as a result of becoming more aware of their rights, her own children had decided that they no longer wished to participate in religious observance in school. However, in the case of school exclusion which involved the use of 'alternative provision', children's consent was rarely sought.

... I'll be very frank, one area where I think ... we don't seek children's views as well as we could is when we are looking at placing them in alternative placements. Often, that is done to children by professionals and parents because of their real belief that that's in the best interests of the child. We have a consent form. So, we've got a panel, a placing panel, that parents need to consent for, and if the children are over twelve they also need to consent. Children under twelve we leave it to the parent because that's the legal position, but we do try on the form to capture the child's and the parents' views. That's been in place since August, and I've only ever seen parents commenting

on that box. You know, so I myself need to go back to schools and say 'Do we need to speak to children about this?' (PEP, Council 5)

Another Principal Educational Psychologist commented on the lack of focus on children's rights within the children's hearing system:

So actually, to be removed from your school where your friends are, within your community, to a different provision elsewhere, I don't think we've even started to think about how we involve children in that decision-making process. And we've been in a couple of difficult situations whereby ... the child was placed into a residential school outwith Council 5. And the child [voiced the view] very clearly that that was not the right thing for him. But the children's hearing very clearly thought it was. So, we've had some situations where the welfare and wellbeing of a child from a professional's point of view has not always been heard ... (PEP, Council 5)

This area is highly salient to children with ASN from more deprived backgrounds, since they are relatively more likely to be excluded from school compared with others ([Carmichael & Riddell, 2017](#)).

The school improvement framework *How Good is Our School?* was also seen as a powerful mechanism for ensuring children's voices were heard in everyday school routines :

... in terms of how schools involve children and young people in their self-evaluation for improvement, you would be looking for good evidence that children are active participants in all aspects of school life. So from how they set their learning targets in day to day work that they, they go about. You would be expecting to see class teachers who are empowering and enabling children and young people to ask questions themselves of their own learning, and teachers enabling that through their own approach. ... So I suppose I'm setting that scene because I think there's a danger otherwise that we see children's views and decision making around additional support needs somehow sits separately and it shouldn't. ... HMIE and Education Scotland, they are looking for evidence every time they are in schools and head teachers should be looking for that evidence, of how children are involved in making decisions about their learning. (PEP, Council 3)

Looked after children

Although looked after/care experienced children have much poorer educational outcomes than others, some local authority staff believed that their authority was making progress in listening to the voices of this group:

I think, I think we do well by our looked after children. I think there are processes in place to allow them to know what their voice is and what their rights are. I think we have a *You're Safe* forum, I think *Who Cares?* is really good. In Council 5 we have something called the Champions Board, ... made up of care experienced young people who keep us on our toes, quite rightly. ... I think they could be a group where we could see really good practice, compared to maybe our general additional support needs group. I think they've got ...organisations that allow them to know what their voices are, who'll speak for them on their behalf, who'll mentor them ... Each secondary school has designated members of staff for looked after children who receive lots of training and, at every LAC forum, they have a *You're Safe* booklet that they fill in and a worker meets with them beforehand so they can have their say on how things are going. That gets presented at the meeting. I think more and more young people are attending their looked after meeting. I do think that's a real success.

I: Good.

R: And increasingly when there's an issue, I'm thinking recently there's been a tricky situation where the young person had left school and wanted to go back to school, and the social worker picked up the phone and we sorted that. So, I think we generally are corporate parents in the sense of that we make things happen. So, I would hope that we'd never get to the point that there would be a complaint. And I do think they increasingly know...their rights. (PEP, Council 5)

Relationship between parents' and children's rights

Local authority staff felt that parents sometimes constituted a barrier to the realisation of children's rights:

I: Are there any other challenges to do with embedding the rights of children?

R: [Laughs] I think parents. Parent understanding that children have rights and a voice.

I: Right. So why would parents not want to understand that?

R: Because I think, generally, especially for children with additional support needs, it's not easy in terms of getting the right support at the right time for their young people, and I think sometimes they... sometimes don't stop to think about their child. (PEP, Council 5)

Another Principal Educational Psychologist believed that when a parent made a placing request this often had an adverse effect on a child's wellbeing:

I think that the minute a young person is aware ... that there is a matter for dispute then it has an impact on their wellbeing because they ...know that there are questions being asked about whether they are in the right school or not, for example. ... They know that that is at stake. They know it because, in spite of parents' best intentions they ... become aware of it. (PEP, Council 3)

Overall, principal educational psychologists believed that the rights of parents were accorded greater status than the rights of children and young people. Even when a young person was over 17, it was still assumed that the parent would speak for them:

there's still I think in Scotland, from my own experience, there's still a thought that if a child or a young person is a certain age then it should be the adult making decisions about these things, and I think that's quite dominant – parents think that as well. ... even the 16 to 18 thing, you know, from a guy who used to be a deputy head in a school, who used to have responsibility for fifth and sixth year, the amount of times you would phone up the parent and [the young person] was 17 years of age, and speak to the parent before you would speak to the actual young person, still happens relatively consistently. (PEP, Council 4)

Will the 2016 legislation make a difference to children's rights?

All the PEPs and speech and language therapy managers we spoke to were supportive of the broad goal of enhancing children's rights. They recognised that more work was needed, for example, in developing methods for accessing the views of children with communication difficulties, as illustrated below:

I also think that schools need to get better at actually making sure that all children have the opportunity to express their views regardless whether it is verbally or not. I think we have had a big push in AAC (alternative and augmentative communication) recently. We've got a project going on at the moment which is we've got all our schools ... looking at alternative communication methods for children. Because I think that's another area where we say AAC to some teachers and they'll say, 'What does that mean?' you know. So, I don't think that the awareness of other ways of

communicating for children is out there as much as it probably should be in our schools, but we are dealing with that. (PEP, Council 4)

However, they generally emphasised GIRFEC and its planning arrangements as the way forward, rather than the ASfL framework which was seen as cumbersome and bureaucratic.

SECTION 4: LEGAL, MEDIATION AND ADVICE SERVICE REPRESENTATIVES

This section focuses on the views of four legal experts, the manager of a mediation service and the manager of the national advice and information service in Scotland.

Perceptions of the ASfL and GIRFEC legislation

Respondents were asked whether they thought that the Education (Additional Support for Learning) (Scotland) Act 2004 (the ASfL legislation) was working well, and some also commented on its relationship with the Children and Young People (Scotland) Act 2014 (the GIRFEC legislation). Amongst this group, many were critical of certain aspects of both the ASfL and GIRFEC legislation, and there were concerns that GIRFEC was perceived as replacing or taking precedence over the ASfL legislation.

An education law consultant working in private practice felt that a major problem with the ASfL legislation was lack of awareness by parents and a perception among teachers that it was no longer important in the light of GIRFEC:

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)

He believed that social workers too thought that the ASfL legislation had been superseded by GIRFEC. Asked why less use was being made of CSPs, he replied:

I think particularly in the context of maybe social work ... there was maybe an assumption that the CSP can now be left to wither on the vine as it were. And that really what they should be concentrating on is child's plans. And that might be particularly the case where, you know, some authorities are quite far down that route. They have had child's plans on a non-statutory basis for a decade, some of them. So they really see that as the primary way in which planning should take place even though the legislation about CSPs remains in force and there's no plans to repeal it or amend it. (Education Law Consultant)

I: Do you think it's likely to happen? I mean do you think that CSPs will gradually disappear?

R: I mean there's no basis for that happening at the moment but I suppose, you know, to the extent that it sometimes relies on parents to be proactive in requesting, or whatever. Then if that isn't happening, because people aren't aware of it or because they're being told that the child's plan is doing that job now, they didn't really need [a CSP] or whatever, that could contribute to a decline. (Education Law Consultant)

He noted that Parts 4 and 5 of the GIRFEC legislation concerning the named person and child's plan had not yet been implemented, due to problems with proposed information sharing measures. The Scottish Government introduced new legislation (The Children and Young People (Scotland) (Information Sharing) Bill 2017) designed to address data protection concerns, but this also ran into difficulties, and at the time of writing there was no timetable for the commencement of parts 4 and 5 of the legislation.

The President of the ASN tribunal believed that the complexity of the legislation, including the qualification criteria for a CSP, constituted a major barrier to justice and that this was in contrast with the English system where EHC Plan criteria were less restrictive:

I know that we have far stricter [criteria], and undoubtedly that plays a part. We've talked about the CSP in the context of improving access to justice. If you make the legislation so complex that it is difficult to interpret and difficult to apply, that in itself is a barrier. (President, ASN tribunal)

In the President's view, the child's plan would not be an adequate replacement for the CSP:

Given the data we hold in terms of the rising number of children in Scotland with additional support needs, it is difficult to understand why the CSP is not used more often. I think the resistance to it is unfounded. I don't think people need to be anxious about the CSP. In my view, the child's plan, which presumably if the CSP disappeared would succeed it, would not be sufficiently well-equipped to capture the complexities of meeting the educational objectives for a child with additional support needs. The CSP is intended to keep everyone's attention focused on providing the range of supports necessary to ensure that the child is able to benefit from her or his education. It can give comfort and clarity to the child, the young person and the parent— and to those who provide the specified support. It is a statutory document with statutory duties. I would like to see it remain – and be better understood. (President ASN tribunal)

In her view a statutory framework was still needed because vulnerable children, particularly those with mental health difficulties and care experienced children, experience much poorer educational outcomes:

The bigger challenge for me [in addition to constantly reviewing and equipping my membership] is getting news about the jurisdiction out there to the vulnerable groups of children who are unaware of their rights to access this jurisdiction. I have been asked whether it is a good thing that the tribunal has a low volume of cases. My answer to that is if research was able to demonstrate that educational outcomes are improving and we were on a trajectory of improvement for vulnerable groups of children, children with mental health problems, care experienced children, and so on, then I would say we have a low-volume of cases because we're getting it right. But research would suggest we are not on that trajectory of improvement, and we are therefore not in a position to say we are getting it right. (President, ASN Tribunal)

The advice and information service respondent reported that most enquiries came from parents, with very few from foster carers or young people. Issues raised concerned the level and quality of support available in school. Requests for advice on dealing with communication issues in school and placing requests were also common:

So most of our enquiries, they're about support for learning and about concerns about the inadequacy, the level of support basically. So that's about a quarter of the enquiries that we get. So it's basically things like, 'My son was getting this level of support from the...support from the learning support teacher and that's just decreased'. Or, 'My daughter's really struggling with... keeping up and the class teacher's saying they're fine', you know. ... We also get, in our sort of top five is relationship...difficulties with the school. And that is disagreements about how a class teacher's doing something, approaches being made to a depute or the head teacher, parents unhappy with the response, that kind of thing. I think a third, in the last quarter, was about placement. So just ... parent feeling that their child's not in the right school ... Not really sure about what options are available, what they can do in terms of placing requests or, you know, there's people, educational psychologists maybe coming back and saying, 'No this is the right place'. So lots of things around placement. (Advice and information manager)

Operation of redress mechanisms

Legal respondents noted that the ASfL Act had strengthened parents' rights by introducing new dispute resolution mechanisms, but local authorities had contested these measures at the time and continued to resist them. The education law consultant was asked for his views on the effectiveness of the different redress mechanisms in the ASfL legislation, and whether children without a CSP (the majority of those with ASN) and their parents should be able to make a tribunal reference with regard to educational provision. He responded:

I think there's no really good reason to have these things separated on the basis that they are. So that if you've got a complaint that you're not getting the right type of provision for your needs, if you've got a CSP it goes to the tribunal. And if you don't have a CSP then it goes to independent adjudication. That dividing line seems to me to be quite artificial. Having said that, I am a big fan of the independent adjudication process. And so, you know, it's not that I say that one is better than the other but they are different. And it might be that actually if you are expanding the tribunal's reach then you might also expand the independent adjudicator's reach and have them as part of an overall process or as alternatives for parents. (Education Law Consultant)

He also felt that local authorities needed to do much more to raise awareness of independent adjudication, and that lack of knowledge accounted for the fact that there were 'only a handful' of adjudication requests each year:

Well part of it is definitely that people aren't aware of it. And not that long ago the Scottish Public Ombudsman, in two separate case from different authority areas, reprimanded two different councils, Highland Council and Fife Council because parents had gone through the ordinary complaints process with matters to do with additional support needs and had gone from there to the ombudsman in the usual way. But at no stage had either council told the parents that there was the availability of a specialist complaints process, as it were, that was set up and designed to deal with that very type of complaint. So I think there is a real lack of awareness and understanding of the process and that's why it isn't used. (Education Law Consultant)

In addition to the tribunal and adjudication redress procedures, the education law consultant noted that parents, young people or children could make an appeal to Ministers under Section 70 of the Education (Scotland) Act 1980 (as amended) with regard to the local authority's failure to provide adequate and efficient education:

The Scottish Government has just ... concluded a consultation on introducing time limits to that process and some guidance for people who are bringing complaints. Now interestingly section 70 is a kind of a free standing thing and there's no kind of entry qualifications for who can make one. Section 70 can be used by the Scottish Government without somebody making a complaint. And so there's no difficulty with a child making a complaint of that sort. It wouldn't be covered under this legislation that we're talking about but it's very much open to anybody with legal capacity. (Education Law Consultant)

The President of the ASN tribunal (which transferred into the Health and Education Chamber of the First-tier Tribunal for Scotland on 12th January 2018) explained that one of her main tasks was to make sure that people understood the judicial nature of the tribunal and its independence and from any other agency. She believed that the child should be at the centre of proceedings:

Whether the child is a party or not in our proceedings the child is at the centre. The emphasis during my Presidency has been on how to translate that into practice, exploring how we can better understand the views of the child and how we can hear the evidence of the child. The tribunal is

now taking a very proactive role, rather than a reactive role [in placing the child at the centre of our proceedings]. (President, ASN Tribunal)

She believed that the role of the tribunal was less well understood by local authorities, in terms of its judicial nature, its independence and the range of statutory obligations the tribunal is able to impose:

There is a great deal of inconsistency within local authorities and across local authorities in terms of CSPs. Some schools consistently provide CSPs, whereas others appear to resist the provision of CSPs. The CSP is a statutory document, with statutory responsibilities and this may be part of the resistance. Those who provide other education plans may say we don't need it because we're doing all of this but where the grounds are met for a CSP, one ought to be provided.

Placing requests can have considerable financial implications for local authorities. Not just in relation to the one child for whom a tribunal may grant the appeal, but as one education authority recently said, the decision of the tribunal in relation to that one child can set a precedent, an expectation, for others parents in that education authority. Other parents may want the same for their child, which may impose even greater financial implications. When the financial implications of a tribunal decision is raised, I remind them that the tribunal is an independent judicial body, which makes a legal decision based on the additional support needs of the particular child, in the particular circumstances.

Some of the resistance towards the tribunal will arise from the potential consequences of some of our decisions, which may cause a change in policy or practice or have financial implications. Decisions are often made in relation to children's education, which are largely resource driven, rather than needs driven. The tribunal makes decisions based on the child's additional support needs, and the only time the tribunal has to have regard to financial resources is where this arises as a particular defence in a placing request.

There are different attitudes within local authorities. There are those who understand the role of the tribunal and those who do not. There are those who hold the tribunal responsible when the decision of the tribunal does not lead to a better outcome for the child. It is not uncommon for an education authority to write to me to let me know when a placing request has been unsuccessful. I respond by reminding the education authority of the independence of each tribunal and how their decisions are made (based on evidence and fact) and that I cannot interfere with the individual decisions of tribunals. This upholds the judicial independence of each tribunal, which is our major strength. I am not sure that other Scottish tribunals face this same challenge – this may be unique to the ASNTS. (President, ASN tribunal)

Perceptions of the Education (Scotland) Act 2016

Representatives of legal and statutory bodies were supportive of the extension of children's rights, and believed that the main impetus for the legislation was the Scottish Government's commitment to children's rights, as well as the report of the UN Committee on the Rights of the Child which recommended in 2008 that rights of appeal should be extended to children:

I think there is a genuine commitment at government level towards improving the rights of children in Scotland. And I think this is reflected in recent legislation. The next stage is to make sure the legislation is fully implemented. I think there has been a consistent drive towards improving the rights of children in Scotland, and this government has been very good at focusing on the UNCRC, which reminds us about the importance of children having their views expressed and heard. It appears that the Education (Scotland) Act 2016 has granted the greatest extension of rights to children across Europe. (President, ASN tribunal)

Assessments of capacity and wellbeing

There was a general view among this group that the process of implementing the new rights for children aged 12-15 was too 'convoluted', particularly in relation to the tests of capacity and wellbeing. The President of the ASN tribunal said that she would have preferred a presumption of capacity, which reflects the progress of the law and modern developments in Scotland, and which would have been consistent with the Equality Act 2010.

It's really difficult because there's a number of obstacles that the legislation puts in the way of [children using their rights]. The Scottish Government described them as safeguards, I described them as obstacles. You know, the very convoluted process of exercising those rights is of no help at all in encouraging people to do so. So I think it is going to come down to how effective the statutory support organisation can be in raising awareness and then assisting children to navigate through that process. And I think that's really, really important specifically for children who might not have effective parental advocates. So looked after children, young carers and so on. (Education Law Consultant)

The obstacles were described thus:

So there's a requirement that before the...child can exercise a right there is a procedural miasma you have to go through which begins with notifying the authority that you intend to make use of your rights and the first thing that is then done is that your parents are notified of that. So immediately any idea that you're exercising these rights independently is, in my view, compromised. But the legislation says that you can only exercise those rights if the local authority is of the view that you have legal capacity to do so. And that they are also of the view that it wouldn't adversely impact on your wellbeing to do so. So those two things together, together with the procedurally complex or involved way in which those things have to be addressed I think does represent a substantial obstacle.

I: So why do you think those were put in place?

R: The Scottish Government take the view that these are, are safeguards and that, you know, it's to prevent, I guess, vulnerable children from being involved in a process that they're not equipped to deal with or, or something like that. So that's the reason that was given. And I've no reason to doubt that that's the motivation behind it but ...well I'm opposed to those obstacles. I don't think that that's the way that we treat rights holders. Part of the point of having rights is that it's you that gets to decide when it's a good idea to use them and, and not somebody else. (Officer, Equality and Human Rights Commission)

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 2016¹⁰. 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

¹⁰ 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.

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:

... 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 addition, there were doubts about understandings of capacity and wellbeing in the Code of Practice:

... the draft code, for example, talks about an assessment of capacity, taking into account the impact on a child's wellbeing. Whereas capacity's about a child's level of understanding. And ... if you have capacity, you have the capacity to take decisions for yourself and decide about your own wellbeing. And the other ... concern about the adverse impact on wellbeing test is... there seems to be a misunderstanding again about what that means. The ... legislation requires an assessment about whether the exercising of the right would have an adverse impact on the child. But the code, at times, seems to suggest that the process is about whether the decision being challenged is in the interests of the child. Is it the child's wellbeing in relation to the decision or action that's being challenged, or the process of exercising the right which adversely impacts on the child's wellbeing? And for some children not being able to exercise that right might adversely impact on their wellbeing. (EHRC respondent)

The respondent pointed out that under the terms of the Age of Legal Capacity (Scotland) Act 1991, a twelve year old child might instruct a lawyer to act on their behalf with regard to a disability discrimination claim. Simultaneously, the child might wish to make a reference to the tribunal, but this might be disallowed by the local authority on the grounds that the child did not have capacity or that exercising their right would have an adverse effect on their wellbeing. She noted that these concerns were raised all the way through the passage of the bill by the Equality and Human Rights Commission, as well as other members of the legal community such as the Children's Commissioner, Govan Law Centre and the Scottish Alliance for Children's Rights. However, the Scottish Government had not shifted its position (although it had moved from a 'best interests' test to a 'wellbeing' test). Overall, she felt that the Government was claiming to be meeting its obligations under the UN Convention on the Rights of the Child. However, the legislation was 'paternalistic' and that rights were not being delivered:

The ... Government are saying that the Act is giving children the right to challenge decisions and actions under the additional support needs framework. But I don't think they're actually giving children that right. What they're doing is saying, 'the education authority whose decision you're challenging will decide whether you've got capacity and whether it's good for you to exercise that right'. I think that's quite fundamental. (EHRC respondent)

Like the education law consultant, the EHRC representative believed that having to ask the local authority's permission to exercise a right was particularly problematic for looked after children for whom the local authority was the corporate parent. For children with learning disabilities or dyslexia, who might have problems with literacy and numeracy, the guidance for testing capacity and considering wellbeing were seen as paternalistic and restrictive

<http://www.gov.scot/Resource/0052/00529415.pdf>

She also questioned why children were unable to request mediation or make a placing request. Asked for the reasons behind these exclusions, the education law consultant explained:

So the [exclusion of] mediation was because the mediation providers felt that that wouldn't be appropriate. So that's been done for that reason although the legislation does then impose new rights to make sure that the child is somehow involved and can participate in the mediation process. And the placing request bit, that was actually a concern that I had raised during the process which is just because of the way that the rest of the legal system interacts with that. So it is still the parent's legal responsibility to ensure that the child attends school and that that is, as you'll be aware, a criminal offence where the child doesn't attend school. And so for the child to be able unilaterally to, you know, make a request that then imposes an obligation on their parents to transport them to that school, you know, even where that might not be feasible for whatever reason raised difficulties from that point of view. And so again, you know, I think that there's, potentially within the guidance, scope to underline the point that of course ... older children, children aged twelve to fifteen who have legal capacity ... ought to be consulted when the parent is making decisions about what school the child should attend. (Education Law Consultant).

A mediation provider confirmed that their organisation had argued strongly that independent mediation should be excluded from the legislation for the following reasons:

From the outset the, the legislation was that it's parents that could request it up to age sixteen. And between sixteen and eighteen it was the young person that could request mediation. In [name of mediation provider] we have had no young person on their own. Obviously the changes with the Education Act and the changes in the rights of the child, we were quite vocal in, in the respect that we did not feel that the children between twelve and sixteen should have the right before the parent to access independent mediation for various reasons. One is that from day one we have always said, regardless of what the legislation says, children and young people can be involved in mediation per se. Where and when it's appropriate and relevant. The disputes that come to mediation are the adults who are in dispute about whatever the child's issue is. In mediation ... there's an opportunity and a safe space for people to be able to have this productive conversation but one of the main aims of mediation is to be able to negotiate and compromise over the issue. As a mediator we would find it very, very difficult [because of] a power imbalance between a head teacher or a local authority officer and a twelve or thirteen year old to be able to negotiate on, and, and compromise on an even footing in a mediation. And we don't think that that would be right for a young person. We don't think it would be right from a child's point of view to have to go through that kind of situation with a head teacher who they then have to have a relationship with, within school. However it does not at all negate the fact that the young person can be involved in the mediation. And ... so ... we, at all stages when a referral comes in the first thing we would do is go out and meet with the parties involved. And that more times than not it's the parent that we see first. And at that meeting we nearly always see the young person even if it's just to be able to visualise them because I don't like going into mediation not knowing what the child looks like, you know, if nothing else. They have their opportunity to speak to us. (Mediation provider)

Advice, information and advocacy services

Interviewees emphasised the importance of advice, advocacy and information services in helping children realise their rights but also in raising awareness among parents, schools and local authorities:

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)

However, there was also a strong awareness of the practical difficulties in explaining to children the exact nature of their new rights and the steps a child would have to go through before being able to exercise their rights:

... we did consultations with our youth advisors around the Reach website and obviously shaped that according to that feedback. And it was very much about small pieces of information and signposting and a lot about video, you know, and links to advice, YouTube advice, Instagram. So we are definitely taking that to more visual...and video content. So we won't have a guide ... for children about their rights. We will have it within lots of different posts on the website. We'll have, some video resource. ... Our Instagram account will reflect that. And we may develop some additional social media platforms depending on the feedback we get ... we want our key messaging to be around, you know, participation in your education planning, the support you need ... because obviously the complexity ... If you kind of look at how the legislation's been framed and all of the different steps that are involved before a child will be able to exercise their rights, we kind of have to deal with all of that, ... figure out how we want to, to present it. Speak to children about it and then put something up but ... yeah we wanted to do it obviously as simply as we possibly can.
(Advice and information service manager)

Looked after children

Respondents highlighted the particular situation of looked after/care experienced children for whom the local authority acted as corporate parent. Carers were often unaware of educational rights and emphasised their caring responsibilities:

In the early stages of taking the child into care, their education needs are maybe not a priority at that stage. Quite often it's, you know, engaging with social work. ... These children have maybe been out of school for a long time. I don't think it's the carers, I think it's the package that the carers get, it's not seen as an equal priority. (Mediation provider)

Will the 2016 legislation make a difference to children's rights?

Legal respondents were rather sceptical that the 2016 Act would lead to a major enhancement of children's rights. As noted above, they pointed out that the law was complex and redress mechanisms were 'convoluted'. The capacity and wellbeing tests were introduced in response to a parents' lobby, who were also at the time opposing the named person provisions of the GIRFEC legislation. A legal respondent felt that 'a bit of fear and far too much reservation resulted in something far too complicated.'

A mediator questioned whether the rights granted were what children actually wanted:

I'm not convinced it's going to make a difference. I'm not convinced that there were enough children consulted to find out if it really is ... something that children truly want. Or if this is an aspirational 'keep up with the rest' [idea]. I don't think it's a bad thing again but I suppose if I have any, my concerns would be that we have to watch that we don't overload children with decision making in areas that might become cumbersome and also overwhelming a wee bitty because the client group that we come across are people who are ... you know, in dispute or conflict about things. And there's a small cohort in there who will try, as I said before, kind of everything. And I have concerns that they, because they can't get an assessment or something, they are now going to use their child's rights to do that. And I think we've just got to be wary that there are some people who will use the child's rights in the wrong way. (Mediation provider)

In addition, changing social attitudes to disability and disadvantage were crucial:

I think the primary obstacles that people come across are issues to do with ... you know, funding and resources and, you know, sometimes just sort of attitudes towards disability or social exclusion or whatever the additional support needs are that are difficult to overcome. So, you know, a lot of that isn't really legislative per se. It's more to do with kind of underlying social trends. (Education Law Consultant)

The Scottish Commissioner for Children and Young People did not believe that the Education (Scotland) Act 2016 would bring about significant change. He was opposed to the restriction of rights to children in the 12-15 age group, which he regarded as an arbitrary age limit, and he also believed there should be a presumption, rather than test, of capacity. Overall, he felt that the law was too complicated and justice was often inaccessible. A range of systemic changes were needed:

Sometimes it means the bodies that take complaints need to change. Are you actually going up to schools, are you actually changing your system? Are your staff trained in child development and in understanding different [types of] communication? So we need to build the ability of children through advocacy and through support to access justice systems. And we need to change the justice systems to be more responsive to children and young people. (Scottish Commissioner for Children and Young People)

It would be a good idea to establish a 'one stop shop' to avoid children having to navigate their way through complex legal systems and different legal remedies:

They need to be able to access [their rights] in the, the easiest possible way. And the more we complicate it, the less of an access to justice approach that we're taking. The less of a child's right approach which we're taking. The fact that there's multiple routes to something can actually be less beneficial because you end up just getting confused and lost and then you get a disturbing possibility of having two really identical cases with one getting a worse result because of a choice that was made in terms of the route to justice. (Scottish Commissioner for Children and Young People)

The need for a radical overhaul of the entire legislative framework was also supported by the education law consultant:

I think it's crying out for the Law Commission to take a look at it, in all honesty ... Because it's unnecessarily complex in lots of different areas. And I think could definitely be streamlined but it would be quite a job to do so. And part of the problem is that it's obviously so politically challenged an area that it then becomes very difficult even to make what you think are simple administrative changes without, you know, somebody being upset as well. (Education Law Consultant)

In terms of simplifying the qualification criteria, she suggested that a CSP should be available to any child requiring a range of additional supports over a period of time, in order to benefit from school education:

I think the CSP ought to be available to any child who needs a range of supports from more than the class teacher. I think the interpretation of who is an appropriate agency introduces unnecessary complexity, as does the concept of what is 'significant'. I think that [a CSP ought to be delivered to] a child who needs a range of supports over a period of time, in addition to the conventional class teacher model. The CSP would ensure the support the child needs is consistently delivered, irrespective of staff absence or staff change. This is a crucial element of ensuring children with additional support needs are able to benefit from their education. (President, ASN Tribunal)

Despite its undue complexity, she was in favour of retaining the CSP because a statutory plan with a common format throughout Scotland was needed:

There is room for improvement in the statutory criteria for a CSP. It is unnecessarily complex but the CSP itself and the functions it is designed to serve are important. I would like the CSP to remain, although I would welcome a more straightforward approach to the criteria. I do not think the child's plan would sufficiently address the elements of the child's additional support needs, their educational objectives and how these are to be supported, in the way a CSP does. I would want the CSP to stay.

Quite apart from the [plans] that we are aware of and understand, like IEPs, there are schools that use their own naming conventions for education plans. The CSP is the only statutory document of its kind. It calls the education authority to account it gives the child or young person rights in relation to their education, it provides parents with rights. (President, ASN Tribunal)

The education law consultant noted that the Children and Young People (Scotland) Act 2014 is not primarily rights-based legislation:

... it's interesting because it [the GIRFEC legislation] is not set out in a rights framework, particularly the child's plan part of that legislation. So I think that's part five of the Act. It does set out some rights that flow from it. ... I suppose the whole sort of thinking behind it is very much something that is...about how the agencies around a child will operate and act and there's the right to powers that they have and the duties that they have, rather than being a primarily rights-based piece of legislation. (Education Law Consultant)

He pointed out that a late amendment to the legislation introduced a specific complaints process and regulations were brought into force, albeit briefly, before Parts 4 and 5 were suspended. The complaints process primarily involved the Scottish Public Services Ombudsman, rather than a tribunal-based system of redress.

With regard to the general approach to children's rights in Scotland, the Commissioner for Children and Young People felt that there were many positive aspects, for example the dynamism of civil society and the independence from government of the Children's Commissioner. However, he also highlighted some negative features, including the low age of criminal responsibility (which has just moved from 8 to 12). He was heartened that Scotland appeared to be on the point of prohibiting the physical punishment of children (despite opposition from the Catholic Church).

SECTION 5: VOLUNTARY SECTOR ORGANISATIONS

Three voluntary sector organisation representatives were interviewed. One organisation supported care experienced/looked children and young people, another was a support organisation for parents of children with ASN and the third was an organisation working on behalf of children and adults with learning difficulties and disabilities, including ADHD and autism.

Perceptions of the ASfL and GIRFEC legislation

The interviewee from the behaviour support organisation was supportive of the broad aims of the ASfL legislation but felt that reduced resources was limiting its effectiveness:

I actually think it works well. I think there's increased pressure on resources, hugely increased. And so actually although there's lots of sort of discontent, I think that things have been done better and fairer. I think ... it makes sense and it matches the need. (Parents' Support Organisation)

In addition, she felt that the CSP was poorly conceived and not connected with the child's level of need, but rather with the resources they were receiving:

The one bit I think doesn't make sense, and to me never did, is the co-ordinated support plan. So the fact that it's not based on the level of need, ... and that it's circular. ... You know, so if you're in a special school and, you know, it's all provided for you, it doesn't matter how high your level of needs are, you shouldn't in theory get a co-ordinated support plan. Whereas if you're in mainstream and that mainstream cannot provide for all of that child's support needs then you should be entitled to a co-ordinated support plan. Parents are just told, 'Oh no you don't need one'. And they, they don't know how to challenge that. And but also it's like 'Well what does it achieve?' It's just, to me it doesn't really achieve much for parents. I think it's a real shame actually. I think people should have a more effective means of challenging not just the place but what's offered within the place, shouldn't they? ... So you have to get a co-ordinated support plan and then you have to appeal to tribunal that the contents were not met. But you have to have qualified for the co-ordinated support plan in the first place. Well what if you were at a special school and you just felt they weren't meeting a certain support need? I know there'd be other routes but it doesn't seem logical ... it's just too obtuse isn't it? (Parents' Support Organisation)

Parents who decided that they wished to challenge the local authority often found that they were pathologised:

The parents who do challenge are, are ... what's the word? They're made to feel ... as if they're ... trouble makers basically. And yet the legislation is there for them to use. So you're supposed to be grateful for what you get basically. You're not supposed to challenge and question. And that's very wrong for the system, let alone the parents because it means the system never hear how it needs to improve. (Parents' Support Organisation)

The number of CSPs issued was now so small as to make them almost worthless:

I think they're rubbish really and everybody knows they're rubbish and they're just sort of a token thing ... I mean obviously there's a few handful of people who get a CSP and then challenge it to the tribunal and that might have been useful for them but the numbers are absolutely ridiculously small aren't they. And, and what else is it used to work, it hasn't got any real meaning. (Parents' Support Organisation)

The interviewee from the organisation for looked after children was asked whether the 2009 amendments had made a difference for this group. He commented:

I don't know exactly how good the support was before that change was made. But certainly that has not been implemented well. It may have made some differences on the margins. I wouldn't want to rule that out as a possibility. But certainly from what we've heard, what's supposed to happen is that you're presumed to have additional support needs unless assessed otherwise. And you should automatically be assessed for a co-ordinated support plan as well. So there's two different things that should be going on there. You should be on a co-ordinated support plan or at least be assessed to see if you're needed on one. And you should be treated as having additional support needs unless assessed otherwise. The actual implementation of that has been very patchy from what we've heard, both from professionals and young people. Most young people are not aware that that's supposed to have happened. A lot of the young people we've spoken to have no memory of ever having been assessed for additional support needs and certainly no additional support provided for their learning. Certainly as well looking at sort of freedom of information requests that Govan Law Centre put in back in 2015, it's just not happening in the way that it's supposed to. It's a very wide difference between local authorities in terms of the percentage of looked after children who are on these co-ordinated support plans. And in some areas it's very low percentages. They seem to see the child's plan as being a replacement or something like that. It's difficult to know what the reasons are. And we've heard from teachers that if they, they don't have the resource to provide the additional support there's no point doing the assessment. Certainly that's the concerns that we've heard ... So it's ... not worked I think unfortunately. Certainly not nearly as well as people would have hoped. (LAC organisation)

Perceptions of the Education (Scotland) Act 2016

The parents' support organisation felt that giving children a tranche of new rights was likely to be of little significance because parents did not understand their own rights and were unlikely to be able to support their children as autonomous rights bearers:

I think I find it a bit puzzling really because it seems, again, not to make much sense to me to give children those rights because the parents can't understand their rights in that regard. So our role is to explain it but we only explain it to those who make it to our door. There's many out there who don't. I mean, you know, so how are the children going to make anything meaningful of that? So to me I feel 'Why was that done?' There's, to me I almost feel like maybe there's a bit of another agenda there because ... surely nobody believes that a child with an additional support need is going to be requesting their CSP and then personally taking it to a tribunal to question their contents. I mean it's not going happen is it? (Parents' Support Organisation)

The interviewee from the LAC organisation supported the new legislation in principle but had doubts about its effectiveness because of the difficulties in ensuring that children and young people are adequately informed and able to circumnavigate the tests of capacity and wellbeing:

... the main thing is that young people would need to know this is available to them and that's a big challenge. There's also some difficulties around accessing the tribunal or the adjudication in terms of capacity and the capacity tests that have been introduced are bizarre to be frank and probably open to legal challenge from my understanding. So a young person who's under twelve automatically does not have capacity, even if they were eleven and a half. That's problematic and not in line with any other test for capacity. And a young person who's over twelve is not presumed to have capacity which again is problematic and not in line with any other capacity tests and needs to be assessed without any presumption one way or the other as to the capacity. And then assessment includes, from what I understand, includes things like their educational attainment which is utterly strange given that they're saying, 'I didn't have enough support for my education and I wish to appeal that'. And [the local authority could say] 'Well to decide whether you have capacity, we'll look at how well you've done in education without the support that you're saying you need'. And then the other part obviously to the capacity test is the wellbeing test where the local authority has to decide whether, if this young person was to appeal a decision that we have

made, do we think that would affect that young person's wellbeing in any respect? So having them as the judge of that is a conflict of interest so is problematic as well. So ... once you get over all of those hurdles it's a very exciting option for our young people but there are a lot of hurdles in the way. I don't think very many care experienced young people will know about these rates at the moment. And for those who do it's getting through those capacity tests might be off-putting and confusing and it, I suspect it will not be done uniformly across the country. Well possibly not even uniformly within one education authority. But nonetheless it is potentially a very exciting development. And young people having that option of being able to assert their rights could lead to a lot of change potentially. And the fact that that wasn't an option before was always a worry because they don't have the support of parents to go and do it for them. What they will need are advocates, I think. And ... ideally advocates that they have a relationship with already and who they've already been working with on other issues. So I think that's definitely going to be important. (Children's organisation)

There was some doubt about whose job it was to inform young people of their rights. The organisation was trying to spread the information to the advocates who were supporting looked after children, but there was no budget to underpin this work. In addition, the interviewee believed that advocates should express children's opinions and wishes, rather than make suggestions about an appropriate course of action.

Operation of redress mechanisms

The parent support organisation explained that they had been contracted to run a parent advocacy service, in collaboration with a local law centre, for four years. At the time of the interview (December 2017), the Scottish Government was in the process of retendering the contract. Much of the work undertaken by the voluntary organisation involved working closely with parents of children with ASN, particularly when they were in dispute with the local authority. The organisation supported twenty eight families who were in the process of making references to the tribunal, and a further twenty eight whose children had been excluded from school:

So we would attend meetings with the parent and we would, we can tell them about the actual provision within the local authorities that we work with. And so we can help them talk through choices about what school is appropriate. And ... we often are working to resolve disputes with schools so particularly, I think, last year we supported about twenty eight families with children who'd been excluded from school. (Parents' Support Organisation)

The aim of the organisation was to help the parent resolve the disagreement at the lowest possible level:

... we basically usually get a phone call from the parent. Very often it's some crisis. For example, something's happened and the child has been excluded from school. So then we would help the parent to make sure they'd done all the sort of basics first about, you know, rather than go to a complaint straight away, ... but to just go and talk to the school and try to work things out that way. (Parents' Support Organisation)

When a disagreement had escalated into a grievance, the organisation encouraged parents to use all the dispute resolution mechanisms which were available to increase pressure on the local authority to resolve matters as quickly as possible. The interviewee was aware that the Scottish Government and the ASN tribunal believed that parents should move sequentially through the different types of dispute resolution, but this was likely to lead to a very long-drawn out process which was not in the child's or the family's interest. When parents approach the organisation:

... what we'll then do is we talk them through and we will put a reference to tribunal. And now we don't waste any time, we just do that as fast as we can. But a big problem is obviously that the tribunal's process is so slow so you can't get through everybody from May to the end of June. And then there's the summer holiday and it's too late for people going back. So that's a big problem, very difficult for families. So we just get ours in as fast as we possibly can. ... So what we do is get all their paperwork in and we just put in a summary of their situation. And then we can go to mediation at the same time. So we'll just put in an email to Council 1 and say, 'We're putting in a reference for so and so, can we request mediation?' And we just do a whole lot of mediation and so on. Where things really get drawn out or where we perceive there's been a history of unfairness to that family, then ... we use other systems. So we could put in a complaint or we put in a reference to disability discrimination. And we just sort of increase the sort of pressure on that tactically. ... So the way that we can use those different routes means that we can speed things up for people where we see that there's a need. (Parents' Support Organisation)

The interviewee also spoke about helping parents to make placing requests via the tribunal, so that if the parents' preferred school was full, the local authority had to come up with an acceptable alternative:

And similarly with the education appeals, we support a lot of the mainstream families to do the education appeal process. We help parents to say: 'OK well that one was full but that's not good enough. You know, that's no excuse. You've still got to provide an appropriate education for this child so what are you going to do?' (Parents' Support Organisation)

However, she emphasised that in order to avoid escalating disputes, and for the tribunal experience to feel positive for parents, strong support was needed. In one authority where the support service was delivered, there had been no tribunal cases, but parents were nonetheless happy with the system because they felt supported:

In X LA, we've resolved every single case without going to a tribunal hearing. But it's also that the families come out of it not feeling battered to a pulp. You ring up and they're happy and bright ... and they sound like a different person. Whereas I think without the support they might have won but they may not have come through feeling OK. I remember a quote from someone where she was saying how wonderful it had been to be supported and they'd gone to ASN tribunal. And she said, 'And we lost the ASN tribunal' but ... you'd never guess she'd lost from reading the rest of it cause it just sounded like someone who'd had all their problems solved. (Parents' Support Organisation)

The view of the children's organisation was that there was no real possibility of making a reference to the tribunal for a looked after young person because the local authority as corporate parent would be challenging its own provision:

And the other concern about it is that there had been no appeals at ... which is disappointing but on the other hand not at all surprising because you would be asking a local authority to appeal against itself. And even if they could do that, which I don't think they can, but even if they could there's no way that that could be a proper or fair appeal process. It would be inherently compromised. (Children's organisation)

In addition, this interviewee did not understand why children had not been given the right to access independent mediation, which was likely to be less stressful than making a tribunal reference:

... mediation seems like in, in a lot of ways like it might be more suitable for children than going to tribunals. Much much less adversarial which would seem to fit quite well. So I didn't understand

the rationale for excluding children and young people from mediation. I wasn't sure if there had been a rationale given. (Children's organisation)

He concluded that, in common with many other policies, the assumption was made that all children were living in conventional families:

Unfortunately what we do see this quite often in policy is that it's written with the assumption that parents are going to be alongside children. And even when talking about sort of very broad things, making sure that the community and that parents are involved in decision making at the school, it's often talking about working alongside parents and making sure that parents are invited, forgetting that not all children at the school have parents who are involved in their lives at all. (Children's organisation)

Advice, information and advocacy services

The parents' support service saw their task as using a pro-active advocacy model to amplify the voice of parents to ensure that their perspective was taken into account when major decisions were being made:

... Say you've got a child coming from an out of authority placement back to Council 1 and people are just not focusing on the needs. So therefore it's going to go wrong. And as an advocacy agency you can make that parent's voice louder so you can say to everyone, 'You must do this otherwise ...', and kind of cite all the horrible things that will happen to them. And suddenly they will run round and it happens. And although of course, they're annoyed with us for doing that and they don't like you doing that but at the end they then think, 'Actually that was a good thing that you did that'. (Parents' organisation)

This organisation believed that establishing a good relationship with parents was essential to producing a good outcome for the child. When parents appeared to the school to be aggressive, they were often just frightened and confused. Having a supporter at a readmission meeting could make a significant difference in encouraging recognition of different standpoints:

... if the child is excluded you go along to the readmission meeting. And our role there is to explain to the school that they have to make reasonable adaptation for readmission. ... You can just play a role there which is really simple but makes all the difference. So basically, I was at one recently where the family were so frightened and stressed but of course the school just saw them as angry and difficult. And the family are so stressed, they don't remember to actually say 'We know that what that child did was wrong'. So you've just got to say 'Before we go on with this, can I just say that Mr and Mrs So and So really do agree that so and so was wrong to do that. And they've made it really clear to him that he was wrong as well'. And then you can see the school really relieved, so that's just at a very simple level. But if that child was out of school there's nowhere for those children to go. So the authority then has a huge problem on their hands because they've got children who are out of school for months and months who are then very difficult to place ... There's all kinds of situations where you can really help to make the system work a lot better. (Parents' organisation)

By way of contrast, the children's support organisation used a rather different model of advocacy, reflecting the child's views rather than suggesting what might be the best course of action for them to take:

So there are two different sort of definitions of advocacy. So there's a broad sense of advocacy where you're advocating for the child's best interests. And lots of different people do that. So that can be foster carers, sometimes teachers can advocate, it can be residential workers, it can be parents, it can be friends in that broad sense of advocating for the children's best, the child's best

interests. Professional independent advocacy that we provide is about advocating just purely for the child. So not taking a view on what's best for the child at all ... We should be ... always helping the child to understand what their rights are. But we wouldn't suggest a route. We might suggest, we might say to them, 'Here are the rights that you have and you could do this if you would want to'. So we would help the child to understand their options but we wouldn't suggest what the best option would be in our view. And also perhaps most importantly is when it comes to the tribunal or the hearing or whatever it was, if the advocate is speaking on behalf of the young person which is often, sometimes we support them to speak on their own, sometimes an advocate will speak on their behalf. It would only be reflecting on what the child had asked us to say. The advocate ... would never give their view on what would be best for the child. And that would always be their view, it would always be the child's view that the advocate would be putting across.

Children's and parents' rights and the policy process

The parent support organisation believed that efforts to focus on children's rights might be used to deflect attention from parents' rights. The interviewee argued that it was normal for parents to be involved in aspects of their children's lives, and it seemed strange to expect children with ASN to make decisions independently of their parents:

I find it quite sort of baffling really because I think other parents out there, they're allowed to ... support their children through education. Nobody's ever come to any other parent I know and said, 'Your child has the rights to choose whatever A levels they're getting'. ... Of course, it's an interaction between you and their child and the vast majority you want to listen to your child and make sure that they're, you know, you're doing what your child would want as well. So I feel, but then I'm on the parent led side rather than the child ... But if I look at what's happened over the time I've been involved in the voluntary sector, so that's twenty years, I feel there's been very very little parent voice in Scotland. And actually the one time we could have had a bit more say was when For Scotland's Disabled Children was funded but there was very very little parent involvement in that. So basically there hasn't been a lobby and actually the sad thing about that is parents have something very very valuable to contribute. And if you look at any of the real step forwards, they've been driven by parents. ... And on a bigger scale, in terms of policy in Scotland. ... parents are excluded from that discussion. (Parents' organisation)

The organisation felt that local authority mistrust of parental motives was misguided:

There's that element where they're just like, 'Oh we don't want to hear from the angry difficult parents'. ... you hear from the authority ... about parents, that if they're articulate then they've got a sort of personality disorder or a mental health problem. If they're not articulate they've got a learning disability or a mental health problem, you know. And you meet the people and you sort of think, 'Well, really ... this is a perfectly normal person. They're just upset and angry and they're frightened for their child'. And I used to slightly judge people as well but after the years, all I see is people who are really trying their best for their children. And, you know, just coming against brick walls and getting hurt and offended. And then trying harder and then being told even more that they're belligerent. (Parents' organisation)

Despite this perception of belligerence, it was very unusual for a parent to behave in a deliberately obstructive manner:

... of the thousand families, in the eight years I've been in post I would say there's been less than a handful who eventually we began to think, 'Actually are you doing this in the best interest of your child'. And we have got the experience to pull out of those kind of situations because we cannot support a parent who's actually undermining. And that's out of a thousand a year. (Parents' organisation)

Allowing children to make a reference to the tribunal, according to the parents' advocacy organisation, was unlikely to address central problems, such as lack of adequate provision for children with challenging behaviour. Initially, the interviewee had seen the new legislation as a means of boosting children's rights. However, she believed the real agenda was to reduce parents' power and influence:

I just thought, 'Oh it's just a way of making sure that children's rights are addressed'. But now, I suppose I feel ... annoyed that there's horrendous lack of attention to some discrimination for children. And that the suggestion is that somehow if their views [are expressed] separately that that's going to make a significant difference. When actually ... there's a huge lack of statutory provision for children with extremely challenging behaviour. So why don't they just provide that instead of doing this sort of token gesture ... sense that it is about saying the parents are too powerful ... But every time we've worked with children's advocacy organisations, it's been sort of collaborative. It's not been they're saying one thing and we're saying another. (Parents' organisation)

The children's support organisation believed that they had taken available opportunities to feed into the process of policy formation such as responding to government consultations, but they were unsure as to whether they had been effective:

We've given consultation responses on education on a few different occasions where we've referenced these issues with co-ordinated support plans. And we're also part of the advisory group for additional support for learning, which feeds directly into Scottish Government policy making. We haven't particularly raised the issues of capacity. It's, it's been more the issues that pre-date this, the new rights. We've raised the issues around the failure to implement the previous legislation in terms of assessment for additional support needs and the assessment for co-ordinated support plans. But no I don't think we have particularly raised our concerns around capacity. That's been more led by the commissioner's office. (Children's organisation)

Will the 2016 legislation make a difference to children's rights?

The interviewee from the children's organisation believed that some progress was being made in Scotland in terms of listening to children's voices, although he did not have high expectations of the new education legislation because of its complexity and barriers to the realisation of rights (see earlier). He felt that the 2009 amendments should have radically improved the position of looked after/care experienced children but had never been implemented properly:

And in, in lots of ways these new rights should be completely irrelevant to care experienced young people because they should all have been deemed to have additional support needs already. And they should all have been assessed for a co-ordinated support plan by law. So the legislation's already in place, it's just that the practice has not kept up with the policy, with the legislation. So on the one hand these rights are clearly a good step forward and it's great to have the option for young people to come forward and assert their rights in a way that they couldn't before but it shouldn't really have been necessary. Like the fact that you can now make an appeal to adjudication and ask to be assessed, shouldn't be required because all care, all looked after children should have been deemed already as having additional support and should be on a co-ordinated support plans or assessed for a co-ordinated support plan. And on one unless assessed otherwise. So in terms of more legislation around this area, I don't think that's needed. I think what would be good would be to fix the capacity tests for the new rights to make sure that it's the same as it would be for any other capacity test. That you're presumed to have capacity if you're twelve or above and that there's a straightforward sort of capacity test that doesn't involve wellbeing or educational attainment for anybody below the age of twelve. And that would be a step, that would be helpful but that's less about care experienced people, that's more about other children. For me

these rights shouldn't be needed because everybody should have been deemed to have additional support already. (Children's organisation)

However, he highlighted the Independent Care Review as an example of a policy initiative which put children's voices at the centre:

We're definitely making progress, there's still a long way to go. But I mean the best example probably of listening to children's voices at the moment is the independent care review. So we now have had the commitment from Nicola Sturgeon to listen to a thousand care experienced voices and also we've now got an independent review of the care system which is going to look in great detail, well it is looking in great detail at what works well and what needs to change. And the consistent message that has come from the First Minister and from Fiona Duncan who's the chair of the review is that at the heart of that review is going to be the voices of care experienced children and young people. And that really should be the driver of that entire review process is their voices. And that's a first, I think as far as I'm aware anyway, to do a comprehensive review of the care system with care experienced young people's voices at the heart of that review. (Children's organisation)

Overall, he believed that appointing a long-term advocacy worker for every care experienced child would be the most effective way of improving educational outcomes:

Well we think every child should have an advocate and that that, they should have a right to an advocate in statute. That is one legislative change that we would like, certainly like to see. Not specifically around additional support for learning but more broadly. That would be someone who would, ideally, be consistent across their whole life regardless of where they moved or what care setting they were in. So that consistent relationship would be key to making sure that they receive the support that they need in education and mental health and every other area. (Children's organisation)

SECTION 6: SUMMARY AND CONCLUSION

Perceptions of the ASfL and GIRFEC legislation

Many respondents believed that there was a poor understanding of the ASfL legislation in schools and local authorities. A key part of the ASfL legislation was to replace the Record of Needs with the CSP. As our analysis of official statistics shows ([Carmichael & Riddell, 2017](#)), there is a declining use of CSPs in Scotland. In 2005, 2% of children had a Record of Need or a CSP. By 2018, the proportion of children is 0.3%.

Different views were expressed about this decline. Principal Educational Psychologists believed that CSPs had outlived their utility. They involved too much work and were of little use to the child. PEPs reported that the focus of development work in local authorities over recent years was on the development of the GIRFEC programme and the child's plan, which they saw as a 'living document'. A SALT manager reported that CSP meetings were increasingly infrequent and could not remember the last time she had been invited to one. In the local authorities where she worked, CSPs were only opened for children with complex needs and where parents pushed for this to happen. PEPs explained that the criteria for the opening of the CSP were linked to the services a child was receiving rather than the significance or complexity of their needs. Unless significant one to one support was delivered by agencies outwith education, a child did not qualify for a CSP. In the context of cuts in services, fewer children were receiving such specialist support and therefore fewer qualified for a CSP.

In contrast with PEPs, legal respondents were concerned about the declining use of CSPs because of the additional rights of regular review and redress associated with them. It was felt that the legislation had been poorly drafted in the first place, so that the qualification criteria for a CSP were unnecessarily opaque and restrictive. Concerns were also expressed by the voluntary organisation for care experienced/looked after children that the 2009 amendments to the ASfL Act were being ignored. These stated that all looked after children should be assumed to have ASN and should be assessed with regard to the need for a CSP. His view was that these assessments were not taking place and there was no effective mechanism to ensure that they did. Our statistical analysis suggests that only 2% of looked after children have a CSP, despite the fact that many are likely to be receiving services from both education and social work. The parents' voluntary organisation also felt that CSPs were being used so little that they had become 'a joke'.

The Scottish Government official was less concerned about the declining use of CSPs and IEPs because of the increase in the use of child's plans. However she also believed that the criteria for opening a CSP were clearly stated in the Code of Practice and local authorities which failed to open a CSP for a child who met the criteria were in breach of the law. If a problem in this regard were noted by Education Scotland and the Inspectorate, then this would be flagged up and reported to Parliament – but no such issues had been raised to date in the five yearly reviews of the legislation.

Perceptions of the Education (Scotland) Act 2016

Interviewees noted that the impetus for the legislation had come from a recommendation by the UN CRC reporting team that children should be given the same legal rights, including rights of appeal, as their parents. Broadly, interviewees supported the principle of boosting children's rights. However, different views were given of the underlying motivation behind the legislation and the extent to which it was likely to make a difference.

The Scottish Government official was enthusiastic about the changes, noting that eligible children with ASN were being given twenty two new rights and that, as a result, Scotland could claim to be a world leader in the field. Education Scotland and local authority interviewees felt that the widely adopted Rights Respecting Schools programme was boosting awareness of children's right to be an active participant in their education. PEPs believed that GIRFEC was also effecting change by promoting the idea of respect for children's wishes.

A more sceptical note was sounded by those with a legal background, who felt that unnecessary obstacles to the realisation of children's rights had been created. In particular, there were criticisms of the tests of capacity and wellbeing, which would be carried out by the local authority on each occasion that a child wished to use a right. There was a lack of clarity about the evidence which the local authority would draw on to test capacity and it was felt that there should be a presumption of capacity, as was the case in relation to the Equality Act 2010 which could be used to make a complaint of disability discrimination. There was also a lack of clarity about whether the test of wellbeing applied to the process of exercising the right, or the consequences which might flow from doing so.

Questions were further raised about why children were not allowed to use mediation or make a placing request. The children's organisation pointed out that these exceptions reflected an assumption that children with ASN would have parents acting on their behalf, but this was not the case for care experienced/looked after children. Mediation could be a useful way for a care experienced child to resolve a dispute and was likely to be less stressful than a tribunal. The Scottish government official explained that mediation providers believed that participation in mediation might place a child in a very uncomfortable situation, since they would be expected to negotiate around issues which might be emotionally charged and then have to return to school the next day. The exclusion of the right to make a placing request was to avoid the situation where the child requested to attend a school at some distance from home, which might disrupt family life.

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 were felt to be 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 recognize that she or he has the right to express them; it is not up to the child to first prove her or his capacity.¹¹

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.

¹¹ <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>

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.

Operation of redress mechanisms

In line with findings from earlier research on dispute avoidance and resolution, Principal Educational Psychologists expressed some reservations about the tribunal, partly because the focus was on the parents' wishes rather than the child's. Parents who were pushing for a residential placement were described by one respondent as 'obsessed' and another felt there was a need to check more carefully whether this also reflected the child's wishes. One interviewee questioned the motivation of parents who sought redress through a tribunal. Another PEP described the tribunal as 'adversarial' and said that this was indicative of relationships having broken down. A further criticism was that the tribunal placed too much weight on discrete psychometric and health reports rather than taking into account qualitative sources of evidence such as school reports.

A different view of the tribunal was expressed by the representative of the parents' organisation. She felt that parents using the tribunal were often characterised as angry or deranged. In her experience they were usually bewildered and frightened for their children's future, and they found that the tribunal was an extremely helpful mechanism in resolving a dispute. Whether they won or lost, parents valued the clarity and finality of the process. The children's organisation interviewee noted that the tribunal had not been used by any young person who was care experienced, thus radical change, including more extensive use of CSPs, would be needed to if it was to be used by children.

Those with a legal background believed that access to the tribunal was an essential form of legal redress in an area where the allocation of additional resources was critical. Local authority opposition to the tribunal and to opening CSPs was rooted in resistance to statutory accountability, as well as funding pressures. It was recognised that children's voices were not at the forefront of tribunal proceedings at the moment, and work was needed to make the tribunal more accessible.

An education law consultant commented on inconsistencies in the legislation, which meant that children with a CSP (and their parents) were able to access the tribunal, while other children with similar levels of difficulty but without a CSP were not able to do so. The latter group, including the vast majority of children with ASN, would have to use alternative routes of redress such as independent adjudication. Although effective in terms of resolving disagreements, adjudication was even less well known and understood than the tribunal, and local authorities did little to inform parents and children of its existence. As a result, only about 12 adjudications took place each year.

The Scottish Government felt that the tribunal was working well and the relatively low volume of cases, compared with the equivalent tribunal in England, reflected that fact that it was seen as a last resort, only to be used when formal and informal mediation had been tried. There were concerns about how well the system would work if a child tried to represent themselves at a

tribunal, but this was unlikely since the Children's Service was being funded to provide legal representation, advocacy, advice and information.

Children's rights in everyday educational practices

Education Scotland respondents noted the difficulties in involving children in everyday classroom activities, particularly those from socially disadvantaged backgrounds or with communication difficulties. Children with challenging behaviour were particularly likely to be marginalised because their form of expression was generally unacceptable to teachers. A PEP also suggested that despite the general move towards recognising children's rights, the views and wishes of children excluded from school, who might be placed in alternative provision, were often ignored. They felt that children and parents rarely played a major role in curriculum planning and their contributions to IEPs and CSPs were often tokenistic. However, respondents indicated, alongside the desire to communicate more effectively with children, there had been major developments in alternative and augmentative technologies which made these attempts more feasible. Children's involvement in curriculum planning through IEPs and CSPs was often only tokenistic. However, the SHANARRI indicators of wellbeing associated with GIRFEC were being used routinely in schools to allow children to assess their own progress and plan future learning goals.

Advice and information services

The representative from the national advice and information service explained that her organisation intended to use social media as much as possible, focusing on straightforward messages to do with children's rights of participation. She recognised that the complexity of the legislation made the job of communicating the legal technicalities to children extremely difficult. The President of the ASN tribunal discussed the major project which was being undertaken to communicate with children about how they might be able to use the tribunal in the future. Despite these efforts, most respondents recognised that among all policy actors (teachers, schools, local authorities, parents, children and young people), knowledge and awareness of the ASfL legislation, including the 2009 and 2016 amendments, was very low, making the implementation of additional rights for children extremely difficult. While welcoming new rights, children and young people found it difficult to engage with legal technicalities.

Relationship between parents' and children's rights

The Scottish Government respondent acknowledged that parents and children would in the future have to negotiate with each other in order to decide who was going to exercise a particular right, such as making a reference to the tribunal. Where parents and children might have different views, for example, in relation to a residential school placement, there were no clear rules about which views should take precedence.

The parents' organisation interviewee believed that the new emphasis on children's rights might be used tactically to deflect attention away from parents' efforts to secure better provision for their child. She believed that parents were generally the best advocates for their children, and that in relation to the mainstream population it was expected that parents and children would work together on decision-making, for example, in relation to choice of exam subjects. She believed that parents of children with ASN were not a powerful lobby and had little influence on Scottish Government policy, which in the future might be further diminished.

A somewhat different view was voiced by a mediation worker, who felt there was a danger that parents might manipulate their children in order to influence educational decision-making. She

also felt there was a danger of over-burdening of children with decisions that should be taken by an adult. This was also the view of the Commissioner for Children and Young People.

Principal Educational Psychologists believed that the local authority should continue to be the ultimate arbiter of the allocation of increasingly scarce educational resources. One interviewee described the role of the local authority in terms of 'managing parental expectations'. The motivation of parents using the tribunal, particularly those seeking an expensive residential placement outwith the local authority, was questioned. There was a suggestion that the findings of the tribunal were not always helpful in terms of overturning local authority assessments of what was in the best interests of the child and the family.

Care experienced/looked after children

Most groups expressed concerns about the poor educational, social and economic outcomes of looked after children. The interviewee from the children's organisation explained that children who were looked after by their family or in kinship care had particularly poor outcomes and often received very little additional support from social services and other agencies. He believed that carers tended to focus on trying to improve social relationships and that educational attainment did not feature as a priority. Carers were unaware of the educational support they should offer children and young people, in place of birth parents. Local authorities were failing to fulfil their duties in terms of assessing children's additional support needs and considering whether a CSP was needed. The Scottish Government official felt that the new rights for children with ASN in Scotland might be taken up most by looked after children. However given that legislation passed in 2009 had yet to be implemented effectively, there seemed little hope amongst other interviewees that the new legislation would make a radical difference to enhancing the rights of looked after children. In particular, very few looked after children would be able to make a reference to the tribunal because so few had a CSP.

Conclusion

Ongoing tensions between professionalism and rights

In our earlier research, we argued that in order to understand policy changes in the field of ASN/SEN, it is necessary to understand the conceptualisations of procedural justice which underpin a range of approaches. Following Mashaw (1983) and Kirp (1982), research on decision-making and access to justice in the field of ASN/SEN (Riddell et al., 2000; Riddell, 2003) identified six models of procedural justice operating within the Scottish ASN context (professional, bureaucratic, legal, consumerist, managerial and market). These models operate alongside and in a state of tension with each other. Each has a set of positive and negative trade-offs and as a result receives support from different interest groups. In the post-war period in England and Scotland, professionalism and bureaucracy were dominant, according a great deal of power to medical officers and administrators and casting parents as 'bit players'. From the 1970s onwards, an increasingly important role was assigned to 'new' professionals such as educational psychologists. There was also a growing emphasis on partnership with parents.

Educational reforms of the 1980s emphasised parental choice, casting parents not just as partners, but as drivers of the educational market. Their consumer choices, in theory if not in practice, would determine what type of educational provision would flourish or wither on the vine. The dominance of New Public Management from the 1980s onwards also accorded a prominent role to parents, with rights to information on school performance set out in a range of charters.

Parents were recast as ‘citizen-consumers’ ([Clarke et al., 2007](#); [Newman & Clarke, 2009](#)), with responsibility for ensuring that local services were responsive to both individual and local needs. The discourse of rights also became stronger as the Disability Discrimination Act (superseded by the Equality Act 2010) was extended to education in 2001, with the notion that disabled people had legal rights to equal treatment, which should be legally enforceable if necessary.

In our earlier work we argued that in Scotland, professionalism and bureaucracy continued to be the dominant paradigms, while in England greater weight was accorded to rights and consumerism in the context of the widespread marketisation of education. We also noted that in both England and Scotland very little attention had been paid to children’s rights ([Harris, 2005](#)). Scotland now claims to have ‘leapfrogged’ England in terms of introducing the most radical children’s rights legislation in Europe ([Harris, 2018](#)). However, the evidence gathered in our research so far suggests that there may be a gulf between the expressed objectives of the legislation and their practical realisation. Key informants commenting on the legislation from a legal perspective question whether the ‘safeguards’ put in place by the Scottish Government, in terms of assessments of capacity and wellbeing, will in fact act as obstacles to the exercise of children’s rights.

It is evident that the new rights depend on the effective implementation of the original ASfL legislation, since the majority of rights already enjoyed by parents and young people under this legislation have been extended to children. Many respondents remarked on the low level of awareness of the legislation in school and among parents of children with ASN. They also found the legislation unnecessarily complex, which made it difficult for people to understand. There were particular issues around understanding of the qualification criteria for a CSP, which were understood to be related to the services the child was actually receiving, rather than their level of need. Local authority respondents questioned the relevance of CSPs in the light of the work involved and the decline in the number of children qualifying for one, as public sector cuts have led to a reduction in one-to-one services. The interviewee from the organisation for care experienced/looked after children commented that although the 2009 amendments highlighted the need for a greater focus on the assessment of the educational needs of this group, and the opening of a CSP where required, this had not occurred – most looked after children had no memory of ever having had their needs assessed.

Local authority staff questioned the utility of the ASfL legislation and said they had prioritised the implementation of the GIRFEC programme, despite the lack of statutory underpinning for Parts 4 and 5 of the Act and the lack of a route of redress equivalent to the tribunal. The education law consultant commented that the Children and Families Act 2014 is not rights-based legislation, but focuses on local authority duties. There are no clear qualification criteria for a child’s plan and the document has no statutory status. It 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](#)). Rather than tilting the balance of power away from local authorities and towards children and young people, it would appear that the downplaying of the ASfL legislation and the foregrounding of the GIRFEC programme may have done precisely the opposite.

Tensions between professional roles and paradigms

As noted above, principal educational psychologists doubted the relevance of the CSP and regretted the ‘adversarial’ nature of the ASN tribunal. Psychologists criticised of the type of

evidence used at tribunal hearings which was seen as relying too heavily on standardised medical and psychometric tests. The model of assessment which they were promoting was more holistic and qualitative in nature, relying on practitioner assessment through documents such as school reports and child self-assessment against SHANARRI indicators. One respondent was critical of health colleagues, who he felt 'overstepped' a professional boundary by advising parents to push for a specialist placement, when local authority policy was to support inclusive placements.

One of the reasons suggested for the declining use of CSPs was the reluctance of health colleagues to commit to the provision of health resources in a CSP because of the fear that they would be legally accountable for non-delivery. Educational psychologists recognised that health colleagues were struggling to meet their own statutory responsibilities and regarded the implementation of the ASfL legislation as the concern of education. Education staff were resentful that the tribunal was only empowered to require the local authority to make particular types of provision, rather than also obliging health services to do the same. Meanwhile the manager of a speech and language service observed that over recent years she had never been invited to attend a CSP review meeting, concluding that servicing CSPs was no longer a local authority priority.

From the inception of the post-Warnock legislation in Scotland, there have been tensions between different professional roles and responsibilities. Research on the implementation of the Education (Scotland) Act 1980 (as amended) ([Thomson et al., 1989](#)), revealed that in most local authorities educational psychologists took on the role of compiling and reviewing Records of Need. However, many resented this administrative burden because they felt that their principal role was to act as consultants in school. They also felt compromised by pressure from senior officers to only commit resources which the local authority was already providing, rather than what the child might actually need to fulfil their potential. Finally, educational psychologists felt that health colleagues were reluctant to collaborate while medical officers questioned the need for health to comply with demands for additional resources for a Record of Needs which was essentially a 'tool of the education department' ([Thomson et al., 1989, p. 53](#)).

Following extensive lobbying, a central recommendation of a report on the role of educational psychologists ([SEED, 2002](#)) was that 'a number of functions and tasks undertaken by psychological services or by individual psychologists should be reallocated to other services. These include servicing the Record of Needs process, making special transport arrangements and managing other support services such as educational home visitors and behaviour support teachers' ([SEED, 2002, p. 11](#)). The Code of Practice accompanying the ASfL legislation stated that the education authority must appoint CSP co-ordinator and inform parents, young people and children of the individual's name and contact details. However, there is a degree of vagueness about who this should be:

The education authority will appoint a co-ordinator, and this person could be from any agency contributing to the plan, but need not be. The choice of the coordinator will depend on the nature of the additional support needs and the provision to be put in place for the child or young person. ([Scottish Government, 2017a, p.87](#))

The responsibilities of the coordinator are considerable, ranging from compiling the plan, monitoring provision, ensuring that there is no undue break in services, organising review meetings, attending tribunal hearings, knowing the legal framework surrounding the sharing of information and working closely with children, young people and parents. Difficulties in appointing CSP coordinators and the complexity of the role may be one of the reasons contributing to the declining use of CSPs. Although educational psychologists do not have a

statutory responsibility to be the lead co-ordinator, it is evident that some continue to do so since they are likely to have worked with children and parents closely over a number of years. Their numbers, however, have fallen from 411 in 2012 to 363 in 2016.

The future of children's rights in Scotland

All of our respondents expressed an optimistic view about the new emphasis on children's rights and believed that there was a genuine desire to advance this agenda in Scotland. At the same time, a number of reservations were expressed concerning the likelihood that the 2016 amendments to the ASfL legislation were likely to have a significant impact.

Concerns were expressed that the new emphasis on children's rights might be associated with a downplaying of parents' rights. As noted in our earlier work, mothers are often the most active in advocating for their children ([Riddell et al., 2011](#)) and the accounts of local authority staff suggest a tendency to invoke negative stereotypes of parents making reference to the tribunal. Ryan and Runswick-Cole ([2008](#)) undertook a review of the way in which mothers of disabled children have been portrayed in disabilities studies, concluding that they are often seen as oppressors rather than advocates. They suggest that mothers of disabled children operate within 'oppressive mothering ideologies and disabling environments'. Rather than seeing children and parents as rivals in the exercise of rights, it is important to recognise the mutuality of their interests.

Further important points were made about the need to ensure that children are not placed in a position of bearing the burden of ensuring that local authorities' statutory duties are fulfilled with regard to the assessment of ASN, the opening of CSPs and so on. In the present context, 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 & 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. As some key informants pointed out, 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, only 2% 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.

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