



Centre for Research in Education Inclusion and Diversity

CREID BRIEFING 40

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

**Analysis of Key
Informant Interviews:
Scotland**

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Introduction

In this briefing, 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.

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.

Findings

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 2016, the proportion of children was 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 recognise that she or he has the right to express them; it is not up to the child to first prove her or his capacity.¹

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.

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

¹ <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>

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 the 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 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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Further information

All working papers and briefings of this project **Autonomy, Rights and Children with Special Needs: A New Paradigm?** (Ref. ES/P002641/1) are available at <https://www.ed.ac.uk/education/rke/centres-groups/creid/projects/autonomy-rights-sen-asn-children> and on the website of the Centre for Research in Education Inclusion and Diversity (CREID) at the University of Edinburgh (www.creid.ed.ac.uk). For any enquiries about this project, please contact Professor Sheila Riddell Sheila.Riddell@ed.ac.uk

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