

# **Advice to the Department of Education on its Consultation on Draft Special Educational Needs (SEN) Regulations**

**16<sup>th</sup> May 2016**

## **Introduction**

The Office of the Commissioner for Children and Young People (NICCY) was created in accordance with 'The Commissioner for Children and Young People (Northern Ireland) Order' (2003) to safeguard and promote the rights and best interests of children and young people in Northern Ireland. Under Articles 7(2) and (3) of this legislation, NICCY has a mandate to keep under review the adequacy and effectiveness of law, practice and services relating to the rights and best interests of children and young people by relevant authorities. Under Article 7(4), NICCY has a statutory duty to advise any relevant authority on matters concerning the rights or best interests of children and young persons. The Commissioner's remit includes children and young people from birth up to 18 years, or 21 years, if the young person is disabled or in the care of social services. In carrying out her functions, the Commissioner's paramount consideration is the rights of the child or young person, having particular regard to their wishes and feelings. In exercising her functions, the Commissioner has regard to all relevant provisions of the United Nations Convention on the Rights of the Child (UNCRC).

## **International Children's Rights Standards**

The UNCRC is a set of legally binding minimum standards and obligations in respect of all aspects of children's lives which the Government has ratified and must comply with in the discharge of its functions. The Northern Ireland Government Departments, including the Department of Education (DE), is obliged to comply with the obligations under the UNCRC by virtue of being a devolved administration of the UK Government, the signatory to the UNCRC. There are a number of UNCRC articles, Committee recommendations and Committee General Comments which are relevant to the Consultation on the SEN Regulations. Articles 28 and 29 are the main UNCRC articles which relate to education. Article 28 outlines the right to education, whereas Article 29(1), which details the aims of

education, adds a qualitative dimension to the general right to education under Article 28. Article 29(1) reflects the rights and inherent dignity of the child; it insists on the need for education to be child-centred, child-friendly and empowering and highlights the need for educational processes to be based upon the principles outlined in Article 29(1). General Comment 1 on the Aims of Education<sup>1</sup> provides insight into the obligations on Government under Article 29(1) of the Convention. According to the UNCRC Committee's General Comment on Article 29 of the Convention – a statement of its meaning and objectives - education must be child-centred, child-friendly and empowering.<sup>2</sup> The goal is to strengthen the child's capacity to enjoy the full range of human rights, to promote a culture which is infused by appropriate human rights values and to empower the child through developing his or her skills, learning and other capacities, human dignity, self-esteem and self-confidence. In this context, 'education' goes far beyond formal schooling to embrace the broad range of life experiences and learning processes which enable children, whether individually or collectively, to develop their personalities, talents and abilities and to live a full and satisfying life within society.

Other articles are also relevant in the context of the consultation on the SEN Regulations, not least the 4 principles of the Convention. The UNCRC principles require the Government to ensure that children are not discriminated against - Article 2; their best interests are upheld - Article 3; they develop to their maximum potential - Article 6; and they are able to meaningfully participate in all aspects of their lives - Article 12. General Comment 1 on the Aims of Education<sup>3</sup> also highlights a number of other Convention articles which are relevant to the fulfilment of the aims of education as detailed under Article 29 of the Convention.<sup>4</sup> These include, but are not limited to, the rights and responsibilities of parents (Articles 5 and 18), freedom of expression (Article 13), freedom of thought (Article 14), the right to information (Article 17), the rights of children with disabilities (Article 23), the right to education for health (Article 24) and the linguistic and cultural rights of children belonging to minority groups (Article 30).

With regard to the funding of education for children with SEN, Article 4 of the UNCRC states that:

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<sup>1</sup> United Nations Committee on the Rights of the Child, General Comment No. 1 (2001) 'The aims of education' CRC/GC/2001/1.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*, para 6.

*“States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.”*

The Committee’s General Comment No 5. on General measures of implementation of the UNCRC,<sup>5</sup> is clear that children should be visible in budgets and that analysis of resources for children should take place to ensure that States are fulfilling their obligation to allocate resources to the maximum extent in order to ensure the realization of children’s rights. In addition, it outlines the obligation on States to ensure that budget decisions which will impact on children are made with the best interests of the child as a primary consideration. It states that,

*“The Committee needs to know what steps are taken at all levels of Government to ensure that economic and social planning and decision-making and budgetary decisions are made with the best interests of children as a primary consideration and that children, including in particular marginalized and disadvantaged groups of children, are protected from the adverse effects of economic policies or financial downturns.”<sup>6</sup>*

The UN Committee also recommended that,

*“...the State party, in accordance with article 4 of the Convention, allocate the maximum extent of available resources for the implementation of children’s rights...”<sup>7</sup>*

It highlighted the need to invest in children by Governments, stating that investment in children is a:

*“...widely accepted best guarantee for achieving equitable and sustainable human development and a fundamental requirement for social and economic priorities of any government”<sup>8</sup>*

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<sup>5</sup> General Comment No.5: General Measures of Implementation of the Convention on the Rights of the Child, UN Doc CRC/GC/2003/5.

<sup>6</sup> *Ibid*, para 51.

<sup>7</sup> *Ibid*, para 19.

<sup>8</sup> CRC (2007) Day of General Discussion “Resources for the rights of the child – Responsibility of States”, Para 27.

The Committee went on to recommend that the Government:

*“a) make children a priority in the budgetary allocations as a means to ensure the highest return of the limited available resources; and make investment in children visible in the State budget through detailed compilation of the resources allocated to them;*

*b) consider using rights-based budget monitoring and analysis, as well as child impact assessments on how investments in any sector may serve “the best interests of the child”<sup>9</sup>*

The Committee on the Rights of the Child has recognised the importance of holding States to account with regard to their obligations to invest in children to deliver their rights under the Convention. The Committee is currently working on expanding on what is meant by the General Measures of Implementation of the Convention and is taking forward work with a view to drafting a new General Comment on public expenditure or public investment in infancy and childhood to implement the rights of the Convention. It is proposed that this General Comment will include indicators to measure the extent to which States are meeting their obligations. In addition, the Human Rights Council has recognised the importance of investing in children and has adopted a resolution, *“Investment in the rights of the child”<sup>10</sup>* which affirms the high economic and social returns of investment in children and stresses the importance of resource allocation and spending for the promotion and protection of children’s rights.

Article 2 of the First Protocol to the European Convention on Human Rights (ECHR) as incorporated by the Human Rights Act 1998, also provides that no one shall be denied the right to education. This has been interpreted by the European Court of Human Rights to mean that every child is entitled to access *effective* education. Moreover, taken together with Article 14 ECHR - the non-discrimination principle - the right to access available educational facilities must be secured to all children without discrimination.

Also of relevance to the current consultation is the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), which was ratified by the UK Government on 8<sup>th</sup> June 2009. Article 5 provides that persons with disabilities shall have equal access to all the protections afforded by the law. Article 7 provides that all children with disabilities shall have full enjoyment of all human rights and fundamental freedoms; that their best interests shall be a primary consideration and that their voices shall be heard in all matters

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<sup>9</sup> *Ibid*, para 30.

<sup>10</sup> 27<sup>th</sup> March 2015

concerning them. Article 24 provides the right for persons with disabilities to access an inclusive education system at all levels.

### **Code of Practice**

As we have previously stated, it is difficult to provide fully informed comment about the Special Educational Needs and Disability (SEND) Framework in its entirety and its potential impact on children and young people without sight of all of its component parts. NICCY believes that it would have been helpful in ensuring that consultees are in a position to provide fully informed comment if the Code of Practice was made available. NICCY is aware that the Code of Practice will not be made available until September 2016. NICCY has a number of very serious concerns about thresholds which are to be employed within the SEN Framework and it remains unclear whether these concerns will be addressed as this issue will be dealt with under the new Code of Practice. It would be extremely helpful therefore if the Code of Practice was made available and pre-consultation is taken forward as expediently as possible. Such consultation should also include direct consultation with children and young people.

As also stated previously, NICCY has concerns that due to the legislative process relating to the passage of Regulations, there will be less scope to influence the content of Regulations. It is therefore vitally important that there is adequate consultation on the Special Educational Needs (SEN) Regulations at the earliest possible stage, including direct consultation with children and young people as required under Article 12 of the UNCRC and Section 75 of the Northern Ireland Act 1998. It will also be vitally important that the Department of Education takes into account the views expressed through consultation in finalising the SEN Regulations, particularly as the Regulations will be subject to the Affirmative Resolution Procedure. There is a clear statutory obligation, under Schedule 9 paragraph 9(2) of the Northern Ireland Act 1998, on all Public Authorities to take into account any consultation carried out in relation to the policy. A firm commitment to this is also included within the Department's approved Equality Scheme.<sup>11</sup> It is therefore essential that the Department fully complies with this commitment and clearly shows how views expressed through consultation on the current proposals have been taken into account in progressing the SEN Regulations.

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<sup>11</sup> Para 3.1., Department of Education Equality Scheme, 25<sup>th</sup> September 2013.

## Discussions with Departmental Officials

In providing advice to DE on the SEN Regulations it was very helpful for NICCY staff to meet with DE staff on 15<sup>th</sup> December 2015 and on 7<sup>th</sup> March 2016 to be given presentations on these and discuss some of the issues relating to the SEND Framework and in particular, the SEN Regulations.

## General Comments

NICCY welcomes the Department's intention to introduce a more responsive and effective SEN and Inclusion Framework, which will be delivered through four elements, of which the SEN Regulations are one. In the year 2015-2016 **56%** of our new enquires were in relation to Education and **35%** of these, by far the largest category of queries, relate to children with SEN. Indeed currently, SEN provision is the subject of **20%** of all new enquiries.

It is NICCY's view that there is a pressing need for meaningful reform of the SEN Framework in a manner which ensures better outcomes for children and young people. A great deal of the SEN cases which NICCY deals with illustrate an urgent and pressing need for increased investment in, and improved processes associated with, SEN. It is NICCY's experience that many children are not being assessed within a reasonable timeframe due to a lack of resources and the imposition of quotas which is having an extremely detrimental impact on the ability of those children to have their right to an effective education realised. In addition, there has been a marked decrease in the quality of statements with the specified provision being vague and unenforceable. It is fundamental in order to create a SEND Framework which meets the needs of children and young people and upholds their best interests that statements are as robust as possible, with clear specification and quantification of need. NICCY is concerned that the review of the SEND Framework is resource driven and does not have the best interests of children at its core. In order to address the failings with the current SEND Framework, NICCY wishes to see increased, appropriate investment in SEN to ensure early identification of SEN for all children and improved educational provision for those with SEN which meets their needs and enhances outcomes.

In addition, the transition period from the current SEND Framework to the new Framework will be an unsettling time for many vulnerable children and young people and their families.

It is vital to reduce the impact of this on children and their families and to avoid any disruption to the education of children and young people with SEN. The Department should ensure that children and their parents are given access to as much information about the transition between the two Frameworks; information on the operation of the new system; what children and their families should expect; and the level of services that they can access. This responsibility on the Department and the Education Authority as duty bearers must be discharged in a manner which places the child at the centre of the process.

It would also be helpful if there was greater access to information regarding the types and levels of services available for children and young people with SEN through each individual school. It has been NICCY's experience that a lack of clarity and information has led to confusion and inappropriate placements. Schools should be clear about the services that they are expected to provide, publicise this information and where a school is specified on a statement, should be selected on the basis that the services provided by the school are the most appropriate to meet the needs of the individual child. This would go some way to ensuring that all children are appropriately placed and that they have their assessed needs fully met.

## **Regulation 2**

NICCY welcomes the amendment under Regulation 2 to propose a change to the definition of 'transition plan' which links to the duty on health and education authorities to co-operate with each other in the preparation of a transition plan, under section 5 of the SEND Act. NICCY has advised Government and engaged in the development of the SEN Framework from the outset. We have consistently advocated for the introduction of a statutory duty to co-operate to be introduced on Education and Health authorities in meeting the needs of children with SEN and when transitioning from children to adult services. NICCY has raised this previously with the Department of Education, the Committee for Education and in our 2012 research, "*Review of Transitions to Adult Services for Young People with Learning Disabilities*," carried out by Professor Laura Lundy, Dr Bronagh Byrne and Dr Paschal McKeown. NICCY is very pleased by the introduction in the SEND Act of a statutory duty to co-operate on education and health authorities in the identification and assessment of children who have, or may have, special educational needs; and also in providing to children with special educational needs, the services which those special educational needs call for in the preparation of a transition plan. NICCY agrees that the shift in the draft Regulations towards coherent planning for the child's transition from school to adulthood, including future employment, training or

health care provision as appropriate is important. It will be also important that the Department produces very clear Guidance on transitions planning to ensure that this process is carried out consistently and that the necessary process for effective transitions planning is clearly detailed for professionals who will be carrying this out. Training on the shift in approach, the operation of the new duty and steps to ensure coherent planning processes for transitions planners will be an essential element in the effective operation of this new duty to co-operate.

In NICCY's research report, "Review of Transitions to Adult Services for Young People with Learning Disabilities," a number of areas were identified as requiring significant work to bring about vital improvements for children and young people with SEN. These include the areas of education, employment and training, health and social care, social security, leisure and transport. Cross cutting issues identified include the need for integrated planning, person-centred planning, consistency of provision, access to information and the participation of children and young people with SEN in decision making. This extremely comprehensive report made a number of recommendations regarding transitions and children and young people with SEN. NICCY advises the Department in developing the co-operation duty specifically with regard to transitions to pay particular regard to its transitions report. NICCY is happy to meet with Departmental officials on this to provide further advice if this would be helpful, or on any other aspect of the SEND Framework.

Co-operation between the health and education authorities in meeting the needs of children and young people with SEN and disabilities will be an extremely important component of a successful SEND Framework. The Department will be aware of both the new obligation under the SEND Act as detailed above, but also under The Children's Services Co-operation Act (Northern Ireland) 2015 (CSCA). The CSCA makes a commitment to children's rights in line with the relevant provisions of the UNCRC in the delivery of children's services to improve the well-being of children and young people in Northern Ireland. This obligation is particularly important in the context of the SEND Framework given that the co-ordination of how Government Departments and agencies are meeting their obligations under this Act is now the responsibility of the Department of Education. The obligations under the Act should inform all of the work which Government Departments and agencies take to improve the lives of children and young people in Northern Ireland. It places statutory obligations on Government Departments and agencies to co-operate with each other in order to contribute to the improvement of the well-being of children and young people as well as having to adopt a Children and Young People's Strategy. The Act sets out eight areas which define the well-being of children and young people and these include learning and achievement and living in a society which respects

their rights.<sup>12</sup> It also states that in determining the meaning of well-being for the purposes of this Act, regard is to be had to any relevant provision of the United Nations Convention on the Rights of the Child.<sup>13</sup> The Act states that the NI Executive must adopt a Children and Young People's Strategy which sets out how it proposes to improve the well-being of children and young people.<sup>14</sup> The strategy must set out the outcomes the Executive intends should be achieved for that purpose<sup>15</sup> and the actions to be taken by Northern Ireland Departments, among others, for the purpose of achieving those outcomes.<sup>16</sup>

There are also obligations under the Act on the NI Executive to prepare a report on the operation of the Act<sup>17</sup> which is laid before the Assembly<sup>18</sup> and published by the NI Executive.<sup>19</sup> It must include statements on what actions have been taken by the NI Executive, and Government Departments, for the purpose of achieving the outcomes set out in the Children and Young People's Strategy; what progress has been made towards achieving those outcomes, or the extent to which they have been achieved; how children's authorities and other children's service providers have co-operated with each other in the provision of children's services; how children's authorities have exercised their powers to share resources and pool funds; and how the well-being of children and young people has improved.<sup>20</sup> The report should also identify any further opportunities for co-operation between children's authorities and other children's service providers that could help to achieve the outcomes set out in the strategy; any other ways in which the well-being of children and young people could be improved, and any ways in which the Children and Young People's Strategy might be revised in order to contribute to those improvements.<sup>21</sup>

NICCY wishes to see all Government Departments and agencies who are involved in the delivery of children's services, carrying out ongoing transparent monitoring on its work within the statutory monitoring context required by the Children's Services Co-operation Act (Northern Ireland) 2015. This will make the monitoring requirements of the Act easier to comply with on an ongoing basis and should impact on how Government Departments, including the Department of Education focuses its work, with a clear emphasis on

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<sup>12</sup> The Children's Services Co-operation Act (Northern Ireland) 2015 1(2)(c) and (g)

<sup>13</sup> *Ibid* 1(4)

<sup>14</sup> *Ibid* 3(1)

<sup>15</sup> *Ibid* 3(2)(a)

<sup>16</sup> *Ibid* 3(2)(b)

<sup>17</sup> *Ibid* 5(2)

<sup>18</sup> *Ibid* 5(8)(a)

<sup>19</sup> *Ibid* 5(8)(b)

<sup>20</sup> *Ibid* 5(3)(a)-(e)

<sup>21</sup> *Ibid* 5(4)(a)-(c)

children's rights, with the child at the centre of the delivery of children's services and co-operation and best use of resources as fundamental guiding considerations. For the purposes of the SEND Framework, NICCY wishes to see better co-operation resulting in better outcomes for children and young people. Services should be much more closely aligned and streamlined as a result of the duties on children's services providers to co-operate, with services provided to children and young people in a holistic manner which meets all of their needs with the best interests of the child as a primary consideration. Children and young people should all be able to access the services and support they require, to address their needs regardless of the education setting they are in. This should ensure greater parity of provision and standardisation of access to all the necessary services required by all children in SEN - regardless of sector. NICCY also expects the statutory duties to co-operate to result in a transparent and effective alignment of timescales for each stage of the SEND process between health and education.

## **Regulation 7**

Regulation 7 relates to information to be notified to the EA. This places an obligation on the Board of Governors of an ordinary school to notify the EA about any planned or immediate changes in the circumstances of a child for whom the EA is making SEN provision. While NICCY appreciates the need to make best use of limited resources, we do have a number of concerns about the proposed obligation on Boards of Governors at Regulation 7(3)(b) to alert the EA where a child with SEN is, or is likely to be, absent from school for a period of 4 weeks or more. The outworkings of this obligation will mean that children who are absent from school for a period of 4 weeks or more, on their return to school, will/may not be provided with the classroom assistant they had previously been allocated. There are a great many children with SEN who are likely to be adversely impacted upon by this. It is most likely that a child who is receiving SEN provision who is absent from school for a prolonged period of four weeks or more will be absent due to ill-health. Upon their return to school, it will be vitally important to their continued enjoyment of education and successful reintegration that they are adequately supported and comfortable. The change of a known classroom assistant with whom the child will have an established relationship of trust, can only add to the stress of very vulnerable children in this position. NICCY believes that the practicalities of trying to build up a new relationship of trust with a classroom assistant who is unaware of the particular needs and preferences of the child after being out of the school environment for a protracted period of time, can only have a detrimental impact on the ability of a child with SEN to reintegrate successfully and access an effective education. This is particularly the case with children who have

certain conditions, including those diagnosed with autism spectrum disorder (ASD). This level of disruption to and impact on the educational routine of vulnerable children with conditions such as ASD is contrary to the best interests of the child. It appears to NICCY that this proposed obligation is resource driven, as opposed to needs driven, and does not have the best interests of the child as the primary consideration in line with Article 3 of the UNCRC. NICCY would therefore firmly urge the Department to reconsider the introduction of Regulation 7(3)(b) as we believe that the loss of a classroom assistant who is known to and trusted by the child is in direct conflict with Article 3, 4 and 29(1) of the UNCRC.

### **Regulations 8 and 9**

Regulations 8 and 9 detail a number of requirements about the qualifications and experience of learning support co-ordinators (LSC) in ordinary and special schools. NICCY is concerned that some of the qualifications and experience which are proposed for LSCs under the new SEN Regulations are at a higher level than many LSCs currently have. NICCY is aware that the EA specifications, under which the qualifications and experience for LSCs will be qualified, have yet to be developed. There is clearly an early identifiable training need which arises under Regulations 8 and 9. It is extremely important to ensure the continuity of service for children with SEN in schools that the LSCs are fully equipped to meet the requirements of experience and qualifications as soon as these requirements are introduced. If there is any delay in the delivery of training and accessing of the necessary qualifications and experience by LSCs, there will be a disruption to the educational service provision for children with SEN. If LSCs do not meet the requirements of qualifications and experience, people who currently are employed as LSCs may not be in a position to continue in this role. The impact of such an eventuality on the educational experiences of children with SEN is potentially damaging. NICCY wishes to see this potential training and skills deficit being immediately addressed so that children with SEN do not have the quality of their education compromised due to a failure to effectively plan and provide the necessary training for LSCs in a timely manner.

### **Regulations 12 – 16**

For the purposes of making an assessment, Regulations 12 – 16 detail from whom advice will be sought, when the EA is making an assessment. NICCY welcomes the introduction under Regulation 12 to take advice from children above compulsory school leaving age. However, NICCY wishes to see this Regulation being amended to include children of all

ages in line with Article 12 of the UNCRC and section 1 of the SEND Act which places a very clear obligation on EA to ensure that the voice of the child is heard and that children are able to fully participate in the SEN process. While we appreciate that the views of the child are included as considerations for an assessment under Regulation 16, we believe that the inclusion of the child, regardless of their age, in seeking advice is more in line with the ethos of participation which can be found at other parts of the Regulations and the SEND Framework. We outline the obligations under the SEND Act and Article 12 of the UNCRC with regard to participation in more detail below. NICCY can see no reason why children of all ages should not be asked for advice by the EA in making an assessment.

NICCY also believes that EA should seek advice from the parents / carers of all children, regardless of age in making an assessment. The draft Regulation currently states that advice will only be sought from the parents of children who are below compulsory school age. Article 5 of the UNCRC places an obligation on the Government to respect the role of parents in their children's lives. While it is entirely appropriate that the child is the rights holder, this should not preclude EA from seeking advice from their parents or carers in making an assessment. While we appreciate that representations from parents are included as considerations for an assessment under Regulation 16, we believe that an obligation on EA to seek advice from parents of children with SEN, regardless of their age, is more in line with the SEND Framework inclusive ethos. NICCY believes that assessments should be made in as informed a way as possible. Both children with SEN, regardless of their age and the parents of children with SEN, regardless of their children's age, will have a valuable contribution to make to the assessment process. NICCY wishes to see the Regulations being drafted in a manner which permits them to do so throughout the process.

### **Regulation 17, 20 and 21**

Regulations 17, 20 and 21 contain proposals for the reduction on timeframes for certain stages of the SEN process. NICCY is extremely supportive of reducing the length of time it takes for children and young people to progress through the SEN system. Delays in the system are having an extremely detrimental impact on the educational experience of children and young people with SEN. NICCY wishes to seek assurances from the Department that the reduced timescales will not impact on the robustness of the SEN process which should be as efficient as possible and driven by the needs of the child.

## **Regulations 22-24**

Regulations 22-24 details the Annual Review process and mainly makes amendments to provide for the transferral of certain rights to children over compulsory school age from their parents. NICCY has a number of concerns with regard to the Annual Review process which are not addressed in the proposed amendments to the SEN Regulations. NICCY would be supportive of reference being made to the statutory duty on health and education authorities to co-operate with each other in the assessment, provision of services for children with SEN and transition planning in the context of Annual Review. NICCY is hopeful that this duty and the duty on children's services providers to co-operate with each other under the CSCA will impact positively on the Annual Review process. We hope these duties will make this process more efficient and streamlined, with all of the relevant professionals and stakeholders, including the child and their parents/carers, contributing fully, in co-operation with each other to better meets the needs of the child. Improvements to the Annual Review process has the potential to lead to less interventions and more adaptable and responsive services, leading to improvements in the educational experience of children and young people with SEN.

## **Regulation 26**

One very positive change to the operation of SEN in Northern Ireland is the strengthened provision for the rights of children and young people with SEN by virtue of amendments to the SEND Framework in the Special Educational Needs (Northern Ireland) Act 2016 (SEND Act). Section 9 of the SEND Act amends Part II of the Education (Northern Ireland) Order 1996 (the 1996 Order) for the purpose of conferring on a child over compulsory school age who has or may have special educational needs, certain rights previously exercisable by the parent of that child. Section 9(2) of the SEND Act states that Regulations may make provision about assistance and support to enable a child over compulsory school age to exercise any such right. Part VI of the draft Regulations details the level of support which will be provided for young people over compulsory school age to exercise these rights under Part II of the 1996 Order. Given the specific and particular vulnerabilities of children with SEN and/or a disability, it is vital that young people are provided with the necessary support and assistance to allow them to realise their rights under this section of the SEND Act. A failure to adequately support young people in exercising their rights will negate any progress made with regard to stronger children's

rights protections that have been contained in the SEND Act. It is therefore extremely disappointing to NICCY that the proposed level of support and assistance for the exercise of these rights is not sufficient to ensure that all young people who wish to realise these rights will be facilitated to do so. Regulation 26 states that a child who wishes to exercise their rights under Part II of the 1996 Order can have his/her parent or another person present in discussions with the Authority or as an advocate through conducting such discussions or making representations to the Authority on behalf of the child, in compliance with the child's reasonable wishes. It is not defined within the regulations as to what the Authority will deem as a child's 'reasonable' wishes; clarity therefore would be welcome on this point. Of great concern to NICCY is Regulation 26(3), which states that,

*“Nothing in this regulation shall require the Authority to arrange or fund support or advocacy”.*

This is extremely disappointing, particularly given the emphasis in the SEND Act on ensuring that the views of the child are heard and taken into account in decision making, including providing the information and support necessary to allow children and young people to participate in decision making. Section 1 of the SEND Act states that,

*“In exercising its functions under this Part in relation to a particular child the Authority shall— (a) so far as reasonably practicable, seek and have regard to the views of that child; (b) have regard to— (i) the importance of that child participating in decisions; and (ii) the importance of that child being provided with the information and support necessary to enable participation in those decisions.”.*

NICCY believes that the emphasis on ensuring that children and young people with SEN are facilitated to fully participate in decision making should be a central tenet to the entire SEND Framework. The insertion of the above provision by virtue of Regulation 26(3) is in direct conflict with the obligation under section 1 of the SEND Act to ensure that the child is provided with the information and support necessary to enable participation in decision making. NICCY wishes to see the inclusion of a similar statutory obligation in the draft Regulations to ensure that the necessary independent advocacy and support is provided to enable children with SEN and disability to fully exercise their rights under the SEND Framework.

As highlighted previously, Article 12 of the UNCRC provides for the right of the child to be heard in all matters affecting them, with their views to be given due weight in accordance with their age and maturity. In 2008, following its examination of the United Kingdom's

compliance with the UNCRC, the Committee on the Rights of the Child recommended that the State party, in accordance with Article 12 of the Convention, should promote, facilitate and implement, in legislation as well as in practice, within the family, schools, and the community as well as in institutions and in administrative and judicial proceedings, the principle of respect for the views of the child.<sup>22</sup>

The UN Committee on the Rights of the Child's General Comment No.12 on the right of the child to be heard emphasises the importance of the right to be heard and outlines the obligations on government. Article 12 discourages State Parties from introducing barriers either in law, or in practice, which would restrict the child's right to be heard.<sup>23</sup> General Comment No.12 is also clear that State Parties are under an obligation to ensure the implementation of the right to be heard for children experiencing difficulties in making their views heard.<sup>24</sup> It is therefore NICCY's view that there is a clear obligation on Government to ensure that, in the case of children with SEN, they take whatever measures are necessary to ensure that their voices are heard and that they receive the support they need to exercise their rights. This should include having access where required, to a statutory advocacy service. Children should be entitled to the support they need to enable them to exercise these new rights under Part II of the 1996 Order. Any failure to put measures in place where children are being prevented from realising their rights or encounter barriers which are not addressed and therefore adversely impact on the ability of children with SEN to exercise these rights, runs entirely counter to the extension of these rights to children through the SEND Act and the Government's UNCRC obligations.

In addition to the Government's UNCRC obligations, Article 7 of the UNCRPD specifically refers to children with disabilities and obliges State Parties to take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children. NICCY believes that the provision of statutory, independent advocacy and support services to all children and young people who require them is essential for the realisation of this right under the UNCRPD.

NICCY also wishes to highlight the development of statutory advocacy services for children and young people with mental ill-health and learning disabilities under the Mental Capacity Act 2016 (Northern Ireland). While the model of advocacy falls far short of what

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<sup>22</sup> United Nations Committee on the Rights of the Child, Concluding Observations United Kingdom, CRC/C/GBR/CO/4, 20<sup>th</sup> October 2008, para 30.

<sup>23</sup> General Comment No 12, The Right of the Child to be Heard, CRC/C/GC/12 1 July 2009.

<sup>24</sup> *Ibid*, para 21.

was originally intended for children under the Mental Capacity Act, the provision of a statutory advocacy service for children with mental ill-health and / or a learning disability is vitally important to facilitate children and young people's voices to be heard in decision making. The recognition by both the Departments of Health (DoH) and Justice (DoJ) that a statutory right to advocacy is necessary for vulnerable groups of children to exercise their rights, should also apply to children and young people with SEN who require advocacy and support to exercise these rights. It is important to state that not all children and young people with SEN will wish to exercise the rights conferred on them by Part II of the Education (Northern Ireland) Order 1996. These rights only apply to young people above compulsory school age and relate to certain appeal rights, which not all children with SEN will wish to exercise, meaning that the provision of independent advocacy and support services should not be extremely resource intensive to provide but vital to the realisation of children's rights. NICCY wishes to see the Regulations being amended to include an obligation on the Authority to provide the necessary support services in ensuring all children are facilitated to exercise their rights under the new SEN Framework.

NICCY does not agree with the part regulation which prohibits the child to have a legal representative present to support them or advocate for them when having discussions with or making representation to the EA. This is a clear equality of arms issue, particularly when one considers that the EA has access to its own legal representatives at all times.

### **Regulation 27**

Regulation 27 addresses the issue of the Capacity of the child and states that a child over compulsory school age is presumed to have the capacity to form his own views and express those views in all matters affecting him, falling within Part II of the 1996 Order, these Regulations and the Code of Practice unless questions about the child's capacity are raised by one of a number of people. It goes on to state that where a question is raised about the capacity of the child, the Authority shall determine the child's capacity in relation to matters affecting him which fall within Part II of the 1996 Order, these Regulations and the Code Of Practice. Regulation 27(6) states that capacity relates to the child's ability to understand the information published by the Authority about the arrangements for identification and assessment of children with special educational needs; understand what is being asked of him and be able to act in an informed way in the exercise of those rights.

Again, there is a lack of clarity around how the actual test for capacity, for the purpose of the exercise of the child's rights under Part II of the 1996 Order, will be run which takes

into account these factors. There is also no information provided with regard to who will determine capacity in children and young people. There is clear scope for overlap between the SEN Framework and the determination of the capacity of a child and the Mental Capacity Act, which introduces a capacity test for children and young people aged 16 and 17 for the purposes of access to a range of protections and safeguards under the Act. While these tests are for different purposes, there have been a number of years of policy development and extensive engagement with key stakeholders working for and with children and young people - for whom capacity is a consideration - in developing the capacity test for the Mental Capacity Act. NICCY would advise Officials in developing a capacity test for children with SEN to engage with those who lead on the development of the capacity test in the DoH for children with mental ill-health and / or learning disability to ensure that the lessons learned and issues raised in the development of this test, inform any test for capacity in the SEN Regulations.

While we realise that the statutory provisions relating to children and young people who can access the extended rights under Part II of the 1996 Order are contained in the SEND Act, NICCY wishes to reiterate its disappointment that these have been restricted only to children and young people over compulsory school leaving age. The UN Committee on the Rights of the Child's General Comment on Article 12<sup>25</sup> interprets the obligations on Government by virtue of Article 12 of the UNCRC. It states that the Government shall,

*"...assure the right to be heard to every child "capable of forming his or her own views". This phrase should not be seen as a limitation, but rather as an obligation for States parties to assess the capacity of the child to form an autonomous opinion to the greatest extent possible. This means that State 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 the capacity to form her or his own views and recognize that she or he has the right to express them."*<sup>26</sup>

It also states that, Article 12 imposes no age limit on the right of the child to express her or his views, and discourages States parties from introducing age limits either in law or in practice, which would restrict the child's right to be heard in all matters affecting her or him.<sup>27</sup> Article 12 is clear that the views of the child must be, *"given due weight in accordance with the age and maturity of the child"*. This requirement makes it clear that

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<sup>25</sup> *Op cit.* 23

<sup>26</sup> *Ibid*, para 20

<sup>27</sup> *Ibid*, para 21

age alone cannot determine the significance of a child's views. As the General Comment on Article 12 states:

*"Children's levels of understanding are not uniformly linked to their biological age."*<sup>28</sup>

For this reason, NICCY believes that the views and wishes of the child have to be assessed on a case-by-case examination and children need to be facilitated and supported to participate fully in decisions impacting on their lives, regardless of their age. NICCY is aware that section 13 of the SEND Act provides for a pilot project to extend appeal rights and rights to take disability claims to children under compulsory school leaving age. In line with the requirements of Article 12 of the UNCRC as explained by General Comment 12, NICCY wishes to see the introduction of the pilot scheme to children and young people under school leaving age as soon as possible to ensure greater children's rights compliance.

NICCY also wishes to seek assurances regarding the training to be provided to those who have responsibility for running the capacity test with children and young people with SEN for the purposes of exercising their rights under Part II of the 1996 Order. The Committee on the Rights of the Child's General Comment No.5 provides a detailed account of children's rights training requirements on Governments. It notes that the Government's target audiences for training must include, *"...all those involved in the implementation process - Government officials, parliamentarians, judiciary, and for all those working with and for children."*<sup>29</sup>

In its 2008 Concluding Observations the UN Committee on the Rights of the Child placed a clear emphasis on the need for training for professionals in all aspects of the Convention and its application. The Committee emphasised the need for,

*"...the reinforcement of adequate and systematic training of all professional groups working for and with children, in particular law enforcement officials, immigration officials, media, teachers, health professionals, social workers and personnel of child-care institutions"*.<sup>30</sup>

Training for professionals working with and for children and young people with SEN, such as those with responsibility for making decisions about the capacity of a young person as

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<sup>28</sup> *Ibid*, para 29

<sup>29</sup> *Ibid*, para 53.

<sup>30</sup> *Op cit.* 22, para 21.

well as independent advocates should include, training on children's rights, child protection training, training on the determination of the capacity of the child and on training on how to effectively communicate with children with SEN and disability. We would seek clarification as to the type of training which will be delivered for professionals working with and for children under the SEND Framework and a timescale for delivery.

### **Regulations 29 – 31**

Regulations 29 – 31 detail how the duty on EA to provide independent mediation, provided for in section 10 of the SEND Act, will operate. This places a duty on EA to provide independent mediation to an individual who intends to make an appeal relating to SEN to the Tribunal. It requires EA to make arrangements for the provision of mediation and to provide for the appointment of an independent person who can facilitate the resolution of disputes or act as a mediator. It is NICCY's view that if mediation is effectively managed and implemented, with the best interests of the child as the primary consideration, it could provide a more positive resolution process than the Tribunal. It will be essential that the mediation process is genuinely independent and that individuals perceive it to be so, otherwise they may be reluctant to participate. The opportunity to take part in mediation should be made available to individuals in a timely manner in order that the process can begin promptly and issues can be resolved as quickly as possible. It will also be important that a mediation mechanism demonstrates its effectiveness at an early stage in order to engender confidence in the process and encourage other individuals to participate. If mediation is to be regarded as a preferred resolution mechanism, it will be essential that an appropriate and effective mediation infrastructure is put in place. NICCY would appreciate it if the Department could provide evidence of the viability of the mediation model, including information regarding the current numbers of suitable mediators in Northern Ireland, its intentions regarding the appointment and training of additional mediators and the levels of resource required to establish and maintain a mediation service.

### **Section 75 of the Northern Ireland Act 1998**

NICCY is disappointed to note, from the Equality and Human Rights Policy Screening for the SEN Regulations,<sup>31</sup> that the policy has been screened out for equality impact assessment under section 75 of the Northern Ireland Act 1998. Given the nature of the

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<sup>31</sup> Department of Education, Revised November 2015

SEN Regulations, children and young people are clearly the group most likely to be impacted upon by the proposals contained therein. It is also clear from an examination of the prevalence of SEN in certain groups that specific groups of children and young people are likely to be impacted upon by the SEN Regulations than others.

NICCY is concerned by the lack of data considered in carrying out the screening exercise on the SEN Regulations resulting in a failure to fully consider the needs of children and young people. Fundamental to the proper execution of screening is the data relied upon by the public authority in carrying out the screening exercise, particularly with regard to the categories of sexual orientation and SEN and young carers, school age mothers and SEN, for whom there is no data presented. Proper screening of a policy based on all available disaggregated qualitative and quantitative data is a pre-requisite to determining if there is the potential for differential adverse impact or if there are actions which should be taken to better promote equality of opportunity and consequently the need to carry out a full EQIA. The Equality Commission's Guidance for public authorities in relation to screening is clear that where there is no data available, this should result in a public authority giving consideration to carrying out an EQIA. The Equality Commission's Guidance states that,

*“As a first step in the screening exercise, public authorities should gather evidence to inform their screening... The public authority should ensure that any screening decision is informed by relevant data... The absence of evidence does not indicate that there is no likely impact. A public authority should make arrangements to obtain relevant information, whether quantitative or qualitative. If a public authority having taken reasonable steps to obtain relevant data, concludes that none is available, it may then wish to consider subjecting the policy to an equality impact assessment.”<sup>32</sup>*

In addition, the screening documentation highlights variances with certain groups and fails to adequately address these. The screening document states that there is, “...no clear explanation” for these variances in the case of children with a disability, proposes a suggested rationale without an evidential basis in the case of newcomer children, and states that in relation to Travellers, the Taskforce on Traveller Education did not suggest any amendment to the SEN Framework, therefore any issues relating to Traveller children and SEN can be dealt with by the Code of Practice. There is clearly potential for adverse impact identified in the screening documentation, however, this has not given rise to the

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<sup>32</sup>Section 75 of the Northern Ireland Act 1998: A Guide for Public Authorities' Equality Commission for Northern Ireland, April 2010, pg 52.

correct answers being reached in response to the screening questions or any proposed mitigation.

The Department appears, in carrying out its screening of the SEN Regulations, to believe that the Regulations will apply equally to all children and will have a generally positive impact on everyone. While we appreciate that it is the intention of the Department that the impact of the SEN Regulations will have an overall positive impact on all section 75 groups, section 75 of the Northern Ireland Act 1998 requires more than avoidance of adverse impact. It also requires a proactive approach to be taken by designated public bodies to ensure the promotion of equality of opportunity where greater protections are required for groups who will be disproportionately impacted upon by proposals. This is particularly the case where variances have been identified through screening without any mitigation being proposed. Where there is a clear over-representation of one or more groups of children, section 75 requires positive action to be taken to ensure the enjoyment of equality of opportunity by that group. For example, despite identifying that schools may be inappropriately identifying SEN in some children and that SEN may be undetected in newcomer children due to language difficulties, the Department has decided not to subject the draft Regulations to an EQIA. The Equality Commission's Guidance for Public Authorities on Implementing Section 75 of the Northern Ireland Act 1998 states that:

*“The promotion of equality of opportunity entails more than the elimination of discrimination. It requires proactive measures to be taken to facilitate the promotion of equality of opportunity between the categories identified in Section 75 (1). The equality duty should not deter a public authority from taking action to address disadvantage among particular sections of society – indeed such action may be an appropriate response to addressing inequalities.”<sup>33</sup>*

It is clear from this that there is a statutory obligation on the Department to take action not only to mitigate against adverse impact or inequality but also to proactively promote equality of opportunity in order to comply with section 75 of the Act. Where issues regarding the enjoyment of equality of opportunity have been identified with regard to specific groups, which is the case in the current screening exercise, proactive measures must be taken to promote their enjoyment of equality of opportunity in order to ensure compliance with section 75 of the Northern Ireland Act 1998. These measures are not

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<sup>33</sup> Section 75 of the Northern Ireland Act 1998, A Guide for Public Authorities, Northern Ireland Equality Commission, 2010, pg 24

included in the suggested mitigation and we believe that a full EQIA should be carried out on the SEN Regulations.

Given that the proposals contained within the consultation document will impact significantly on children and young people, direct consultation with children and young people with SEN would be extremely beneficial for the development of these Regulations. This should include the provision of child accessible versions of the consultation document - a vital element to ensuring compliance with both section 75 of the Northern Ireland Act 1998 and Article 12 of the UNCRC.

The United Nations Committee on the Rights of the Child in its' Concluding Observations on the United Kingdom in 2008 recommended that,

*"...the State party, in accordance with article 12 of the Convention... promote, facilitate and implement, in legislation as well as in practice, within the family, schools, and the community as well as in institutions and in administrative and judicial proceedings, the principle of respect for the views of the child"*<sup>34</sup>

The Department's Equality Scheme also states that,

*"Specific consideration is given to how best to communicate with children and young people, people with disabilities (in particular people with sensory or learning disabilities) and people from ethnic minorities. The Department will also be mindful of multiple identity issues such as the particular needs of traveller children"*<sup>35</sup>

We would therefore be grateful for details of how you have, or intend to, consult directly with children and young people with SEN as part of this process.

In light of our concerns as outlined above, we would urge the Department of Education to carry out a full and comprehensive equality impact assessment on the SEN Regulations, including direct consultation with children and young people with SEN, using and relying on all relevant and necessary data in line with the Department's statutory equality obligations under section 75 of the Northern Ireland Act 1998.

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<sup>34</sup> *Op cit* 22.

<sup>35</sup> Para 3.2., *Op cit*.11

## **Conclusion**

NICCY welcomes the opportunity to provide advice to the Department on the SEN Regulations and also to meet with Departmental Officials to discuss issues relating to the SEN Framework and in particular, the SEN Regulations. We call on the Department to take into account the recommendations made in this submission, which we provide in the statutory advice capacity under Article 7(4) of 'The Commissioner for Children and Young People (Northern Ireland) Order' (2003)'. We would be happy to discuss any element of this submission or provide further information / clarification if required.