Response to the Department of Education's Consultation on the Draft SEN Code of Practice

Children's Law Centre
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Introduction

The Children's Law Centre is an independent charitable organisation established in September 1997 which works towards a society where all children can participate, are valued, have their rights respected and guaranteed without discrimination and every child can achieve their full potential.

Our organisation is founded on the principles enshrined in the United Nations Convention on the Rights of the Child (UNCRC), in particular:

- Children shall not be discriminated against and shall have equal access to protection.
- All decisions taken which affect children's lives should be taken in the child's best interests.
- Children have the right to have their voices heard in all matters concerning them.

We offer training and research on children's rights, we make submissions on law, policy and practice affecting children and young people and we run a legal advice/ information/representation service. We have a dedicated free phone legal advice line for children and young people called CHALKY and provide legal information through an online platform known as 'REE' and legal advice through 'REE Live Chat'. We also undertake strategic litigation to vindicate children's rights.

From its perspective as an organisation which works with and on behalf of children, both directly and indirectly, the Children's Law Centre values the opportunity to respond to the Department of Education's consultation on the draft SEN Regulations.

Caveat

CLC wishes to acknowledge that the Department of Education has been open to listening to the views of stakeholders throughout the various stages of the out-workings of the SEN and Inclusion Review and that provisions have been made which reflect that the Department has not only listened but has acted upon advice and information received.

However, the Department has issued this important consultation during a worldwide pandemic which is having multiple impacts upon children and young people within the education system in Northern Ireland. The day to day work of education specialists at CLC and colleagues throughout the sector has been significantly impacted due to the necessity to provide legal

advice, to prepare multiple legal actions for vulnerable children and young people and to engage with policy work relating to wave after wave of issues arising from the coronavirus pandemic. This situation is continuing. We have raised with the Department that the timing of this consultation and a substantial range of other consultations connected to education, SEN and disability issues, alongside the work created by the pandemic makes it impossible for CLC and colleagues in the sector to properly scrutinise the draft revised regulations and draft Code of Practice. We are aware that other stakeholders have similarly expressed concern. The consultation period has been extended, but the difficulties remain, with increased workload and disruption caused by the pandemic ongoing.

We note also that the new revised draft Code is an extensive piece of documentation with 14 chapters, 13 annexes and 14 sections of diagrams, which in terms of scrutiny, must be cross-referenced with the existing Code, draft revised Regulations and the SEND Act (NI) 2016. In Annex 2 of the consultation documents, the Department itself has noted 51 points of cross-reference between the draft Code and the draft Regulations. Given the pressures already mentioned, useful and constructive scrutiny of the Code is time consuming and difficult. Therefore, any responses given by CLC at this stage are subject to the caveat that we do not feel sufficient scrutiny has been possible or will be possible under all of the circumstances and our response is therefore a provisional response. We reserve the right to change our position and to take new positions on all relevant matters.

CLC are also extremely concerned with indications given to us directly and at public meetings that the Department will not count answers that are not submitted through the online questionnaire. This is not usual practice as we understand it and is particularly concerning given the matters omitted from the questionnaire. All responses should be counted and analysed properly. The online questionnaire notably omits matters of considerable importance which go to the very heart of the operation of the SEN framework. There are only 7 substantive questions in the questionnaire to cover an enormous level of change between the current Code and the draft Code.

Equality and human rights impact assessment, along with full and proper scrutiny of the significantly amended draft Regulations and an extensively altered revised Code of Practice, which is an extremely substantial document, will not be possible in our view until the succession of COVID-related education and health matters coming before the Departments and the Executive and impacting upon all stakeholders has subsided to the point where a

relatively normal level of business has resumed and we can look at the new operational context.

Please read this response together with our response on the draft Regulations as the changes we have suggested in relation to the Regulations would also require to be remedied within the connected sections of the Code.

Key Issues Identified by the Department of Education in Online Response Form

Our numbering below matches that within the online questionnaire.

3. **Do you agree that the responsibilities of the LSC are clearly set out in the SEN Code?**

CLC response: Agree – but there are some concerns more generally about LSCs

CLC notes that the requirement to monitor the effectiveness of the LSC has been removed from the draft Regulations and we recommend that this is reinstated either within the Regulations or Code, to ensure the LSC receives sufficient support to carry out their role effectively. CLC's view is that at the very least, the requirements should be underpinned by mandatory continuous professional development on **both SEN and disability equality** issues relevant to the LSC role and through regular review of LSC training needs. The Department might consider introducing **mandatory minimum annual CPD requirements** for LSCs to enable LSCs to access the time and resources they need for professional development opportunities. Schools will likely require increased recurring resources to enable them to meet the new duties effectively.

CLC is concerned that no regulation or guidance has been made regarding the number of children for whom an LSC ought to be responsible. CLC recommends that the Department considers how to enable an LSC to fulfil their role within a large school, or a school population with a high level of SEN to enable equality of LSC provision for pupils across schools of different sizes and with different characteristics (e.g. location in an area with high levels of socio-economic deprivation).

Section 3 of the Code is clear regarding the LSC role. Taking into account the potentially overwhelming level of detail in which the Annexes to the Code, requiring that a school should record evidence and decisions made about every registered child's special educational

provision, CLC is concerned that if the LSC is not in fact given the resources, time, support and autonomy to carry out the role, schools will struggle to fill the post and may even become reluctant to place children on the SEN Register.

4. **Where there is a concern that a child may have SEN, do you agree that the process to be followed by schools is clear in the SEN Code?**

CLC Response: Disagree

CLC notes the extensive information included in the Annexes to Code. We are concerned that the level of detail in recording procedures, and particularly the checklists, may lead to schools and others taking an **overly prescriptive approach** to deciding what Stage of the Code a child should be at. Such an approach would set the bar too high and cause delay for access to intervention at Stages 2 and 3. **There are also situations where a child needs to receive either EA Pupil Support Services or statutory assessment straight away based on the individual facts of their case, without the school having ticked off long lists of actions. This need to act upon the individual circumstances of the child should be highlighted in the relevant parts of the revised Code and specifically on the templates in the Annexes**.

Given the intensely bureaucratic manner in which the SEND framework has been operated in our experience, and whilst we fully support the need for evidence-based decision-making, we do have **significant concerns that the level of instruction and direction within the Annexes will cause decision makers to become entangled in unduly complex processes and to lose sight of the child. It needs to be simplified to strike the correct balance between guidance about evidence gathering and enabling exercise of professional judgment as to what is required at a particular time.**

An important safeguard in the current Code at paragraph 2.18 has been kept in the revised Code which provides that **the Stages of the Code are neither steps nor hurdles to be crossed – they are a means of informing schools about decisions to be made and that decisions should be child-centred. Processes should at all times serve the best interests of the child and ensure that their presenting SEN are identified and met.**

The "Key Point" in Section 3 that "not all children with learning difficulties have SEN" should be removed. This wording, taken out of context, is highly capable of being misinterpreted to the detriment of the child. **The key point is to identify the children who**

have SEN which is the purpose of the SEN framework and the definition is clearly set out in Article 3 as discussed above. The diagram at 3.9 is clear and useful.

CLC is also concerned that the Department has introduced a 4th Stage into the 3 Stage model without labelling it as such. This is the "**whole school provision**" stage. Whole school provision is incapable of definition as it is an amorphous concept which will vary from school to school. The reliance on this concept and the connecting of it to SEN provision is worrying due to the lack of clarity it carries with it. CLC have witnessed this terminology being misused in practice in a way that delayed access to SEN support. **CLC strongly recommends that the Department revises the draft Code to ensure that "whole school provision", which should actually be a mark of the quality and built capacity of general educational provision in any school, is not treated as a threshold or barrier that has to be surmounted before SEN can be identified and met.**

It is evident from Section 3.2 of the Code that inclusion is a strong feature of the foundation of the "graduated response" referred to by the Department. CLC strongly agrees in principle with the mapping exercise that is recommended but we see the whole school provision concept more as an **"inclusion" issue rather than an additional hurdle** to get over to reach Stage 1, which we predict it may become if not operated effectively.

CLC therefore recommends that the Department should consider emphasising it's guidance on whole school provision within the Inclusion Section where it would more comfortably sit, as it crosses over "relevant and purposeful measures" (as referred to in the current Code - linked to school resources) and accessibility of education and associated services for children with SEN and disabilities as well as the quality of general education for children who face disadvantage and those who do not.

The language of inclusion and reasonable adjustment within Section 3 is welcome and CLC agrees that schools should correctly record children with SEN on their registers.

However, CLC disagrees entirely with the way the Department is seeking to limit the children who might be registered by virtue of falling within Article 3 of the 1996 Order which defines "learning difficulty". It is clear from the legislation that a child who has significantly greater difficulty in learning than the majority of children his age, falls within the definition. The Department appears to be saying that if a child has lower ability then they should not be treated as having a learning difficulty and should simply rely upon reasonable adjustments made by the school under SENDO. Firstly, this contradicts the essential principal that we should have high expectations of all children. **Secondly, this analysis of the law is incorrect and is too simplistic an approach which is likely to be interpreted in an**

unlawful way by practitioners who follow this guidance. The peer comparator in the statute in this category is age, not ability level. **If the Department wishes to change and restrict the meaning of Article 3, it will need to amend the legislation.**

Similarly, the Department has attempted to "reinterpret" the meaning of "special" educational provision by requiring "whole school provision" to be ordinary provision in all schools. **Whilst such whole school provision should indeed be the norm in an ideal world, it currently is not and attempting to creat this distinction at a time when the capacity of schools in not sufficiently built and in the wake of a global pandemic, after years of austerity cuts, is liable to result in children who need special educational provision being unable to access it.**

CLC strongly recommends that the Department reworks its explanations linked to the Article 3 definitions to accurately state the legal position and that it avoids potentially unlawful attempts at limiting the statutory construction of the words and thereby the application of the definition to all relevant children, in excess of the legal powers held by the Department.

5. **Where a child is at Stage 1 of special educational provision, do you agree that the process to be followed by schools is clear in the SEN Code?**

CLC Response: Disagree

The "Key Point" on page 27 of the Code that **in exceptional circumstances a child may be placed directly into Stage 1 is <u>extremely concerning</u>**. CLC does not agree that this should be particularly exceptional in any case. A similar point is made at page 30 regarding Stage 2, and again the exceptionality is overemphasised. As stated above, **CLC prefers the language of the current Code that the Stages of the Code are neither steps nor hurdles** and very much welcomes that the Department has kept this this terminology in Section 3.51 of the revised draft Code, particularly given that the legislative threshold for statutory assessment is not a high bar test. **It would be better to remove the points about exceptionality and state, taking into account the content of section 3.51, that it would be usual for a child to progress through a continuum of provision but that decision as to the appropriate Stage must be based upon the individual circumstances of each case.**

The insertion of whole school provision into the revised Code as a precursor to accessing special educational provision, alongside the misinterpretation of Article 3 of the 1996 Order, causes a significant lack of clarity which calls for revision of the draft Code.

Our concern, as we have consistently stated, is about how the revised framework will be effective in the absence of school and EA capacity, time and resources which will enable it to operate in practice. Schools have been chronically underfunded, their budget deficits are growing in many cases, along with class sizes. Early intervention through the earlier stages of the Code is consistently unavailable and unmet need is neither measured nor reported upon.

CLC recommends that disaggregated data is captured about the length of time children are held at Stage 1 while Stage 2 resources are put in place. If unmet need is not identified and resolved quickly, there will be serious repercussions for the intent and effectiveness of the revised SEND framework. It must be recognized that processes are only as good as the outcomes they produce for the children and young people they are intended to serve.

CLC believes it is critically important that the Department sets out clearly how it intends to operationalise early intervention through supporting schools in mapping available in-school SEN provision, formulating PLPs, identifying/monitoring the extent of unmet need, ensuring cooperation between children's services and making related investment in schools and EA SEN support services, along with setting out short and medium-term timings, costs and budgets for phased SEND implementation.

6. **Where a child is at Stage 2 of special educational provision, do you agree that the process to be followed by schools is clear in the SEN Code?**

CLC Response: Disagree

Whilst it is generally clear what schools are being asked to do, it is not possible to agree with this statement without having information about how Stage 2 will be accessed for children under criteria within the EA's plan of arrangements and what the referral mechanism will be (whether through Educational Psychology or otherwise),

It is not clear without seeing the joint education/health plan, how schools will access health service advice or support, therapies and so on for pupils as part of educational provision in cooperation with the HSCTs and others at Stage 2.

7. **Where a child is at Stage 3 of special educational provision, do you agree that the process to be followed by schools is clear in the SEN Code?**

CLC Response: Disagree - the processes of EA and others are not clear enough.

CLC acknowledges that schools are responsible for the day to day management of their pupils needs but recommends that the **legal responsibility of the EA** to arrange the special educational provision set out in the statement is also referred to.

We have made comments in our response to the draft Regulations regarding Regulation 9 (regarding the provision that schools need not provide their evidence in writing at consideration stage), 10 (statutory assessment advices) and Schedule 2 (format of statement) which we ask the Department to consider here as these matters will have caused difficulty by extension within the code with serious impact on process, including for schools.

The guidance contained in Section 3 around working in a supportive partnership with parents and children, including by providing alternative formats in accordance with the Disability Discrimination Act 1995, and seeking the views of the child is very welcome and crucial to the confidence and participation of parents, children and young people. CLC has seen a booklet entitled “EA resources on Seeking the Views of the Child” which is a very informative and helpful resource.

CLC Response:

8. **Do you agree with the proposed content of the PLP?**

CLC Response: Agree, with additional suggestions

CLC notes the descriptors regarding attendance and recommends that there is explicit drop-down option within both the general attendance box (including authorised and unauthorised absence) and the box marked “Children in Specific Circumstances” to include **counting of children who are not attending full time every day** due to difficulties relating to SEN and/or disabilities. This will enable collection of data on informal exclusion from school, which in our

casework experience is an extensive problem which we have raised with the Department and which in our view relates to unmet SEN and potential disability discrimination. This descriptor box could also be used to collect disaggregated data on all Section 75 categories.

The PLP is a fundamental part of the revised SEN framework. It collects valuable information early and should prevent duplication of effort for schools in the longer term in collating relevant evidence. **The PLP forms a fundamental evidence base under the revised Code to enable a child to access the various Stages of provision**. School leaders have expressed concern to CLC about how they will be able to find the time and space to properly implement the new system. **It is imperative that sufficient time, resources and ongoing regular training and appraisal are afforded to schools** to ensure the PLP can perform its vital function effectively, particularly in the context of emergence from a worldwide pandemic.

The PLP should record any delays in access to EA Pupil Support Services, from the time that the need for a service is identified. **Section 2.30 of the draft Code is particularly welcome in terms of identification of unmet need through electronic notification of requests for external support from schools to the EA.** This will enable the EA to capture relevant data and act to build up services where demand exceeds supply.

CLC very much welcomes the inclusion of a box in the PLP to collect information about when specialist services were requested. This should enable better monitoring of any unmet need and enable accountability and improved service planning. **The monitoring of schools' adherence to the guidance, along with provision of support where required, regarding accurate and up to date maintenance of the SEN Register and logging of the time of requests for external support will be critical to maintenance of efficient operation of the revised framework, including through service planning.**

It is often the case currently that a child can be inappropriately left at an early Stage of the Code for years at a time and this could similarly happen with PLPs. Indeed, PLPs are to be reviewed only twice per year as standard, whereas current practice is generally to review IEPs each term (i.e. 3 times per year). CLC does welcome reference in the code that PLPs can be reviewed more frequently if needed.

CLC recommends that to support an outcomes-based approach which aims to achieve progress for a child, the Department places timescales within the guidance of the Code around the review of PLPs and when consideration should be given to moving a child to a different Stage of the Code if adequate progress has not been evident.

9. **Once a child with a Statement reaches the age of 14, do you agree that the school process for the completion of the first transition plan is clear?**

CLC Response: Agree

CLC welcomes the provisions regarding transition to adulthood and particularly the key point that planning for transition is not a one-off event. We believe that the enhanced participation rights of children and young people and the guidance around the transition process will serve to enhance the relevance and usefulness of transition planning.

CLC recommends that the Department makes express reference in this Section to the obligation under Article 7 of the UNCRPD to proactively enable children and young people who have communication difficulties or disabilities to participate meaningfully and with autonomy in decisions about transition to adulthood.

10. **Do you have any other comments you wish to make on the draft SEN Code?**

CLC has a range of additional areas within the Code upon which it wishes to comment at this point.

Section 14 – Inclusion

CLC recommends that the inclusion section is moved closer to the start of the Code, rather than being at the end. Inclusion needs much greater prominence as a fundamental building block within our education system ad the social model of disability needs to be included and explained at the outset. Our experience is that disabled children are increasingly being informally excluded from education due to unmet need and poorly operated support systems. We are hearing evidence of restraint and seclusion of disabled children. Vulnerable children have been chemically restrained during lockdown when they were not enabled to attend school. Children are exhibiting signs of distress, fear, anxiety and trauma due to poor service access and environments which are not meeting their needs.

CLC is raising serious concerns about the content throughout Section 14 of the draft Code on "Inclusion" which replaces the supplement to the current Code and therefore focuses on disability duties. CLC is very strongly recommending that this Section of the Code is rewritten as it is unfit for purpose, displays significant misconception of what a children's rights-based guide to inclusion in education should contain, fails to

reflect the UNCRPD and is in our view liable to result in increased disability discrimination in education by schools and the EA, including through use of informal exclusion.

Whilst we recognise concepts of inclusion are evident at various junctures throughout the Code, we do feel that one Section to cover disability-equality issues may not be sufficient. It may be best to split this into several graded pieces to make it easier to access for the user.

It is not clear from this Section what rights issues the review of inclusion uncovered. It does not reflect the marked and increasing inequalities what CLC are aware of through legal practice. There is linkage to the ECNI guidance, which is very useful. However, that set of guidance **pre-dates the UNCRPD and the Autism Act (NI) 2011**.

It is extremely concerning that there is a focus on examples of when a child might be excluded and that some of these examples could well amount to unlawful disability discrimination. Some of the language used is entirely unacceptable.

The current supplement on SENDO contains a range of helpful case studies about how schools can make reasonable adjustments. These have all been taken out. **It is highly advisable that the Department creates an updated set of relevant case studies, which take into account the duties under SENDO and the implementation of the UNCRPD, to enable schools and the EA to understand their legal duties.**

This Section of the Code is not compliant with SENDO 2005 and is seriously deficient in terms of modern human rights and equality duties under the Human Rights Act 1998 and the UNCRPD. It requires to be completely reframed through the lens of human rights of children with disabilities, including with reference to General Comment No. 4 made by the UNCRPD Committee.

The attitude and ethos displayed in this section of the Code is simply wrong. This policy is an extremely important mechanism by which this Department intends to indicate progress in implementing the UNCRPD. **The failure to screen the policy in and conduct a full EQIA has resulted in failure to understand the measures that need to be set into the Code to prevent disability discrimination and improve equality of opportunity at an operational level in the post-SENDO and post-UNCRPD systems in which children with disabilities are being educated**.

CLC is extremely concerned regarding Section 14.36 which instead of warning about the dangers of reduced timetables in terms of their discriminatory impact, describes these as a potential "reasonable adjustment" and in the related footnote (no.8) refers to a distressed child who has potentially been traumatised by an unsuitable school environment as a "school refuser". The draft Code actually states that "Schools should be aware that to overuse or abuse the use of reduced school day may be considered discriminatory, particularly for those children with a disability. There are references about justifying exclusion from mainstream education. **This is completely unacceptable within the context of statutory guidance which is meant to aid legal compliance with disability equality legislation.**

We put this also into the context that CLC believes that there are significant training unmet needs across Northern Ireland on the topic of unlawful informal exclusion in all its forms. **Regular training on disability law in education for schools, EA staff and others should be required to be documented by schools and should be continuously monitored.**

There is also important linkage which could be made with the DfC's pending draft Disability Strategy and the HSCB's draft disability framework.

Section 14.10 may need clarified to refer to the right to education in an "ordinary school" (for children at Stage 1 or 2 without a statement) rather than a grant-maintained school. In the same section, CLC take issue with the way that Article 8(2)(c) of the 1996 Order has been referenced out of context in terms of compatibility with the efficient use of resources being a pre-requisite for education in a mainstream school for children with SEN. This is just not correct and is open to damaging misinterpretation. The whole purpose of Article 8(2) is to impress upon schools the importance of doing everything reasonably practicable to ensure that children with SEN participate in all of the activities of the school with those without SEN.

There is reference to parents paying privately for placement in independent schools, which is misleading as it does not cover cases where the EA funds such placement.

CLC very strongly recommends that Section 14 is completely redrafted, putting the child's disability equality rights at the centre of the guidance, and reflecting the important disability equality duties owed to children with SEND to ensure they are not discriminated against in school, except in very limited, lawful and substantially

justifiable circumstances and then only after everything reasonable has been done to make adjustments and remove barriers to inclusion.

Statutory Duty to Cooperate

CLC welcomes the fact that the Department has included a full Section within the Code and references throughout the Code to statutory duties of cooperation. However, CLC has a concern that at the outset of the draft Code, in Section 1.7 the Department gives an unduly limited perspective about whom children's authorities, including the DE, EA, DOH and HSCTs, must cooperate with in relation to education under the Children's Services Cooperation Act (NI) 2015 (CSC Act). There is a focus in the Code upon cooperation with schools only under the category of "children's services providers". CLC acknowledges that central importance of schools as providers for children with SEN and disabilities but it is very important to recognise that schools cannot provide all the special educational provision called for on their own and children will potentially need access to external input from a wide range of children's service providers from both within EA and HSCTs and otherwise. Sections 2.8 and 2.10 and the table on Page 19 regarding HCST duties, and any other relevant references could also be clarified in this regard to ensure all children's service providers are recognised as being potentially relevant to educational access.

We refer to the very serious concerns that we have raised in our response to the revised draft Regulations, in particular on Regulation 10 (statutory advices) and Schedule 2 (format of a statement), including that the current draft format of a statement, which seeks to confine "special educational provision" to provision by EA and schools, is ultra vires Article 16 of the Education (NI) Order 1996 and obstructs legal compliance with the CSC Act. The concerns in this regard raised in CLC's response to the draft Regulations should be read as applying here because the issues stated have carried over into the content of Section 5 of the Code (Making and Maintenance of Statements).

There is a connection here and throughout the Code with the need to move away from silo working and move towards **systemising and jointly resourcing cooperation** between children's authorities and **all** relevant children's services providers to improve the wellbeing of children. **The Code will only be as strong as the legislative foundation it stands upon.**

CLC strongly recommends that the Department, as well as redrafting the relevant regulations and Schedule, should note expressly throughout the Code and in Section 9 of the Code (on statutory cooperation) that s9 of the CSC Act defines "**other children's service providers**" as:

***"any** person or body, of whatever nature, who provides a children's service or is engaged in activities **which contribute to the well-being** of children or young persons (but does not include a children's authority)".*

"Children's services" is similarly widely defined, since the legislative intent of the CSC Act is to move away from silo working and towards welcoming in all services that can be of benefit to children.

In other words, to ensure full legal compliance, the Department needs to clarify throughout the Code that the particular statutory cooperation clause regarding EA and HSC authorities, which will be inserted into Article 12A of the 1996 Order by s4 of the SEND Act, is an additional duty and as such does not have the effect of limiting the reach of the general duty in s2 of the CSC Act for such authorities to cooperate with any children's service provider, including those who are not within the EA or HSC authorities and who are able to contribute to the wellbeing of the child in relation to the right to education (as defined in Articles 28 and 29 of the UNCRC).

CLC welcomes the guidance on the joint plan to be produced by the EA and HSC authorities, including that lead partner should be identified for each action and we recommend that pooling of human and financial resources is included within the earliest possible stages of this planning.

In Section 9 of the draft Code the Department has a subsection entitled "**Distinguishing between Education and Health needs**". The issue with this sub-section is evident in the title, particularly in the context of our concerns with draft Regulation 10, Schedule 2 (specification in Part 3 of statements) and concerns about ongoing silo working. **CLC strongly recommends that this part is reworked to look at "Identifying Health Treatments and Services which may be part of Special Educational Provision"**. This is the actual issue which the CSC Act is designed to address in terms of education.

One of CLC's clients, a child with cerebral palsy attending a mainstream grammar school, who had been denied access to Allied Health therapies that she required in order to enable learning, was integral to the argument for such an Act. Has she been in a special school, such treatments and services would have been available. **This is both a SEN and an Inclusion issue which crosses over the statutory processes operated by the EA when drafting statements and the operation of SENDO 2005.**

CLC hold the view that the Department needs to rework the Section, in particular section 9.26 to enable the matter to be guided from a children's rights perspective and to ensure all parties explicitly understand the concept of health and other services as

special educational provision which can be placed into PART 3 of a statement of SEN, in line with the relevant legislation and caselaw on this matter.

Best Value

CLC is uncomfortable with the juxtaposition of the "Best Value" concept with identifying and providing for SEN. We do not dispute the duties around use of public funding. However, for too long, children have suffered the consequences of resource-based decision making rather than a needs-based/evidence-based approach. **CLC recommends that unmet SEN are identified and provided for and that references to "best value" which could be construed as financial constraint, are replaced with the language of meeting SEN through positive "outcomes"**.

Whole School Educational Provision

CLC recognises the importance of the concept that schools need to create an inclusive educational environment for all learners and that there are a range of tools which good practice would consider ought to be available. We do think it is important to recognise that resourcing has not always followed the policy of inclusion of children with SEN and disabilities in mainstream education. Not all schools are at the same stage in terms of development of inclusive practice. The physical characteristics of schools and the profile of their pupils and availability human and financial resources, and indeed time and space for all school staff to be trained and supported, all play in to the level of "whole school" provision available.

The Department must acknowledge that the experiences of all children and all schools are not equal and it must create a monitoring framework to show what "whole school provision" ought to include, assess progress and actively support all schools to continuously develop such provision to an equitable and inclusive standard.

Definition of a Child over Compulsory School Age

The definition in Section 2.38, of a child over compulsory school age as being a young person aged between 16 and 19 years of age, alongside mention of the cut-off point of 16 years of age for the presumption of capacity, seems to be somewhat vague, and could cause confusion over who has appeal rights. The meaning of "over compulsory school age" and how this is determined should therefore be clarified. There is no mention of the intersection of the

presumption of capacity in the Mental Capacity Act (NI) 2016 from age 16 onwards and the legal definition of compulsory school age, which do not match up neatly. CLC has recommended in its response to the draft Regulations that guidance be given about this issue and clarification would certainly be advisable.

Statutory Assessment Threshold Test

References within the draft Revised Code to "best use of resources" at the point where guidance is being given about making a decision about statutory assessment, are extremely strongly opposed by CLC. The overarching legal test in Article the 1996 Order is "probable necessity" as it relates to the child's learning difficulties. **It is not legally permissible for the Department to inject a resources consideration into an Article 15 needs-based assessment**. **Article 15 of the 1996 Order has not been amended.**

CLC recommends that reference to resources in this context is removed from Section 4 and that the Department inserts into the table in Section 2, on page 17 of the Code (in the third row from the end of the page) – "to decide whether is **probably necessary** to carry out a statutory assessment**…"**.

There may be an intention to reduce duplication within EA operations by avoiding the unnecessary use of panels. That is an entirely different matter. We have consistently challenged use of EA panels which we feel have operated in the absence of due process, transparency and accountability. If this is the point to which the reference to resources refers, CLC recommends it is clarified and dealt with separately, to ensure there is no unintended use of resource considerations within the statutory assessment decision-making process. **It may assist, in addition, to state expressly that consideration of resources is not permissible when deciding about whether the EA probably needs to determine the special educational provision called for by virtue of any learning difficulty the child may have.**

We very much welcome the Department's reference in this part of the Code to *LC's application* in which CLC represented a parent who successfully challenged the NEELB for failing to properly weigh parental evidence and the Board was found to have unlawfully refused a parental request for a statutory assessment. **The EA's decision-making practice in this area has not yet improved as illustrated by extremely high concession rates when refusals of statutory are challenged at SENDIST. It is a rarity for the EA to win such a challenge as decisions have not been evidence-based and we can only assume that they are resource-based. Our members continuously address this issue despite the very clear legal position. It is therefore imperative that there is nothing in the Code that**

further corrupts the operation of Article 15 and that all efforts are made to clarify that the legal statutory assessment threshold is simply a "reasonable probability" test based on need.

Identification and Assessment of SEN

CLC recommends that s2 of the SEND Act providing for the publishing of an EA plan setting out arrangements to meet SEN is commenced urgently. It is difficult to assess how responsive the revised framework is likely to be without sight of this Plan and the specific criteria which enable children to access each individual service.

CLC strongly supports the identification in the Code of the need to measure unmet need in the SEN population. CLC recommends the Department puts in place mechanisms, to collect and monitor information about the level of demand for EA SEN support services, waiting times that children are experiencing and outcomes of provision. For example, PLPs could be used to record the date on which a child is referred to a particular service and to monitor the outcome of the referral at school level, in addition to enabling direct school referrals to the EA to enable the EA to collect and analyse this information (as provided for in the Code).

CLC recommends that criteria for access to EA SEN support services are expressly required within the Code to be needs based rather than resource based. Whilst services may need to prioritised, there should be no shortfall in terms of early intervention. Early intervention is the foundation upon which the revised framework will stand or fall.

CLC recommends that the "Provisional Criteria" used by the EA to make decisions about identification and assessment of SEN should be comprehensively reviewed and consulted upon afresh as it is not fit for purpose.

Any threshold for service access should be based triggered at the point at which a child will fall behind if their SEN is not provided for. CLC recommends that the Department sets out how exactly it would plan to "flex" resourcing and/or provide contingency funding of children's SEN support services in response to evidence of unmet need. We anticipate that with the increased monitoring of unmet need required by the Code, there will be an initial spike in the level of need for specialist intervention, which in turn will require funding.

CLC recommends that costings and budgets (projected and actual) for the phased implementation of the revised framework, and in particular relating to the EA SEN support services, are published along with the EA Plan.

CLC strongly recommends that the Code is clarified to emphasise the right of the parent/young person over compulsory school age to request a statutory assessment. Our experience is that there is a lack of awareness of this legal right, an entrenched pattern of systemic failure to properly weigh parental evidence and an extremely poor record by the EA when challenged by parents through SENDIST about refusals of statutory assessments. The Code needs to be extremely robust in this regard. This legal right is a fundamental challenge mechanism. If EA are making evidence-based decisions, there is absolutely no reason for any fear of emphasising the legal rights of parents and the new rights of young people. The parental/young person's right should be made clear in the flowchart relating to statutory assessment as well as throughout the Code.

Similarly, it is very problematic in section 4.21 of the revised Code (where a child may need an immediate referral to the EA) that the right of the parents/young person to do so, completely independently of any other party, has been left off the list of relevant circumstances in which an immediate referral may be made.

CLC strongly recommends that the parental/young person's independent legal right, which is often the key to accessing the necessary intervention, is listed in Para 4.21 of the Code.

Children with Specific Circumstances

CLC welcomes the expanded list of children who may have particular circumstances impacting on SEN. CLC recommends that the Department expands the list further to include all nine Section 75 groupings and sets out clearly the types of mitigations and specific supports that will be made available to these protected groups.

Equality Screening

CLC strongly disagrees with the decision of the Department to screen out the draft Regulations and Code. While we appreciate that it is the intention of the Department that the proposals are universal in their impact and will apply to all pupils with SEN and disabilities equally, it is clear from the screening which has been carried out on the policy that not only is there potential for differential adverse impact there is evidence of actual differential adverse impact, including for a number of the Section 75 groups by virtue of higher prevalence of SEN associated with particular Section 75 categories or disparity in the comparative data,

potentially including on grounds of race, age, gender, disability and those with or without dependents/caring responsibilities.

Having reviewed the data within the screening document, it is clear that the screening questions have not been answered accurately. CLC has serious concerns in relation to a potential failure to identify the potential for adverse impact or indeed for promoting equality of opportunity for disproportionately represented groups of children with SEN, such as those with disabilities, Irish Traveller children, boys generally, Protestant boys, and potentially school aged mothers and young carers. These appears to be inadequate data and/or inadequate disaggregated data on children with disabilities, BAME children and LGBT children. We note also implications in terms of early intervention for younger children, looking at the significant disparities in numbers of children identified as having SEN/having a statement across pre-school and primary school settings, compared to older children in secondary education settings.

While the Department has noted the various disparities between the Section 75 groups, it has simply stated that the new provisions will apply in the same way to all children. This assertion demonstrates a misunderstanding of the Department's Section 75 duties and its Equality Scheme.

To comply with the department's Equality Scheme, the Regulations and Code should be screened in and in this instance a full EQIA is needed to fully assess impacts and then identify measures to be taken to prevent or mitigate against adverse impacts and to promote equality of opportunity.

While we appreciate that it is the "intention" of the Department that the policy will be equally beneficial to all, intention is irrelevant for the purposes of compliance with Section 75, with rather the potential for adverse impact being the issue engaged. This was the view of the Equality Commission in its decision on a complaint taken to the Commission by the Children's Law Centre and nine other organisations under Schedule 9 of the Northern Ireland Act, stating that the NIO, upon introducing the ASBO legislation, did not discharge its Section 75 obligations correctly. The Equality Commission, in its decision approved on 27th April 2005, found that while adverse impact may not be the intention of a public authority, in order to comply with its approved Equality Scheme public authorities must undertake an Equality Impact Assessment where there is the ***potential*** for adverse impact on children and young people.

The existence of Section 75 is an acknowledgement by Parliament that inequalities exist for members of the nine Section 75 categories in society and places an obligation on Government to eliminate these inequalities when introducing polices and legislation. **It is not enough for a designated public authority such as the Department of Education to simply state that where inequalities have been identified that no additional action is required other than the adoption of a blanket policy which they assert will impact on all young people equally.**

In order to comply with this element of its statutory equality obligations under Section 75 and its Equality Scheme the Department must address the potential adverse impacts which clearly exist and have been identified in its screening exercise and carry out a comprehensive EQIA, including direct consultation with children and young people.

In order to comply with Section 75, the Department is under a statutory obligation to address the inequalities which are identified through mitigation or the adoption of alternative policies. This will require the Department putting in place proactive measures to ensure, for example, that children with disabilities, boys (including protestant boys), children looked after, Irish Traveller children, BAME children and LGBT children are able to fully participate in their education.

The Equality Commission's Guide for public authorities on implementing Section 75 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."

It may also be the case that girls are underrepresented in the data due to failure to identify SEN (e.g., as is recognised to be the case in relation to autism). Further school aged mothers and those with caring responsibilities are likely to be significantly disadvantaged in the event that they are also impacted by SEN or disabilities. We are concerned that more than 23 years after the Section 75 Equality Duty was legislated for the Department does not appear to collect this data. Since the Department states that it does not collect all of the relevant data to assess equality impacts on this group, it should take urgent steps to secure the necessary data,

including from sources in the voluntary and community sector and then carry out a full EQIA to enable assessment, followed by any necessary measures to address adverse impacts and to promote equality of opportunity.

CLC believes that there is a very clear legal basis for the provision of enhanced or additional protections to be given purely on the basis of a pupil's identification within one or more Section 75 categories if it is evidenced, as in this case, that members of certain Section 75 groups have disproportionately higher levels of SEN.

CLC disagrees with the Department's assertion in its Equality Screening that "*the new SEN Framework is set in the context of a well-developed inclusive educational policy environment*".

In addition to the comments above, CLC has particular concerns about a lack of analysis on the human rights and equality impacts in the following respects:

1. CLC does not accept that capacity building has been adequate in the context of the lengthy period of financial austerity that schools have endured. The availability of budget required to underpin the policies and ensure the building of capacity in schools in terms of financial and human resources is critical. It is impossible to assess equality impact in the absence of budgetary analysis and this should include "building back better" within the education sector post-pandemic;
2. The shortage of specialist education provision in Northern Ireland and the ongoing Area Planning process to address this has not been linked in to the proposals;
3. The Department has failed to gather data on informal exclusion of children with SEN and disabilities from full-time education, though we have requested this repeatedly.
4. Severe and longstanding operational deficiencies within the EA CYPS (and the former ELBs) which have now been extensively reported upon due to whistleblowing and external scrutiny.
5. Lack of data on "unmet need" for children with SEN who have been unable to access early intervention at the current Stage 3 (new Stage 2).
6. Evidence emerging about the use of restraint and seclusion of disabled children within education settings, including in the publicly reported case of Harry Shakespeare, a five-year-old non-verbal autistic boy, stated to be "placid and non-violent" who was allegedly strapped to a chair by his legs and waist in school.
7. Lack of linkage with the DfC's Disability Strategy and the HSCB's Disability Framework both of which are currently under development.

8. The short and long term equality impacts of the ongoing worldwide pandemic upon children with SEN and disabilities, including the impacts of restriction of service on vulnerable children, significant school closures and ongoing access restrictions, disruption to operation of all children's service providers within education and health and unscreened modifications of all of the substantive legal provisions by the Department within the operative SEND legal framework without any public consultation.
9. Please see ECNI Guidance from November 2020 on the duties upon public authorities to drive the collection of disaggregated equality data, including in the context of the pandemic: https://www.equalityni.org/ECNI/media/ECNI/Publications/Delivering%20Equality/EqualityData-BriefingNoteNov2020.pdf

In addition to the above matters, CLC is raising serious concerns about the content throughout Section 14 of the draft Code on "Inclusion" which replaces the supplement to the current Code and therefore focuses on disability duties. CLC is very strongly recommending that this Section of the Code is rewritten as it is unfit for purpose, displays significant misconception of what a children's rights-based guide to inclusion in education should contain and is in our view liable to result in increased disability discrimination in education by schools and the EA, including through use of informal exclusion.

CLC would therefore request that the Department urgently reviews its screening decision in this instance. If the potential for differential adverse impact is found (which evidence demonstrates that it has been) on the grounds of race, gender, political opinion, age, disability, dependents or age, the Department should proceed to carry out a full and comprehensive Equality Impact Assessment (EQIA) on its revised SEND and Inclusion Framework using comprehensive disaggregated data sets and child accessible information. This will involve the Department consulting publicly and widely as part of this process, including carrying out direct consultation with children and young people. This will greatly assist the Department in mitigating any identified adverse impact on equality of opportunity and in the promotion of equality of opportunity as is required by Section 75.

Conclusion

We hope that the Department will find our comments constructive and useful as it finalises the arrangements for children and young people with SEN and disabilities under the revised SEND

framework. We thank the Department for the engagement it has had with CLC to date. We recognise that the Department has engaged widely over a lengthy period and we will be pleased to assist in providing feedback or views at any stage of the ongoing process if the Department would find further input helpful.