Response to the Education Authority's Consultation on Draft Frameworks for Specialist Provision in Mainstream Schools and for Special School Provision

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 Education Authority's consultation on a Draft Framework for Specialist Provision in Mainstream Schools and a Draft Framework for Special School Provision.

Caveat

CLC wishes to acknowledge that the Education Authority has been open to listening to the views of stakeholders as this consultation process has progressed through meetings and consultation events.

However, the Education Authority 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 a succession of issues arising from the coronavirus pandemic. This situation is continuing. 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 and fully scrutinise the proposals. We are aware that other stakeholders have similarly expressed concern. The consultation period has been extended on two occasions, but the difficulties which necessitated those extensions remain, with increased workload and disruption caused by the pandemic ongoing.

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.

It also appears to be the case that the Pilot programme running in parallel with this consultation, which is stated to have the purpose of informing the actions arising from this consultation and the consultation on the Department of Education's Revised SEND framework, has been running at a time when there is substantial disruption within the usual operations of the pilot schools. We are aware of clients unable to access specialist provision within their mainstream school due to staffing reduction and the operation of rotas for supervised learning (when mainstream school access was restricted), with disruption to access to specialist teaching and support staff. We

therefore have concerns about the impact of the pandemic and the restrictions imposed upon efficacy of the pilots and the effect of this upon the reliability of the evidence generated.

Introduction

CLC has responded to a number of consultations which are closely connected with the matters raised through this current consultation. We do not believe it is possible to properly consider increasing specialist provision attached to mainstream schools in the manner proposed, in tandem with moves to potentially restrict access for some groups of children to special school provision, without taking into account the wider issues that CLC have raised in our responses to the Department of Education's proposed Revised Draft SEN Regulations (March 2021), the Department of Education's Draft Revised SEN Code of Practice (March 2021), the Expert Panel's call for evidence on Educational Underachievement caused by Socio-Economic Disadvantage (October 2020), the Department of Education's Disability Action Plan 2019-2024 (December 2019) and the EA's Equality Action Plan and Disability Action Plan 2018-2022 (July 2018) .

Links to the responses mentioned above are here:

https://childrenslawcentre.org.uk/consultation-responses/#

We ask the EA to take the above responses into account as the information within them is relevant to both SEND Area Planning consultations.

Key Concerns

The main concerns following on from the above responses that we wish to draw to the EA's attention in the context of this consultation are outlined below.

Institutionalised Disability Discrimination

Disability discrimination has become institutionalised within our education system in the form of routine use of unregulated informal exclusion from school. In evidence to the Education Committee on 24/06/20 the Education Authority stated that:

"*We do not have the data; as it stands, we do not know how many children are excluded and to what extent, but we know that there are children who are being informally excluded".*

CLC's advice service (CHALKY) data records the annual increase in the number of issues logged by our advice service and illustrates the growing problems with barriers to specialist education placement and access to a full day at school for children with SEN and disabilities:

Discrimination - SEN Placement

1st April 2019 – 05th March 2020	252
1st April 2018 – 31st March 2019	219
1st April 2017 – 31st March 2018	135

Discrimination – Reduced Access

1st April 2019 – 05th March 2020	92
1st April 2018 – 31st March 2019	43
1st April 2017 – 31st March 2018	29

CLC also has long experience of acting on behalf of our clients to challenge exclusion of children with SEND from the day-to-day activities associated with education (school photos, school plays, trips), as well as segregation from peers who do not have SEN and disabilities. More recently we note increasing recognition of the unregulated use of restraint and seclusion in education settings. These potentially harmful and unlawful practices are system-wide indicators of the unmet needs of children with SEN and disabilities who are being failed by the education system which has an obligation to provide them with an effective education.

Funding Implementation of Disability Discrimination Protection in Education

SENDO became operational in 2005 on the cusp of a recession and from that time, the numbers of children with SEN in both the mainstream and special school sectors has significantly and progressively increased, as noted within the consultation documentation at page 10. A proportion of these children, not accounted for within the documentation or equality screenings, will have disabilities under the Disability Discrimination Act 1995, as amended by the Autism Act (NI) 2011.

The EA's comparative figures only run from 2015/16 to 2019/2020, although it is the case that there has been a very long running uphill trajectory in terms of the numbers of children with SEN within the school population. During this 5-year period noted, there was a 2.85% increase in the school population; a 15.86% increase in the number of pupils with statements; a 15.16% increase in the number of pupils with statements in mainstream schools; a 9.37% increase in pupils with statements attending specialist classes within mainstream schools and a 19.35% increase in pupils attending special schools.

This data does not sit comfortably with the EA's assertion that it is the lack of specialist provision attached to mainstream which is driving demand for special school places. It appears to us that it is the need for special school places which is driving demand for special school places and that demand is up for both specialist classes and special school places because of significantly increased levels of need across the pupil population.

CLC would like to see publication of in-depth analysis of the evidence which underpins both of these policies to enable us to understand the direction of travel, particularly regarding the number of special school and specialist class places that will be available within the system, set beside the demand for those places broken down by SEN category, both current (including unmet need) and projected. We want to ensure these two policies are more than an emergency response to system failure and that

they are will have long term positive impact and comply with the legal duty upon the EA to secure provision of sufficient primary and secondary education placements, under Article 6 of the Education (NI) Order 1986, which are “sufficient in number, character and equipment” paying particular “regard to the need to secure special educational provision for pupils with special educational needs”. Article 6 provides that the availability of school shall not be deemed to be “sufficient” unless they are “sufficient in number, character and equipment to afford for all pupils opportunity for education offering such variety of instruction and training as may be desirable in view of their different ages, abilities and aptitudes...” CLC are unable to satisfy ourselves on the currently available evidence, that the two policies will achieve the positive effects envisaged by the EA.

There is no analysis within the consultation document or within the equality screening about the difference between the provision offered by a special school (including health and therapy input) and that offered by a specialist class within a mainstream school. It is not clear what the basic structure of such a class would be or what would be an upper limit on numbers of children placed, how the staff/pupil ratio might be regulated and monitored and how the provision has been or would be “quality-controlled” to ensure its effectiveness. There is no evidence provided about the efficacy of the pilot provisions and any unregulated provisions to date. It is not even clear how long the pilot has been running for or when it is due to end.

There is no evidence-based analysis which underpins the apparent, and in CLC’s view, questionable, rationale of the EA that increasing the availability of specialist classes within the mainstream sector will take pressure off the special school sector by diverting pupils out of special schools. Neither is there any analysis of the cost implications of ensuring that mainstream schools and the EA have capacity to meet SEND legal obligations to the increased number of children that they will be responsible for as a result of the out-workings of this policy and the Department’s proposed Revised SEND framework.

There is no evidence provided in the consultation papers about the outcomes that different options are producing for the groups of children that have already been diverted from one type of resource/placement to another in advance of this

consultation. It has not been made clear which groups of children the EA envisages will be likely to use specialist classes as an alternative to special school placement.

It has been CLC's recent experience that children with moderate learning difficulties are facing difficulties accessing special school placement which would not previously have been an issue, with the messaging to parents being reported to us that "special school is for children with severe learning difficulties". We are also dealing with matters where impromptu arrangements for a specialist class placement have not proved successful. There also appears to us to be a level of reprofiling of children and schools to suit the resourcing issues rather than meeting the child's needs and vindicating their right to education. No evidence has been provided within the equality screening about the impact upon access to specialist provision for children with SEND of any informal reprofiling of special schools that has been ongoing in advance of this consultation.

There is no analysis about what the costs, benefits or impacts and outcomes would be of a range of possible configurations of provision. It seems very likely looking at the EA's figures and considering CLC's legal casework, that significant increase in financial provision and investment is required across all school types just in order to secure basic legal compliance with the law and policy that enables inclusion, and that is before the EA proceeds to shift groups of children into "enhanced" mainstream provision.

Increased opportunity for inclusion in mainstream school is stated to be one of the drivers of these polices. In order to assess the impact of SENDO upon inclusion to date, consultees and indeed the EA would have benefited from analysis of trends from 2005/2006 to date. Running alongside the increasing SEND population across the mainstream and special schools sectors, the capacity of mainstream schools and in some cases, special schools, to meet the legal entitlements of children with SEN and disabilities has been decimated through sustained austerity cuts, with growing class sizes, and accommodation which is not disability-accessible whilst increasing numbers of schools are going into budget deficit, limiting their ability to make basic SEN provision and develop disability accessibility plans.

The SEND system, despite being regulated by a robust legal framework through the Education (NI) Order 1996, as amended, has in CLC's view, been operating over capacity for a significant time period and after a prolonged series of deliberate relative budget cuts has predictably become overwhelmed and dysfunctional. Capacity includes financial resources (including running costs and capital expenditure); human resources; time for educationalists to plan and deliver interventions and to collaborate with others – including parents, carers and children; physical spaces and physical accommodations to increase accessibility to different types of learners; development of specialist knowledge/experience and access to inter-disciplinary specialist services at the point of need.

Capacity in the broad sense that we have described above should be sufficiently agile to be able to flex when demands increase in any particular SEND category. This is one of the intentions of this policy which will in our view only come to fruition with considerable additional funding and sustained system capacity building and maintenance of the necessary funding.

In CLC's legal casework experience where difficulties have arisen, school leaders and their staff are often lacking in knowledge and confidence about their legal obligations regarding equality and non-discrimination owed to children with SEN and disabilities. Alternatively, when they are familiar with legal obligations, they simply do not have the time and resources to implement them properly. In most disability discrimination cases that we deal with, school staff greatly appreciate the opportunity to put things right, access external support as needed and adapt practices accordingly.

We note the indicators developed by the EA which include a "common training framework and maximisation of learning outcomes". This is a positive step but it is not clear how success is to be specifically measured and mapped or what will be included in the training framework**. In CLC's view, recurrent disability equality training and human rights training is required and should be mandatory for all school staff as part of a common training framework** to enable them to recognise and comply with the mandatory legal rights and duties regarding SEND and inclusion and to alert them about the need to seek external support from colleagues in school, from the EA and the Department of Education and specialist providers when required. In light of

the increased recognition of the child as a rights holder within the new SEND framework it is also highly desirable that children and young people themselves access regular training on disability equality and human rights, which will assist in building inclusive school communities.

Connected to this, we note here that in our response to Department of Education's consultation on the revised Code of Practice on SEND, which would undoubtedly form part of training for school staff, we have stated that Section 14 on Inclusion is not fit for purpose and requires to be completely redrafted through the lens of the UNCRC and UNCRPD in order that it will be human rights compliant.

The Child as a Legal Rights Holder

In terms of human rights, it is critical that public authorities such as the EA, when formulating policies affecting children, recognise the child as an individual legal rights holder within the education system. Compliance with domestic law and with basic human rights standards under the ECHR, the UNCRC and UNCRPD would dictate that the child should be given their place as a person with the legal right to an effective education. Fundamental to this is the right to be enabled to participate in decisions; the right to be consulted and to give views in a manner that supports the child's needs and for those views to be given due weight; that all decisions should be made in the best interests of the child and that each child should be treated as an individual with interventions tailored to meet their individual needs.

Giving the child the recognition, they are entitled to is instrumental to enabling effective access to education. In respecting human rights, the EA should be directing this policy, based on robust evidence, towards meeting the needs of children with SEND and vindicating their rights.

It has been a focus on guarding insufficient resources and the longstanding unchecked systemic failure to place the child at the centre of decision-making processes which has led to the ongoing SEND crisis in Northern Ireland. SEND policies should be child-centred and not resource-centred in order to ameliorate the equality and human rights

failings of the current system and to ensure improved and recalibrated services are fit for purpose.

Statutory Duty of Cooperation

CLC's ongoing legal advice and casework demonstrates that there is a pressing need for a robust plan for ensuring cooperation between education and health as regards identifying and meeting special educational needs. CLC have frequently had to use legal proceedings to access direct and indirect health support within education via statements of SEN for children attending mainstream education, including for example children with cerebral palsy (of whom approximately 50% attend mainstream education).

Whilst the consultation on special schools has a focus on developing a plan regarding HSCT input to special schools with a "consistent, integrated tiered model of support" proposed, there appears to be no such plan for children with SEND in mainstream schools or attending specialist classes within mainstream. This requires to be urgently addressed given the health/education statutory cooperation duty pending via s4 of the SEND Act (NI) 2016 which includes a duty to produce a joint plan relating to provision for all children with SEN; given the operational duty in s2 of the Children's Services Cooperation Act (NI) 2015 and given that the direction of these two SEND Area Planning policies appears to be to limit access to special schools by redistributing an unspecified part of the population of children with SEND into the mainstream sector, with a further policy shift towards "inclusive" or "enhanced" mainstream education.

Incidentally, it is not at all clear what the access criteria are to be within the "tiered" model of health support proposed for special schools. This model and a model for access to health and other treatments and services within mainstream schools, for both specialist and ordinary classes, would require to be published and fully consulted upon.

If these two SEN Area Planning policies are predicated on the drive for inclusion as stated, then it will also be critically important that linkages are created between the EA policies on area planning for specialist provision in mainstream schools and special

school area planning and the Disability Strategy co-design process being run by the Department for Communities.

Inclusion

CLC agrees with the rationale put forward by the EA that inclusion of children with SEN and disabilities and the increase in opportunities for inclusion should be a policy driver, though from our perspective, that driver should apply regardless of the type of school setting, rather than being confined to the notion that more children should be moved out of the special school sector and into the mainstream sector and that this will result in "inclusion". Moving or diverting a child from one place to another will not in itself necessarily result in an inclusive education. Effective operational systems and resourcing are required to enable inclusion of the child with SEND within any education setting.

Within the domestic legal framework, children with SEN and disabilities are legally entitled to inclusion and equality of opportunity in education as a result of the Special Educational Needs and Disability (NI) Order 2005 (SENDO). It is with some considerable concern that CLC notes the incorrect legal analysis in both of the SEND Area Planning consultation papers that the SEND Act (NI) 2016 is "broadening the definition of SEN to include disabilities". **The legal definition of SEN in Article 3 of the 1996 Order, which already includes disability, has not and will not change under the SEND Act. SENDO 2005 introduced legal protection against disability discrimination in education settings, strengthened the rights of disabled children to attend mainstream schools and requires accessibility planning. Inclusion, equality and non-discrimination rights for disabled children in education are not a luxury or an "add on" and nor are they a recent policy development. These are currently operational legal entitlements.**

CLC has no doubt, drawing upon our long experience of SEND legal advice and casework that a properly funded, adequately resourced mainstream sector with enhanced capacity to meet the needs of children with complex SEN and disabilities and with early direct access to pupil support services at the point of need, would enable

barriers to inclusion in mainstream to be removed for a significant proportion of children with SEN and disabilities.

CLC's main concern about this policy proposal is that introducing "pop-up" learning support classes will be no more than a "sticking plaster", conceived as a reaction to extreme pressures which have been allowed to build for many years through chronic underfunding of schools, growing class sizes, steadily increasing levels of SEN and steadily diminishing capacity for responsiveness of EA SEN pupil support services.

We are concerned, in the absence of robust evidence to the contrary within the consultation papers, that opening a "specialist class" as a add on with a mainstream school may not be a sufficiently specialist approach for more complex children, particularly those who have not been enabled to integrate in a meaningful way within the mainstream part of the school due to barriers to inclusion which have not been removed.

It is CLC's experience that neither the special school estate nor the mainstream school estate have been equipped with the resources, capacity or tools necessary to properly, confidently and fully implement the policy of inclusion.

We continually work on cases where children are being informally and unlawfully excluded from school or have restricted access to the normal activities of the school, most commonly (but not exclusively) in mainstream schools, for reasons connected to SEN and disabilities. **It is CLC's view that unlawful disability discrimination has become institutionalised within our education system.** This will only be capable of redress with significant work and resourcing across all schools to enable understanding of disability equality rights as well as a scoping of unmet need for children with SEND which results in exclusion and segregation, alongside identification of how such needs will be met. This will also require analysis of the capacity of EA pupil support services to intervene directly and early at the point of need as part of ongoing EA improvement processes.

The EA's proposed criteria for mainstream schools wishing to open a specialist class state that the school should have an inclusive ethos. This appears to us to be a tacit acknowledgement that not all schools have an inclusive ethos. All schools should have an inclusive ethos and significant work is required to enable all schools to welcome children with SEN and disabilities and to be fully equipped to meet the diversity of presenting needs within their communities.

Criteria and Indicators

The indicators lack specificity and could be improved if reframed to describe SMART targets.

We have been able to examine the criteria and indicators for specialist provision in mainstream schools.

In CLC's view, specific indicators are required to enable monitoring by the EA of the impact of resources granted to mainstream schools to enable opening and operation of specialist classes, to measure effective inclusion and participation or, as the case may be, incidence and duration of exclusion, segregation or other unfavourable treatment. For example, the EA could monitor the number of children in specialist classes who are attending full time, and the number who are not and disaggregate that data by Section 75 grouping. These are measurable and can be tracked, as could the reasons for and duration of any non-attendance.

We cannot continue with a position where parents have a legal duty to ensure their child receives suitable full-time education but the state is responsible for or complicit in providing only part-time education. All children have equal entitlement to an effective education, regardless of background or status. No child should be denied the right to education (A2P1, ECHR, together with Article 14 ECHR; Articles 28 and 29 UNCRC; and Article 24 UNCRPD).

The EA should clarify indicator 4.2, that "inclusion in mainstream activities is promoted and supported", to demonstrate how this will be measured in a disaggregated way. It

is also not clear how EA systems will capture data to inform the continuous planning attached to the new frameworks where over a period of time it becomes apparent that a child has not been able to be included in mainstream activities for a sustained period. This would raise the question about whether all reasonable steps have been taken to enable participation and also whether mainstream placement is appropriate or whether, in cases where it may not be sufficient despite provision of reasonable accommodations, it is reinforcing forms of isolation or segregation from peers.

Under Criterion D, CLC suggests that the EA includes an additional indicator to measure the implementation of the child's right to give views and to participate in decisions that are being made about their education in line with Article 12 UNCRC and Article 7 UNCRPD as well s1 of the SEND Act (NI) 2016 which has commenced operation from 18/12/20.

The EA should revise the criteria and indicators for these policies to ensure linkage with the ECHR, the UNCRC and UNCRPD to enable measurement of children's human rights implementation. CLC suggests particular focus upon the best interests of the child, the participation/voice of the child in decision-making and inclusion, equality of opportunity and non-discrimination in access to education. Potential indicators should include collation of disaggregated data related to excluded children and regular survey feedback to collect data on lived experience and outcomes from affected children and parents/carers.

The EA should also engage with colleagues in the Department for Communities who are responsible for the ongoing co-design process of the draft Disability Strategy, where key themes are likely to include participation, inclusion and accessibility, which will include accessibility of inclusive education under Article 24 of the UNCRPD. Appropriate indicators for disability accessibility might be also formulated to enable measurement of implementation of the UNCRPD to be reported to the UN Committee at the next UK examination.

It would be beneficial if the indicators included that all school staff who might come into contact with children with SEND had accessed recurring human rights and disability equality training. This will assist in SEND Act implementation which aims to

improve inclusive practices, particularly regarding the amendments to Article 8 of the 1996 Order (duties upon Boards of Governors).

Indicators 3.1 and 3.2 are unclear both in purpose and effect and the related criterion uses language around accessibility which is confusing in the disability context. Separate terminology should be used to describe disability accessibility (which is an inclusion or reasonable adjustments indicator) and geographical proximity of school placement (distance from home, which may measure ease of travel to provision and the meeting of rural needs). The intended purpose and effect of the related criterion requires to be made clear.

Clear measurable indicators should be used to measure disability accessibility, including indicators connected to successful discharge by schools of the duty to plan for accessibility.

It is not clear from the indicators how exactly the EA will measure indicator 1.7 to show that a school has "a positive ethos" regarding inclusion or is "responsive to making reasonable adjustments". These would be useful indicators if the relevant data can be captured regularly, including through consultation with affected children with SEND and their parents and carers and through inspection processes.

Indicator 1.5 regarding the quality of the environment should include disability accessibility of the environment in the widest sense (not just water, energy efficiency etc), including all types of disability.

CLC suggests that Criterion E which relates to links with the community, should have an additional indicator to measure the extent and outcomes of collaborative relationships and any joint planning with children's services providers, including HSCT providers and other children's services providers.

The EA has not stated any mechanism by which the types and levels of need for the various school placement options will be monitored to enable forward planning. There is potential linkage with EA improvement processes including reviews of current Stage 3 pupil support services and the need to collect data on unmet need and waiting times to enable appropriate service planning (as set out in the above-mentioned report by

the Public Accounts Committee) and the avoidance of unduly escalating SEN which in some cases (the proportion of which is currently unknown) will have been caused by failure of early intervention.

Children without a Statement

The EA's online survey asks whether consultees agree that children without a statement should be able to attend specialist classes within mainstream schools. There is no relevant data, including no disaggregated equality data, and no analysis whatsoever included in the consultation paper about what the projected impact would be. It is therefore impossible to make fully informed comment about this issue.

Whilst in an ideal world, CLC would understand why a child being able to move between placement types flexibly may serve that child's needs, CLC has concerns that the proposed Framework for specialist provision in mainstream schools seeks to introduce two points of potentially reduced governance (dispensing with the need for a Development Proposal and dispensing with the need for a statement for access to specialist class provision), at a time when existing governance structures have been subject to intense criticism.

The EA should hold and collect data, including disaggregated equality data, relating to the operation of current non-pilot and pilot school learning support classes which would shed light on what the impact of current practice is in this regard. It is not clear what the current access criteria for learning support classes is (even with a statement), nor to what degree non-statemented children are accessing these. CLC is aware of cases where schools have decided to place children in such classes intermittently when they were not coping well in the mainstream classes. It is not clear if the EA intends schools to make such decisions or how this would be managed and reported upon in terms of demonstrating the effectiveness upon outcomes for children.

CLC notes the EA's comments about wishing to create a flexible responsive system and this certainly sounds attractive on paper. The EA states that "*Provision which is flexible and agile to meet the changing educational needs of children and young people will provide clarity and transparency for parents on the education and special*

educational needs support that is available to meet the changing needs of their children."

CLC has no confidence that flexibility in the system will operate in favour of the child or that it will result in transparency as this is not our experience. Evidence from CLC's casework would show that any 'flexibility' in the EA's operation of children's services to date, has proved detrimental to children and has resulted in the limitation of resource access, such as through unlawful failure to specify special educational provision in Part 3 of statements, which has enabled changes to be made to provision without parental consultation.

The EA states that it "considers it in the best interests of the child to experience progression" and indicates that progression means moving back into mainstream classes. CLC takes the view that progression is different for different children and needs to be assessed on an individual basis, taking into account how disability-accessible the mainstream class is on a case-by-case basis. If there was sufficient resourcing of the system, and robust management of resource allocation systems, we would not hold the same level of concern as we do. In the context that it is likely these classes will fill as soon as they are opened, as appears to us to have been the pattern to date, there is concern that children will be moved back into mainstream when this is not suitable to their needs in order to make room within the system.

The legal rights of children with statements are enforceable due to legal requirements for monitoring statements and appeal rights being available where the EA wishes to make amendments to specified provision. IEPs (PLPs under the revised framework) are not legally enforceable documents and do not have the same level of safeguard in terms of protecting the child from interference with provision which is connected to resource shortage or poor governance. Give the importance and long-term impact of placement decisions it is imperative that there is strong and transparent operational governance in place and that robust management data is collected and reported upon, as well as collection of data disaggregated for Section 75 groupings, to enable assessment of the efficacy and the equality impacts of the proposed framework.

In order to comment fully on this issue of placement of non-statemented children, CLC requests the relevant information about the proposed governance structure for the operation of specialist classes under the proposed framework, including criteria for access to learning support classes (entry and exit criteria), how, when and from whom children will access the "professional advice and input" that the EA state will "inform the educational journey"; what the mechanisms are for consultation with parents and children; who will be responsible to make the ultimate decision in the child's best interests and what challenge mechanisms will be available in the event that parents or young people disagree with decisions being made about the type of provision they should access.

Given that there is currently insufficient provision to meet the growing needs of statemented children, CLC struggles to understand how many places would be available to be used for non-statemented children and how the EA has assessed what impact the introduction of additional children would have on class groupings. We wonder, particularly regarding autism support classes, how this flexible operating system would impact routine-bound children who require strict structure and "sameness" on a daily basis to maintain self-regulation and the ability to engage in learning.

Pilot – Proposed move away from Development Proposals

CLC notes that the EA proposes to dispense with the use of Development Proposals as the mechanism through which specialist classes can be added, changed or closed. We recognise that out of necessity, in an effort to place children in the absence of available planned specialist provision, the EA has opened classes within mainstream schools already and also that a is pilot ongoing, although the details of the pilot, other than the names of the schools involved, are unclear. There is no information about the duration of the pilot. We have seen no evaluation of the evidence produced to date or how the provision compares to other specialist options in terms of the outcomes for children and young people.

No information or evidence has been provided within the consultation documentation to describe the detail of current or proposed governance which would operate as the

alternative to development proposals. It is therefore not possible to give an informed view about the impacts of such a decision, suffice to say that the current practice of "informally" opening classes has assisted in finding placements for some children but this mode of operation could not in our view act as a substitute for proper planning and development of the schools' estate in the longer term, particularly for children with SEND.

Whilst the EA refers to consultation under the Annual Plan of Arrangements which will be brought in through SEND Act implementation, this process is in itself currently unknown and it is unclear how rigorous the alternative mechanism would be in comparison to a Development Proposal.

CLC has questions around the circumstances in which the EA might close or change a provision and the rights of consultation or challenge affected parties would have in the absence of development proposals. We note that changes of this nature have potential to have significant differential adverse impacts upon certain groups of children, including those in Section 75 protected groups, and also in school communities where particular specialisms have been developed. We are concerned about whether sufficient checks and balances would be in place to protect the rights of children with SEND arising from the equality impacts of opening, closing or changing such provisions. Given the significant potential for differential adverse equality impacts, and the lack of relevant evidence and data within the consultation documentation and the equality screening, this significant proposal should have been screened in at an early stage and should now be screened in and a full Equality Impact Assessment carried out.

Failure of Legal Compliance in Equality and Human Rights Screening

Equality and human rights screenings relating to the introduction of a series of very significant SEND policies, including the proposed revised SEND framework and both of the current EA Area Planning Framework consultations, have not in CLC's view been Section 75 compliant and are in breach of the EA's Equality Scheme.

The two area planning policies should have been screened in due to the potential for significant differential adverse impact upon protected groups. There is clear evidence of potential for differential adverse impact in relation to redistribution of specialist educational placements. We are challenged as to how the EA can assert that there is no potential for differential adverse impact across the Section 75 categories and then screen out the policy given the lack of relevant disaggregated data. There is clearly and undeniably potential for differential adverse impact and the policy therefore needs to be screened in and a full EQIA undertaken as a matter of urgency. Failure to do so constitutes a clear breach of the EA's Equality Scheme.

To date, the unmitigated adverse impacts upon the population of children with SEN and disabilities of policies and practices which have not been fully evidence-based and equality proofed is clearly seen in the evidence gathered independently of the EA in a series of highly critical reports including the NICCY "Too Little, Too Late" report (March 2020), two reports on SEN from the NIAO (June 2017 and September 2020) and the recent Public Accounts Committee report on SEN (February 2021).

Adverse equality impacts causing harm to children with SEND are preventable and can be stopped or mitigated when identified through the proper and lawful operation of Section 75 and the proper discharge of the EA's equality scheme. This is only possible if the EA carries out thorough, effective, legally compliant equality screenings in compliance with its Equality Scheme using comprehensive disaggregated data.

Ongoing work on potentially wide-ranging EA SEND improvement processes being undertaken by the EA are highly relevant to the issues raised in this consultation. It will only be possible to fully appreciate the full suite of solutions required in the longer term to resolve the entrenched and longstanding EA special educational provision deficits after the SEND improvement programme has been fully implemented and outcomes assessed. **The Public Accounts Committee has recommended an independent review of SEN processes within the EA because processes are not fit for purpose. These are the very processes which ultimately lead to placement decisions under Part 4 of a statement of SEN.**

Pending the out-workings of SEND improvement within EA operations and the Department of Education's revised SEND and Inclusion Framework, the proper and lawful functioning of equality screening and monitoring processes are absolutely critical.

It is essential that the EA's SEND area planning policies are evidence based, monitored regularly and closely for equality impacts and that in the longer term we arrive at a position where there is full knowledge about the level and types of unmet need within the SEND population, disaggregated for Section 75 groupings and that the provision available is of sufficient capacity to meet those needs and increase in a timely manner when patterns of need increase. Whilst there is a stated intention to be able to meet projected needs, this is of little value when there is no information or data about the projected numbers of places required or how the increased capacity has been costed and budgeted.

In CLC's view the EA has not complied with Section 75 and its Equality Scheme in the screening exercises carried out on the two area planning consultations. It has made the wrong screening decisions. These decisions should both be reviewed and a full EQIA should be carried out on both policies, which should include effective and relevant consultation with children and young people with SEND and their parents and carers.

Screening Data

Within the consultation documentation and looking at the previous Ministerial Review of Special School Provision (2015), there is relatively good information available about where the gaps in the system are geographically and in terms of range of provision and these have been known to the EA throughout its operation.

However, the equality impact assessment information contained in the screening form for this policy, to determine what the impacts of these policies will be, is entirely inadequate, with a dearth of relevant disaggregated or other data and little or no useful

analysis of the likely policy impacts on the protected groups. **It is extremely concerning to see a screening of such poor quality having been authorised by the EA.**

There is no information or analysis of current flows of children who start in mainstream and move to specialist classes or special schools or who move between specialist classes and mainstream classes. There is no data about the reasons for such flows e.g., levels of unmet need, nor about the outcomes for children in specialist classes relative to peers in mainstream classes. There is nothing to indicate the numbers and characteristics of children from Section 75 groupings who might be impacted by this policy.

Quantitative Data

There is virtually no quantitative data within the screening document which is relevant for Section 75 purposes.

There is no data or analysis at all about impacts upon Irish Medium Education pupils within the consultation or screening documents. Given the severe lack of specialist class provision and the lack of SEN practitioners who can assess children through the medium of Irish for this sector, failure to collect and consider the data about the equality impacts upon children with SEND who learn through the medium of Irish and who may require specialist education in that medium is a clear breach of the EA's Equality Scheme.

It is recorded that there is no likelihood of impact to people living in rural areas and later the document states that 1/3 of the population lives in rural areas. There is no analysis of potential geographical impacts despite the fact the one of the main drivers of the policy is geographical consistency and "equity" of provision across the region.

The list of information used to inform the screening does not include consultation with children and young people and their parents.

It is stated that there is a 22% growth in numbers of pupils at special schools since 2014/15 but there is no analysis of the drivers of that increase, including impacts of unmet need, and no breakdown of the figures by Section 75 groupings to enable analysis of equality impacts on protected groups.

There is no disaggregated data on children with disability in mainstream schools but simply raw numbers on children in various settings (mainstream, LSC, special). There is no breakdown by type of SEN/D to enable understanding of which types of provision need to be increased and what the likely equality impacts of various options would be. The EA states in the screening that it will endeavour to ensure that no pupils will be disadvantaged by this framework. It is difficult to see how this endeavour can be successful in the absence of relevant evidence and data.

In complete contrast to the data on children, there is disaggregated data and breakdown by disability in relation to the EA workforce.

The data on religious belief is deficient, referring only to general population level data for those aged 16 years and over. There is no data considered regarding the religious breakdown of pupils. There is no mention of the known deficits in educational attainment experienced by protestant boys (or boys generally).

In relation to political belief and in relation to sexual orientation it is stated that “there is no evidence at this stage to indicate different needs, experiences or priorities for this group”. There is in fact no data at all presented.

There is no gender data or analysis regarding children at all, including no data on transgender children and young people for whom the EA has a policy and guidance. There is also no data on sexual orientation of children.

There are raw numbers on ethnicity with no analysis about equality impacts upon Newcomer children, Roma children, Separated, Unaccompanied Asylum-Seeking children or children from the Irish Traveller community.

Qualitative Data

Whilst there is a section on qualitative data, it contains no actual data or supporting evidence but rather a series of repeated generalised assertions to the effect that "the framework will provide a positive impact" or that the policy will apply to all pupils regardless of Section 75 characteristics, or that "the EA will endeavour to ensure that no [disabled] pupils will be disadvantaged by this framework."

Such generalised positive assertions demonstrate a fundamental misunderstanding of the EA's Section 75 duties and its Equality Scheme. Intention is irrelevant for the purposes of compliance with Section 75, with rather the potential for differential adverse impact being the issue engaged. The Equality Commission examined this issue 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.

In order to comply with its statutory equality obligations under Section 75 and its Equality Scheme the EA must identify and address the potential adverse impacts which clearly exist in relation to both of these policies and carry out a comprehensive EQIA, including direct consultation with children and young people.

The fact that the screening appears to have been carried out in the absence of consultation with children and young people and the parents and carers has compounded the failure to gather qualitative data for compliance with Section 75.

In relation to ethnicity, it is stated that "*as diversity in school increases with newcomer children and children from a minority ethnic background there will be no negative impact on this grouping with regards to the provision in the proposed framework but it is acknowledged that during the consultation and engagement*

phase there will need to be partnership working with EIS to ensure information reaches these families in an accessible way". This statement confirms to CLC that the EA has fundamentally misunderstood its equality duties under its scheme. It is impossible to say that there will be no negative impact without considering the potential impacts of the policy using disaggregated data for this group of children which the EA have totally failed to do in relation to these policies.

Mitigation and Screening Decision

No specific mitigations have been identified by the EA and the policy has been screened out.

In relation to the duty to promote positive attitudes to disabled people the screening records that this is not applicable. The EA has entirely failed to recognise the impact of disabled children being in the wrong type of school placement and how such children are perceived and treated by others when they exhibit behaviours related to disability that arise from unmet need. This is likely a result of failure to consult affected groups of children and their families when formulating the policy. This failure has resulted in the EA misdirecting itself. There is clear potential for differential adverse impact and the policy should have been screened in.

The EA has also failed to recognise the relevance of Article 14 of the ECHR (non-discrimination). CLC would also argue that that the right to family and private life and the prohibition of inhuman and degrading treatment are also potentially engaged when one looks at the impacts of school placement breakdown for children with complex SEND.

The EA states that it aims to improve outcomes for children with SEND and meet projected demand for places and that there will be no negative impacts. This is the rationale for screening out the policy. As set out above, intention is irrelevant for the purposes of Section 75 and rather it is the potential for differential adverse impact which is the issue engaged. If this policy is not properly resourced and operated, CLC fears, based on our casework experience, that it could have the opposite impact to

that envisaged by the EA, including increased informal exclusion and placement breakdown.

We highlight that age is engaged by virtue of the implications in terms of early intervention for younger children, as we are aware of 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, none of which is identified in this screening.

Taking the above analysis into account, and having also reviewed the screening documentation for the consultation on the proposed special schools' area planning framework, CLC strongly disagrees with the decision of the EA to screen out both of the policies.

In order to comply with Section 75 and its Equality Scheme, the EA is under a statutory obligation to address the inequalities which are identified through mitigation or the adoption of alternative policies. This will require the EA putting in place proactive measures to ensure, for example, that children with disabilities, younger children, boys (including protestant boys), children looked after, children taught through the medium of Irish, 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."

We are concerned that more than 23 years after the Section 75 Equality Duty was legislated for the EA does not appear to collect or hold the relevant disaggregated data. Since the EA states that it does not collect or hold all of the relevant data to

assess equality impacts, 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, which we believe it would be, that members of certain Section 75 groups have disproportionately higher levels of SEN.

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. 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, which should include "building back better" within the education sector post-pandemic;
2. The EA has failed to date to gather and publish data on informal exclusion of children with SEN and disabilities from full-time education, which is essential to inform this policy.
3. 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.
4. 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).
5. 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, reported to be "placid and non-violent" who was allegedly strapped to a chair by his legs and waist in school.
6. Lack of linkage with the DfC's Disability Strategy and the HSCB's Disability Framework both of which are currently under development.

7. 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.
8. 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 light of our analysis, CLC would therefore request that the EA urgently reviews its screening decision in this instance. If the potential for differential adverse impact is found (which we believe is highly likely) on the grounds of race, religion, gender, political opinion, age, disability, dependents or age, the EA should proceed to carry out a full and comprehensive Equality Impact Assessment (EQIA) on both proposed area planning frameworks using comprehensive disaggregated data sets and child accessible information. This will involve the EA consulting publicly and widely as part of this process, including carrying out direct consultation with children and young people. This will greatly assist the EA in mitigating any identified adverse impact on equality of opportunity and in the promotion of equality of opportunity as is required by Section 75. Failure to do so would constitute a breach of the EA's Equality Scheme.

Conclusion

We hope that the EA will find our comments constructive and useful. We thank the EA for the engagement it has had with CLC to date. We will be pleased to assist in providing feedback or views at any stage of the ongoing process if the EA would find further input helpful.