Response to Consultation on SENDIST (Amendment) Regulations 2021

Children's Law Centre
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Children's Law Centre
Rights House
2nd Floor
127 – 131 Ormeau Road
Belfast
BT7 1SH

Tel: 028 90 245704
Website: www.childrenslawcentre.org

For further information contact:

Rachel Hogan rachelhogan@childrenslawcentre.org

Introduction

The Children's Law Centre (CLC) 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'. 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, CLC is grateful for the opportunity to make this submission to the consultation on the draft Special Educational Needs and Disability Tribunal (Amendment) Regulations (NI) 2021.

Introduction

CLC notes that the draft Special Educational Needs and Disability Tribunal (Amendment) Regulations (NI) 2021 ("draft Amendment Regulations") have been consulted upon before the final versions of the revised SEN Regulations and Revised Code of Practice have been published and affirmed. The revised SEN Regulations and revised Code will operationalise the Special Educational Needs and Disability (NI) Act 2016 ("SEND Act").

The timing of this consultation is therefore problematic for consultees, including CLC, because having raised serious concerns about the revised SEND framework in our responses to the revised Regulations and Code we do not yet know what the final operation of the framework will look like in full detail. Please see our responses to the draft revised SEND framework here: https://childrenslawcentre.org.uk/consultation-responses/#.

The changes proposed to the SENDIST procedures in the current consultation by the Department of Justice, whilst they are narrow in scope, are still dependent upon the final affirmed version of the revised SEND framework. In the revised framework, the secondary legislation and statutory Code contain the bulk of the detail of provision about the rights and responsibilities therein and the SEND Act itself contains minimal detail.

It is therefore not possible for CLC to assess the full impact of the operational changes proposed by the Department of Justice which are to arise from provisions contained within future statutory provision. We also question whether the Department itself is in a position to fully assess the impacts, including under Section 75 processes and under the Human Rights Act 1998.

We therefore reserve the right to change our position or raise additional matters once the SEND Framework is finalised and affirmed, when we will have all of the necessary information available.

Key Concerns

The issues we are concerned about at this stage regarding the draft Amendment Regulations are connected with:

- the mandatory 4-week time limit for issue of a mediation certificate, which may restrict access to appeals for parents or young people who fail to access a certificate within the mandatory time period;

- clarification of processes around capacity assessments of young people by the EA and the impact of any forthcoming protocol or guidance formulated in the wake of the recent judgment in the case of ML –v- SENDIST and EA [2021] NI Fam 15 - https://www.judiciaryni.uk/judicial-decisions/2021-nifam-15.

- transfer of appeal rights where a young person is found not to have capacity to understand, retain, appreciate, use, weigh or communicate a decision about the exercise of legal rights under Part II of the Education (NI) Order 1996, as amended.

- Identification of a mechanism to secure effective remedies in SENDIST cases, including the award of compensation to children who have suffered disability discrimination, in line with compensation awards applicable in other types of discrimination cases e.g. race discrimination.

- The Equality Screening, whilst it contains some analysis of disaggregated data, appears to be defective regarding data on children with disability and human rights impacts of “capacity” provisions affecting access to justice.

Further detail on each of these concerns is provided below.

Mediation Certificates – Regulation 7 (Notice of Appeal)

Paragraph 2(9) of the Schedule to the draft Amendment Regulations makes provision for delivery of a Notice of Appeal in SENDIST cases within a two-month time limit which is contingent upon the issue of a mediation certificate.

CLC has raised a concern with the Department of Education in our response to the draft revised SEN Regulations that:

"Article 21C(3) of the Education (NI) Order 1996, as inserted by the SEND Act (NI) 2016 will require that a person cannot file an appeal unless they can produce a mediation certificate. **CLC is particularly concerned about blockage of access to appeal if a parent or young person fails to contact the mediation service to seek information and advice about mediation within the stated timescale of 4 weeks and is therefore not issued with a mediation certificate. Without a certificate, it is not possible to file the appeal. CLC believes that this is a clear breach of the right to a fair trial under Article 6 of the ECHR.**

In relation to Regulation 35, regarding the parent or young person having to notify the mediation service of an intention to appeal within 4 weeks of the EA notice of decision, in order to receive a mediation certificate, CLC suggests that the Department should alter the regulation in a way that will enable a parent or young person who attempts to file an appeal without a mediation certificate (after the deadline for informing the Mediation Service has passed but before the appeal deadline) to obtain one at any time during the 2-month time limit for filing an appeal to SENDIST."

Until such time as the concern we have raised with the Department of Education has been dealt with, through the introduction of a discretion to allow registration of an appeal, or removal of the connection of the mediation certificate with the right to file an appeal, or by some other mechanism**, CLC holds serious concerns about access to justice and human rights compliance in cases requiring a mediation certificate and therefore has concerns about the introduction of the provision within paragraph 2(9) of the Schedule** to the draft Amendment Regulations which **links access to appeal rights to issue of a mediation certificate**. CLC strongly recommends further consideration about how to procedurally deal with cases where parents or young people, some of whom may be within Section 75 protected groupings

or may otherwise need additional protection or mitigations, who fail to understand the need to seek a mediation certificate within 4 weeks of Notice of Decision from the EA, are enabled nonetheless to access their appeal rights, which in the current system, are live for two months.

We also note also that not all types of SEN appeals are going to be subject to mediation and therefore a straight substitution for paragraph 3 of the current Regulation 7 is not workable as there will not be an availability of a mediation certificate in all types of cases. **Provision will therefore need to remain in place for the filing of appeals of a type to which the mediation provisions are not applicable and can therefore not have a time limit that is contingent upon issue of a mediation certificate or the ending of a medication process.**

Further, the meaning of **wording of draft paragraph 2(9) of the Schedule, is unclear** regarding the deadline for appeal where there is mediation. There is reference to a potentially later date to file an appeal, being either within two months of issue of a medication certificate or "**at the end of the mediation process**" – whichever is the later date. **It is not at all clear what this critical provision means. CLC strongly recommends that the alternative time-lines for appeal, where there is entitlement to mediation, and mediation does take place, are clarified.** Is the deadline for filing in such cases "at the end of mediation" and if so how soon after the end of mediation must a parent draft and file an appeal? To what extent would this arrangement delay the outcome of a case, taken from the time that the EA notice of the relevant decision is received and which is subject to appeal rights (which is the current starting point for the two-month time limit).

CLC's understanding is that one of the aims of the Department of Education is to ensure that mediation processes runs as far as possible in parallel to SEN appeal deadlines so that there is no undue delay in accessing appeal rights. If that deadline is removed, there may be little motivation for public authorities to mediate early and access to justice might be hindered, along with access to vital SEND supports for an entitled child.

Our response to the Department of Education on draft revised SEN Regulations, which we restate in response to this consultation by the Department of Justice, is that:

"*It should be possible in CLC's view, for the Department to redraft the Regulations in such a way that a mediation process is enabled to run alongside the SENDIST process without delaying or obstructing access to appeal rights, whilst also allowing for mediation to occur at the earliest possible juncture for those who wish to avail of it*."

Determination of Lack of Capacity – Regulation 7

The draft amendment in paragraph 2(10)(b) and (c) of the Schedule provides for situations where a question is raised by the Tribunal as to the young person's capacity and the EA determines that the child lacks capacity, so that a parent is deemed to have filed the appeal rather than the child. Draft revised SEN Regulation 24 provides a list of 7 parties who can raise a question around the capacity of the child. CLC have requested consideration be given to an 8th category (the child's representative). The Department of Justice may wish to consider further whether it is adequate to refer only to the scenario where the SENDIST raises the capacity issue, or whether the Regulation should cover situations where any relevant person raises the issue.

Further, the operational mechanisms for EA capacity assessments are far from clear at present, as are the interaction between Mental Capacity legislation and the SEND Act and the associated revised Regulations and Code. It is therefore difficult to fully assess the proposed amendment to Regulation 7 to allow for capacity determinations.

There are a number of unfinished workstreams crossing various Departments at present around restrictive practices in health and social care settings (DoH) and a review of restraint and seclusion in schools (DE). CLC have urged in recent policy responses that a cross-departmental regional approach is required because the **human rights protections for the child are the same regardless of setting** whether in education, health, social care, juvenile justice, secure accommodation or the family home.

In relation to the interface between the Mental Capacity Act (NI) 2016, the ECHR, UNCRC and UNCRPD and the existing and revised SEND Framework, and flowing from that, the amendments to SENDIST procedure proposed in this Department of Justice consultation, we recommend that the Department reviews the decision in the case of **ML –v- SENDIST and EA [2021] NI Fam 15** and considers any impact on

provisions for capacity assessments in SENDIST cases. We understand that a joint Health/Education Protocol is under development at present as capacity assessments may be necessary more widely within education settings in relation to Deprivations of Liberty. It is not clear to CLC at this stage which professionals will be carrying out capacity assessments relating to education settings.

In particular, CLC asks for clarity about what the capacity assessment process be, who will carry it out and when and how will the child's human rights, including the right to a fair trial, be protected if the Tribunal or another relevant party raises a question about the child's capacity to exercise their rights under Part II of the 1996 Order.

Also, what challenge mechanism or safeguard (other than judicial review) has been put in place to enable a young person to challenge a determination that they lack capacity?

Transfer of Appeal Rights – Regulation 7 – Notice of Appeal

CLC has raised concerns with the Department of Education regarding transfer of appeal rights from a young person to a parent which are also relevant to this Department of Justice consultation. There may be circumstances in a small number of cases where a parent is not the appropriate substitute e.g. where a parent doesn't have capacity in relation to an appeal, where there is conflict between the wishes of the child and parent, where there is conflict between parents, or for a child Looked After where SEND appeal rights may not always have priority.

In light of these issues, draft revised SEN Regulation 30(2)(a) provided for an "**alternative person**" to exercise the appeal rights where the EA has determined the child does not have capacity to exercise their own rights under Part II of the 1996 order and if there was no alternative person, then the parent would do so. "Alternative person" is then defined in draft revised Regulation 30(4)(a) and (b). We have raised issues with the Department of Education in our response to the draft Revised SEN Regulations with a possible anomaly in 30(4)(b) which we hope can be addressed as we believe there is an error in relation to powers of attorney. In relation to 30(4)(a), this enables a young person to appoint **any person aged 18 or over who is not a**

parent, providing the young person has capacity in relation to the discrete issue of such appointment.

If the "alternative person" provisions of the draft revised SEN Regulations remain as proposed, then the current draft of the SENDIST Amendment Regulations 2021 – "deemed to have been delivered by the parent" will require to be amended to cover the persons other than the parent who may be deemed to be exercising or may be appointed to exercise the young person's appeal rights.

Remedy of Compensation

CLC is of the view that it would be remiss to discuss updating the procedural regulations for the SENDIST without drawing to the Department's attention the ongoing **lack of an effective remedy for disability discrimination in education**. In contrast to other areas of discrimination regarding children, which are generally subject to County Court proceedings, with access to significant remedial powers, the SEND Tribunal does not have a power to make an order for compensation. **The remedy of compensation for disability discrimination is in fact specifically excluded under Article 22(4)(b) of the Special Educational Needs and Disability (NI) Order 2005.**

To illustrate the injustice of the lack of an effective remedy, in 2019 the Equality Commission took a successful race discrimination case on behalf of a young person who was treated unfavourably because of his race when he went to purchase a laptop at a Curry's store. The young person received £3,000 to compensate him for the breach of his rights on that occasion. In contrast, CLC has dealt with disability discrimination cases where children have suffered months of humiliation, isolation, and exclusion with significant loss and disruption of education and after protracted cases, with intense preparation and much additional stress to families, the only remedy is a forced apology at the door of the Tribunal and a commitment to staff training. **The remedies available to SENDIST are not proportionate to the potentially long-term harm, distress and loss of opportunity caused to children by disability discrimination**.

Further, claimants are not entitled to legal aid for representation at SENDIST. CLC's casework experience is that such discrimination claims are extremely arduous and adversarial and that education providers will generally be legally represented. These

are technically very difficult cases which no layperson could fairly be expected to be able to navigate. The complex legal arguments involved have caused difficulty even in the highest courts, as can be seen in the unmitigated difficulties caused in this jurisdiction by the case of **Lewisham LBC -v- Malcolm [2008] UKHL 43**. It cannot in CLC's view, be in line with **Article 6 ECHR** (the right to a fair trial), to expect a parent to represent themselves at SENDIST in a legal claim of discrimination without representation, whilst facing a vigorous and adversarial defence from a legal team representing the Respondent. Then, even when successful, there is no adequate remedy.

It is difficult to see also how government departments can be said to be implementing the **UNCRPD** in Northern Ireland and in particular **Article 7** (best interests and voice of the disabled child) and **Article 24** (inclusive education) whilst it fails to implement the recommendations of both the Equality Commission and the United Nations Committee on the Rights of Persons with Disabilities that it is necessary to legislate for the power to award appropriate compensation to disabled people, proportionate with the severity of the rights violation.

These barriers to access to justice and access to an effective remedy are unacceptable from a Children's Rights perspective and do go some way to explaining the relatively low number of disability discrimination claims made to SENDIST. **We ask that the Department considers urgently how it can address these human rights issues effectively for children with disabilities who have suffered discrimination in education.**

Equality Screening

The Equality Screening appears to be defective in that it does not identify linked policies and fails to recognise that children and young people with disabilities are within Section 75 categories which stand to benefit from the policy e.g. by accessing their own appeal rights on a fair and equal basis with others. There appears to be no accurate data on the number of children with disabilities to enable analysis of impacts upon that group, as this is limited to children recorded in the census as being assessed by a medical professional as having a disability, which in our view is likely to be an underestimate. It is not clear where the Department has sourced the information that

34.5% of children with a statement have a disability. A lack of disaggregated data about children with disabilities in Northern Ireland indicates a pressing need to collect that data.

The decision to screen out the policy is therefore potentially unsound in our view and this will result in failure to identify and mitigate potentially significant negative adverse impacts upon equality of opportunity for children and young people, including those who have disabilities.

Further, there appears to be no analysis of human rights impacts, most notably the Right to a Fair Trial under Article 6 ECHR in conjunction with Article 14 ECHR (non-discrimination).

CLC recommends that the Department revisits its screening decision, carries out a human rights analysis and screens the policy in.

Conclusion

We hope the Department of Justice will find our comments constructive and useful. We will be pleased to assist further at any stage of the ongoing process of finalising the Special Educational Needs and Disability Tribunal (Amendment) Regulations (NI) 2021 if the Department would find this helpful.