



Response to the Education Authority's Consultation on the Draft Special Education Strategic Area Plan 2022 - 2027

**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 the Draft Special Education Strategic Area Plan 2022 – 2027 (SESAP).

Introduction

CLC welcomes the EA's first draft 5-year Special Education Strategic Area Plan (SESAP), which we note is underpinned by the Special Schools Area Planning Framework and the Framework for Specialist Provision in Mainstream Schools.

CLC is hopeful that ongoing collaborative strategic planning for special educational provision will enable the EA to move out of the crisis management that has been well documented in recent years in relation to provision of specialist education. EA systems have in the past failed to enable sufficient, proactive planning and adequate responses to ongoing shifts in the needs and characteristics of the population of children with special educational needs (SEN) in Northern Ireland, including those with multiple identities, such as for example, children with SEN who have disabilities; children with SEN at different ages and phases of education; children with SEN who are educated through the medium of Irish; children with SEN who face socio-economic barriers to education and children with SEN who are Newcomers.

The purpose of this consultation is to seek views relating to the vision, mission and key themes with regard to the draft five-year SESAP. The key issues that we wish to draw to the EA's attention in this context are outlined below.

Key Issues

Scope of the Vision, Mission and Key Themes

CLC notes that this draft SESAP is focused upon children who have a statement of SEN and who should attend a special school or a specialist provision within a mainstream school.

In terms of the legal requirement to ensure provision of inclusive mainstream education to children with SEN and disabilities, CLC queries the exclusion of children who have statements and attend mainstream schools (not within a specialist provision) from the draft SESAP. The strategic thinking is focused upon ensuring there are sufficient specialist places available for those who require them, however feeding into

that planning, it should be noted that planning effectively to promote and provide inclusive and accessible environments for children with statements in mainstream classes should reduce the number of children who may experience placement breakdown, leading to a requirement for specialist provision.

Further, children in mainstream classes with a statement, who are not in specialist provision but who will have significant and complex needs, such as for example, autism, Down's syndrome, cerebral palsy and other complex disabilities, also require access to suitable, inclusive and effective educational pathways as they move towards adult life, regardless of the type of school or class attended. Statemented children in mainstream classes should also be enabled to benefit from increased collaboration, co-operation and sharing of expertise and resources across sectors. They should have access to integrated therapeutic support from HSCTs. Strategic capital development is required for this group as well to ensure that all types of classes are made accessible to all children with statements, including those with disabilities.

Whilst this SESAP has a particular focus on specialist provision by virtue of the relevant underpinning frameworks, CLC feels it is important to note that all children with SEN and disabilities, whether or not they have a statement, are legally entitled to inclusive education in a mainstream school should their parents wish them to attend such a school, by virtue of Article 7 of the Education (NI) Order 1996. The legal test which may displace this legal entitlement is intentionally set to a very high threshold (i.e. incompatibility with the provision of efficient education for other children, where there are no reasonable steps which could be taken to remove this incompatibility).

In short, it is not explicit or clear within the draft SESAP where the strategic planning, including the short to medium term work areas, will fit for children with statements who are not in special schools or specialist provision in mainstream. It is also unclear where any linkage is for this group with the overall strategic area plan for primary and post-primary education. This group includes the majority of the 20,500+ children with statements, with the remaining 6,400+ in special schools and 2,100+ in specialist provision, as per the statistics included in the consultation document. It is not clear where the strategic linkages and inter-dependencies are between this group of statemented children and those specifically targeted by the draft SESAP and the

underpinning frameworks. This is also important in light of the stated intention to dovetail the Operational Plans with the Education Authority's new Annual Plan of Arrangements (APA) when it is introduced through the enactment of the SEND Act (2016) and Revised Code of Practice, given that these provisions are founded upon the availability of pupil support services for children with SEND, including those who do not have a statement. Further, pupil support services will be the subject of independent review and it is as yet unknown what changes will arise during the currency of this SESAP.

The EA should consider and plan how statemented children who are not in specialist provision can benefit from the strategic planning process, by specifically targeting them and planning for their needs through the short to medium term work areas listed on page 16 of the consultation document.

The EA may wish to consider whether the scope of the Vision and Mission and Key Themes of the draft SESAP should be broader, to include all children with statements so that the policy is not limited to providing "*opportunities for education alongside mainstream peers*" but rather provides increased opportunity for inclusive education for children with statements within mainstream schools, both in mainstream classes and specialist classes.

Legislative and Policy Landscapes

In CLC's view, the legislative landscape which the draft SESAP refers to should include the Education (NI) Order 1996, the Special Educational Needs and Disability (NI) Order 2005 and the Autism Act (NI) 2011, as amended. We welcome acknowledgement of the relevance of the duty to cooperate under s2 of the Children's Services Cooperation Act (NI) 2015.

It would be essential, given the necessity of collaborative efforts to bring the implementation of this policy to fruition, to also reference the legal power under s4 regarding the sharing of resources and pooling of funds which states as follows:

Sharing of resources and pooling of funds

~~4—~~ (1) *This section applies to a children's authority for the purposes of exercising any functions in accordance with arrangements under section 2.*

(2) *For those purposes, a children's authority may—*

(a) provide staff, goods, services, accommodation or other resources to another children's authority;

(b) make contributions to a fund out of which relevant payments may be made.

(3) *A “relevant payment” is a payment in respect of expenditure incurred, by a children's authority contributing to the fund, in the exercise of its functions.*

Parents continue to raise concerns with CLC about access to direct therapeutic input which enables access to education in both special schools and mainstream schools. The above provision is, in CLC's view, particularly relevant to the sharing of resources and potential pooling of funds between the EA and the HSCTs to enable better strategic planning, funding and delivery of integrated therapeutic input in education settings for the benefit of children who have SEND, whether with statements or without statements. There remains a concerning lack of clarity within the public domain about what the HSCT/EA models are for access to direct therapeutic input in education settings, whether specialist or mainstream.

CLC welcomes the acknowledgement of the rights of the child under the UNCRC and we welcome the fact that there has been consultation through the EA Youth Service with children and young people regarding this policy, including those with special educational needs. We note that the draft SESAP omits to refer to the rights of the child under the UNCRPD and in particular Articles 7 (best interests of the child and accessible participation of the child with disabilities) and 24 (inclusive education). Given the nature of the policy and the its obvious relevance to disabled children, CLC recommends these rights are expressly referred to within and progressively realised through the SESAP.

In terms of the policy landscape, CLC recommends that the SESAP should also include reference to and linkage with the DfC's draft Disability Strategy, particularly regarding awareness-raising of disability equality rights, disability-accessibility of schools and realisation of inclusive education across our education system.

Equality and Human Rights Screenings

In CLC's view, the draft SESAP 2022 - 2027 ought to be 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 allocation or reallocation of resources required for funding specialist educational provision. 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.

It is absolutely essential that such a far-reaching policy as the draft SESAP is evidence based. The EA has recognised the necessity to collect robust data in relation to this policy on an ongoing basis. The EA's intention is that focus needs to be on outcomes and what difference the plan is making to children and young people with SEND across localities. There is a need for robust evaluation of the effectiveness of specialist provisions attached to mainstream schools, a significant number of which are operating in the absence of formal approvals. The EA does not have a full understanding of the level of unmet need within the SEND population, including those with and without statements and therefore the strategic linkages between the earlier and later stages of the Code of Practice cannot be fully and properly made in the absence of that data.

It is entirely unclear what the consequences of this policy are upon children with SEND who have statements but attend mainstream classes only and who may have unmet needs due to lack of resources e.g. deaf children with inconsistent access to the curriculum due to lack of qualified classroom assistants in local areas. CLC's legal

casework experience tells us that having a place in a class does not equate to having properly planned and resourced specialist provision.

CLC have raised a concern with EA that there have been inequalities in access to specialist classes for children with autism i.e. only those with a diagnosis can access an autism specialist provision but there is a 3 to 4 year wait for a HSCT assessment for autism in some areas. Those who can afford to pay for a recognised assessment are better able to access a place than those who have to wait. Whilst we are aware that the EA is trying to ameliorate this problem, we note the lack of data and analysis on this type of inequality in access to specialist provisions in the screening documentation.

It has been stated in the consultation documentation that the “*decision was taken not to conduct an equality impact assessment as there are no negative impacts on any of the equality of opportunities and/ or good relations categories*”. Looking at the quantitative data provided, CLC is challenged to understand how this conclusion has been reached. **There is absolutely no disaggregated quantitative data or any relevant qualitative data analysis about children with disabilities.** This is a significant data-gap given that one of the driving factors of the policy relates to inclusivity of education. The qualitative analysis on disability within the screening document does not appear to be relevant to the policy and is not based on any disability data regarding children. There is no mention of disability accessibility across the education estate or what impact this policy will have in that regard. How will the policy affect children who need wheelchair access to a local school, who need disabled toilet facilities or who have sensory disabilities such as visual impairment or need safe spaces to carry out sensory activities designed by therapists?

There is no breakdown by type of SEN or Disability to enable understanding of which types of provision need to be increased, where they need to be increased and what the likely equality impacts of various options would be as resources are allocated or reallocated.

There appears to be no data about religious background of children and young people or analysis of the impact across sectors and whether there is any disproportionate

impact based upon religious background. The analysis states that the policy “will be applied to all pupils regardless of religious belief”. This statement shows 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.

The lack of data on disability and religion which are required to properly inform this policy indicate that the policy should be screened in and should be subject to a full EQIA.

The policy is assessed as having a “minor” impact as it will be “beneficial for all” children with SEN. Evidence has not been produced to justify this statement. The temporary specialist provisions that were set up to respond to a breakdown of the system in recent years have not been evaluated. 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. Again, there is a significant gap in relevant data at this point in the strategic planning process.

There is some acknowledgements but little or 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.

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. There is clear potential for differential adverse impact and the policy should have been screened in on this basis. There are steps that can be taken in relation to this draft SESAP to promote positive attitudes to disabled people, particularly through promotion, funding and support for inclusive education and by creating strategic linkages with other relevant policies such as the DE's SEND implementation and with DfC in the development of a draft disability strategy.

In terms of Human Rights, ECHR rights including A2P1, Articles 3, 5, 8 and 14 are also relevant given the impacts suffered by children and young people with SEND, arguably as a result of the previous lack of strategic planning and funding of specialist provision. CLC legal casework and policy work has included children with statements receiving no education whatsoever for prolonged periods; informal exclusion from school; part-time education access; use of potentially unlawful restrictive practices, and disability discrimination through failure to effectively plan and deliver pupil support services which enable access to the curriculum.

We also have experience of parents who had wished their children to receive Irish medium education (IME), having to move the child out of IME due to lack of suitable specialist SEN support in that sector.

We have supported families who are at (and some who have passed) the point of family breakdown due to the lack of support their children with complex disabilities are receiving in education settings and HSCT settings.

If this policy is not fully evidence-based, human-rights compliant, properly resourced and operated in a way that promotes equality of opportunity, 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.

CLC welcomes the commitment made by the EA to continue to develop robust data to inform the strategic area planning but in the absence of this robust data it is CLC's view that the policy should be screened in. If the potential for differential adverse impact is found (which we believe is highly likely, the EA should proceed to carry out a full and comprehensive Equality Impact Assessment (EQIA) to include consultation with children and young people affected by the policy. 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.

Resourcing the SESAP

No information has been provided about how this draft 5-year SESAP will be costed and resourced in order to enable the desired move away from emergency response and towards strategically planned provision, including through partnership working across sectors, to meet the needs of the population within local areas. CLC believes it is essential to have clarity on funding and accountability for any funding, including any pooling or sharing of resources, and how there can be sufficient flexibility of resourcing within local areas to respond to shifting demands to enable this SESAP to improve the educational environment for children with SEND in Northern Ireland.

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.