

# **Advice to the Education Authority on its Consultation on A Case for Transformation Proposed Framework of Future Provision for Children in the Early Years with Special Educational Needs**

**24<sup>th</sup> May 2018**

## **Introduction**

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

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

The UNCRC is a set of legally binding minimum standards and obligations in respect of all aspects of children's lives which the Government has ratified and must comply with in the discharge of its functions. The Northern Ireland Government Departments, including the Department of Education (DE) and its arm's length bodies, are obliged to comply with the obligations under the UNCRC by virtue of being a devolved administration of the UK Government, the signatory to the UNCRC. There are a number of UNCRC articles,

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

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

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

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

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

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

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

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

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

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

The UN Committee also recommended that,

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

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

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

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

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

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

The Committee went on to recommend that the Government,

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

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

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

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

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

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

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

Also of relevance to the current consultation is the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), which was ratified by the UK Government on 8<sup>th</sup> June 2009. Article 5 provides that persons with disabilities shall have equal access to all the protections afforded by the law. Article 7 provides that all children with disabilities shall have full enjoyment of all human rights and fundamental freedoms; that their best interests shall be a primary consideration and that their voices shall be heard in all matters concerning them. Article 24 provides the right for persons with disabilities to access an inclusive education system at all levels.

## **Discussions with Education Authority Officials**

In providing advice to Education Authority (EA) on the Framework for Future Early Years SEN Provision it was very helpful for NICCY staff to meet with EA staff on 6<sup>th</sup> March 2018, to receive presentations on the proposed Framework at a number of events and discuss some of the issues relating to the Proposed Framework for Future Early Years SEN Provision.

## **General Comments**

NICCY welcomes the Department's intention to introduce a more responsive and effective SEN and Inclusion Framework. In the year 2017-2018 62% of the total enquiries dealt with by NICCY's Legal and Investigations team were education enquiries and 40% of these, by far the largest category of queries, relate to children with SEN.

It is NICCY's view that there is a pressing need for meaningful reform of the SEN Framework, including at early years, in a manner which ensures better outcomes for children and young people. A great deal of the SEN cases which NICCY deals with illustrate an urgent and pressing need for increased investment in, and improved processes associated with, SEN. It is NICCY's experience that many children are not being assessed within a reasonable timeframe due to a lack of resources and the imposition of quotas which is having an extremely detrimental impact on the ability of those children to have their right to an effective education realised. In addition, there has been a marked decrease in the quality of statements with the specified provision being vague and unenforceable. It is fundamental in order to create a Framework for Future Early Years SEN Provision which meets the needs of children and young people and upholds their best interests that statements are as robust as possible, with clear specification and

quantification of need. NICCY wishes to see increased, appropriate investment in SEN to ensure early identification of SEN for all children and improved educational provision for those with SEN which meets their needs and enhances outcomes.

In addition, the transition period from the current Early Years SEND Framework to a new Framework will be an unsettling time for many vulnerable children and young people and their families. It is vital to reduce the impact of this on children and their families and to avoid any disruption to the education of children and young people with SEN. The EA should ensure that children and their parents are given access to as much information about the transition between the two Frameworks; information on the operation of the new system; what children and their families should expect; and the level of services that they can access. This responsibility on the EA as duty bearers must be discharged in a manner which places the child at the centre of the process.

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

NICCY notes the 6 'enabling proposals' outlined in the consultation document which will, "...transform how the EA provides support and services for children in the early years (0–6 years)". **Proposal 1 covers Communication** and it is encouraging to see such prominence given to this issue. From NICCY's perspective, it is vitally important that there are significant improvements in communication of information by the EA to parents who are trying to access information on the education options for their children with SEN. The system is complex and difficult to navigate. Both parents and NICCY staff have been highlighting the need for improvements in communication with the EA for some time. We particularly welcome the emphasis in this proposal to have a single point of contact in EA to deal with queries relating to early years SEN provision, developing methods to liaise and communicate with parents and the stated intention to provide much needed clarity.

**Proposal 2 commits to Strengthening Partnerships** with health and social care and early years providers to develop more integrated provision and support. Again, this is

welcome and necessary, particularly in light of the historic problems around the co-operation of Government Departments in adequately meeting the needs of children and young people with SEN. The emphasis on strengthening partnerships is particularly necessary given the legal framework as it relates to children and particularly children with SEN.

Firstly, there is no legal duty on health services to provide for the educational needs of children if requested to do so by the education authorities under Article 14 of the Education (NI) Order 1996. The duty to assist education authorities continues to be subject to resources. Secondly, The Children's Services Co-operation Act (Northern Ireland) 2015 places a statutory duty to co-operate on Government Departments in the provision of children's services in order to promote children's well-being. Thirdly, there is a similar obligation on health and education authorities to co-operate with regard to children with SEN under Article 4 of the Special Educational Needs and Disability (Northern Ireland) Act 2016 (SEND Act).

The emphasis on strengthened partnerships with health and social care will be vitally important for the successful implementation of many of the proposals under the new Framework, in particular with regard to the provision of therapies for children who wish to take up a nursery place in one of the Early Years SEN Centres. Without a firm guarantee of the provision of adequate and comprehensive therapies to these children, who might otherwise have taken up a place in a special school where therapies may be more readily available, it is unlikely that the educational needs of these children will be met in the Early Years SEN Centres.

NICCY has advised Government and engaged in the development of the Early Years SEN Framework from the outset. In addition, we have consistently advocated for and welcome the introduction of a statutory duty to co-operate on Education and Health authorities in meeting the needs of children with SEN. NICCY has raised this previously with the Department of Education, the Committee for Education and in our 2012 research, "*Review of Transitions to Adult Services for Young People with Learning Disabilities*," carried out by Professor Laura Lundy, Dr Bronagh Byrne and Dr Paschal McKeown. NICCY is very pleased by the introduction in the SEND Act of a statutory duty to co-operate on education and health authorities in the identification and assessment of children who have, or may have, special educational needs; and also in providing to children with special educational needs, the services which those special educational needs call for in the preparation of a transition plan.

Co-operation between the health and education authorities in meeting the needs of children and young people with SEN and disabilities will be an extremely important component of a successful Proposed Framework for Future Early Years SEN Provision. The EA will be aware of both the new obligation under the Special Educational Needs and Disability Act (Northern Ireland) 2016, but also under The Children's Services Co-operation Act (Northern Ireland) 2015 (CSCA). The CSCA makes a commitment to children's rights in line with the relevant provisions of the UNCRC in the delivery of children's services to improve the well-being of children and young people in Northern Ireland. This obligation is particularly important in the context of the Proposed Framework for Future Early Years SEN Provision given that the co-ordination of how Government Departments and agencies are meeting their obligations under this Act is now the responsibility of the EA. The obligations under the Act should inform all of the work which Government takes to improve the lives of children and young people in Northern Ireland. It places statutory obligations on Government Departments and agencies to co-operate with each other in order to contribute to the improvement of the well-being of children and young people as well as having to adopt a Children and Young People's Strategy. The Act sets out eight areas which define the well-being of children and young people and these include learning and achievement and living in a society which respects their rights.<sup>11</sup> It also states that in determining the meaning of well-being for the purposes of this Act, regard is to be had to any relevant provision of the United Nations Convention on the Rights of the Child.<sup>12</sup> The Act states that the NI Executive must adopt a Children and Young People's Strategy which sets out how it proposes to improve the well-being of children and young people.<sup>13</sup> The strategy must set out the outcomes the Executive intends should be achieved for that purpose<sup>14</sup> and the actions to be taken by Northern Ireland Departments, among others, for the purpose of achieving those outcomes.<sup>15</sup>

There are also obligations under the Act on the NI Executive to prepare a report on the operation of the Act<sup>16</sup> which is laid before the Assembly<sup>17</sup> and published by the NI Executive.<sup>18</sup> It must include statements on what actions have been taken by the NI Executive, and Government Departments, for the purpose of achieving the outcomes set out in the Children and Young People's Strategy; what progress has been made towards

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<sup>11</sup> The Children's Services Co-operation Act (Northern Ireland) 2015 1(2)(c) and (g)

<sup>12</sup> *Ibid* 1(4)

<sup>13</sup> *Ibid* 3(1)

<sup>14</sup> *Ibid* 3(2)(a)

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

<sup>16</sup> *Ibid* 5(2)

<sup>17</sup> *Ibid* 5(8)(a)

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

achieving those outcomes, or the extent to which they have been achieved; how children's authorities and other children's service providers have co-operated with each other in the provision of children's services; how children's authorities have exercised their powers to share resources and pool funds; and how the well-being of children and young people has improved.<sup>19</sup> The report should also identify any further opportunities for co-operation between children's authorities and other children's service providers that could help to achieve the outcomes set out in the strategy; any other ways in which the well-being of children and young people could be improved, and any ways in which the Children and Young People's Strategy might be revised in order to contribute to those improvements.<sup>20</sup>

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

**Proposal 3 relates to Support for Children with SEN aged 0-3 and their Parents.** This is extremely welcome given the importance of early intervention for children with SEN and need for greater advice and support for parents of children of SEN. It is very encouraging to note the intention of the EA to the provision of immediate support for children prior to the completion of the statutory assessment process which we know is delaying access to services for an extremely prolonged period of time. In 2015-16, 79% of statements of SEN were completed outside the statutory time limit of 26 weeks.<sup>21</sup> NICCY is extremely supportive of quicker access to services for children and young people with SEN. Delays in the system are having an extremely detrimental impact on the educational experience of children and young people with SEN. **NICCY wishes to seek assurances from the EA**

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<sup>19</sup> *Ibid* 5(3)(a)-(e)

<sup>20</sup> *Ibid* 5(4)(a)-(c)

<sup>21</sup> Special Educational Needs, Report By The Comptroller And Auditor General, 27th June 2017.

**that, given the current delay in the statutory assessment process, every effort will be made to ensure that children have their statements completed within the statutory timeframe of 26 weeks or less. NICCY wishes to seek assurances from the EA that the lack of emphasis for a statutory assessment for children who require it will not impact on the robustness of the SEN process which should be as efficient as possible, uphold the domestic and international rights of children with SEN and be driven by the needs of the child.** NICCY would also welcome the provision of additional information on the make-up and skills of the Early Years panel who will make decisions with regard to the provision of services for children with SEN in the early years. In addition, information on how to appeal and challenge decisions of the panel would also be extremely useful.

NICCY is very pleased to note the stated intention of the EA to set up parent cluster groups and parents and child sessions in order to not only meet the needs of the child, but also to provide much needed support for parents. NICCY is aware that many parents of children with SEN face a very difficult journey, which can be particularly magnified through isolation when their children are very young. The EA's commitment to greater support for parents and immediate provision of support for children with SEN is extremely positive. NICCY does wish to see a commitment to the proactive identification of children with SEN by the EA in partnership with the health authorities to ensure that SEN are identified as early as possible and as many children with SEN as possible and their parents can avail of this early years support. This will be particularly necessary given the emphasis in the consultation document on early intervention and consistency of provision.

We note the reference under this proposal to transitions. Transition planning will be an important factor throughout the educational journey for children with SEN and we would like to see greater emphasis on this throughout the document as it relates to transitioning from nursery to primary school and from the Early Years service at age 6. In particular, NICCY would be supportive of reference being made to the statutory duty on health and education authorities to co-operate with each other in the assessment, provision of services for children with SEN and transition planning. NICCY is hopeful that this duty and the duty on children's services providers to co-operate with each other under the CSCA will impact positively on the service provision for children with SEN under the Proposed Framework for Future Early Years SEN Provision. NICCY hopes these duties will make access to services for children with SEN and their parents more efficient and streamlined, with all of the relevant professionals and stakeholders, including the child and their

parents/carers, contributing fully, in co-operation with each other to better meets the needs of the child. Better co-operation and increased partnership working has the potential to lead to more adaptable and responsive services, leading to improvements in the educational experience of children and young people with SEN.

**Proposal 4 relates to Additional Support to Mainstream Pre-school Settings.** There is an emphasis in this proposal on support being, “...*additional EA professional and practical in-school support to meet the needs of children with SEN,*” in order to enable mainstream pre-school settings to meet the increased demand of children who have a diverse range of SEN. Also included in this proposal is the intention to recruit Early Years Practitioners to the Early Years SEN Inclusion Service. NICCY understands that these Practitioners will have appropriate training to provide additional support across mainstream school settings. NICCY also understands that these Early Years Practitioners will replace Classroom Assistants for children in the Early Years. While appropriately trained support staff who better meet the needs of children with SEN is to be welcomed, there is not enough information in the consultation document to fully interrogate this proposal.

It is our understanding from discussions with EA officials that Early Years Practitioners will be EA employees and will generally be deployed as required to work with groups of children, rather than on a one to one basis. NICCY has a number of concerns about this proposal, not least with regard to children who need one to one support and children who require continuity of provision. **NICCY wishes to seek assurances from the EA that where a child requires one to one adult support in the classroom, this will be provided.** It will be vital that Early Years Practitioners can build relationships of trust with and sufficient knowledge of the needs of the children in their care. This will require permanence of placement of Early Years Practitioners and continuity of provision beyond the age of 6. If permanence of placement and continuity of provision is not what is being proposed by the EA, it is likely that this will create additional stress for very young and vulnerable children with SEN in school.

NICCY assumes that if this proposal is to be implemented there will be no guarantee that children will be provided with the Early Years Practitioner that they know and had previously been allocated. There are a great many children with SEN who are likely to be adversely impacted upon by this. For children with SEN, it is vitally important to their enjoyment of education and successful integration, particularly in the early years, that they are adequately supported and comfortable. The deployment by the EA of Early Years Practitioners who may not be known to a child, in the absence of a permanent classroom

assistant with whom the child will have an established relationship of trust, can only add to the stress of very vulnerable children in education. NICCY believes that the practicalities of trying to build up new relationships of trust with Early Years Practitioners who are unaware of the particular needs and preferences of the child can only have a detrimental impact on the ability of a child with SEN to integrate successfully and access an effective education. This is particularly the case with children who have certain conditions, including those diagnosed with autism spectrum disorder (ASD). This level of disruption to and impact on the educational routine of vulnerable children with conditions such as ASD is contrary to the best interests of the child. NICCY is concerned that this proposal is resource driven, as opposed to needs driven, and does not have the best interests of the child as the primary consideration in line with Article 3 of the UNCRC. **NICCY would seek firm assurances from the EA that where permanence and continuity of provision is required and where one to one adult support is necessary that this will be provided.** NICCY is concerned that the loss of a classroom assistant who is known to and trusted by the child is in direct conflict with Article 3, 4 and 29(1) of the UNCRC.

NICCY assumes from discussions with EA officials and the lack of information in the consultation document that the EA requirements for the qualifications and experience of Early Years Assistants, have yet to be developed. There is clearly an early identifiable training need and it will be vitally important to ensure the continuity of service for children with SEN in schools that Early Years Assistants are fully equipped to meet the requirements of experience and qualifications as soon as these requirements are introduced. If there is any delay in the delivery of training and accessing of the necessary qualifications and experience by Early Years Practitioners, there will be a disruption to the educational service provision for children with SEN. If people who are currently employed as classroom assistants do not meet the requirements of qualifications and experience required to apply for the position of Early Years Practitioner, they may not be in a position to move into this role. The impact of such an eventuality on the educational experiences of children with SEN is potentially extremely damaging. NICCY wishes to see this potential training and skills deficit being immediately addressed so that children with SEN do not have the quality of their education compromised due to a failure to effectively plan and provide the necessary training for Early Years Practitioners in a timely manner.

**NICCY would request further information from the EA regarding the training and qualifications of Early Years Practitioners and further information on how they will be used in early years settings.** The Committee on the Rights of the Child's General Comment No.5 provides a detailed account of children's rights training requirements on

Governments. It notes that the Government's target audiences for training must include, *"...all those involved in the implementation process - Government officials, parliamentarians, judiciary, and for all those working with and for children."*<sup>22</sup>

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

*"...the reinforcement of adequate and systematic training of all professional groups working for and with children, in particular law enforcement officials, immigration officials, media, teachers, health professionals, social workers and personnel of child-care institutions"*.<sup>23</sup>

Training for professionals working with and for children and young people with SEN, such as Early Years Practitioners should include, training on children's rights, child protection training and on training on how to effectively communicate with children with SEN and disability. **We would seek clarification as to the type of training which will be delivered for professionals working with and for children under the Proposed Framework for Future Early Years SEN Provision and a timescale for delivery.**

**Proposal 5 relates to the Extension of the Continuum of Mainstream Pre-school Provision.** This involves setting up Early Years SEN Centres in mainstream pre-school settings. The emphasis in this proposal is inclusion and the rationale is to give children and their parents the opportunity to attend a mainstream pre-school with the support required to meet their needs. While NICCY believes that this is a welcome proposal, we do have concerns around how the EA plans to ensure that children attending the Early Years SEN Centres attached to mainstream pre-schools will be fully included in the school population. NICCY is concerned that there is the potential under this proposal for children to become isolated from the whole school population, which would entirely undermine inclusion and be very detrimental to the educational experience of these children. A great deal of work will be necessary to ensure the full integration of children in Early Years SEN Centres within the school population.

The Concluding Observations of the United Nations Committee on the Rights of Person's

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<sup>22</sup> Para 53, United Nations Committee on the Rights of the Child, Concluding Observations United Kingdom, CRC/C/GBR/CO/4, 20<sup>th</sup> October 2008.

<sup>23</sup> Para 21, *Ibid.*

with a Disability<sup>24</sup>, following their examination of the UK Government's compliance with the UNCRPD, is clear about the obligations on Government with regard to inclusive education. The detail included in the Concluding Observations on the provision of an inclusive education is reflective of the level of work that must be done in order to provide a truly inclusive education for children with disabilities. The Committee recommends that,

*“...the State party, in close consultation with organizations of persons with disabilities, especially organizations representing children and young persons with disabilities, and in line with the Committee’s general comment No. 4 (2016) on the right to inclusive education and targets 4.5 and 4.8 of the Sustainable Development Goals:*

*(a) Develop a comprehensive and coordinated legislative and policy framework for inclusive education and a timeframe to ensure that mainstream schools foster real inclusion of children with disabilities in the school environment and that teachers and all other professionals and persons in contact with children understand the concept of inclusion and are able to enhance inclusive education;*

*(b) Strengthen measures to monitor school practices concerning enrolment of children with disabilities and offer appropriate remedies in cases of disability-related discrimination and/or harassment, including deciding upon schemes for compensation;*

*(c) Adopt and implement a coherent and adequately financed strategy, with concrete timelines and measurable goals, on increasing and improving inclusive education. The strategy must:*

*(i) Ensure the implementation of laws, decrees and regulations on improving the extent and quality of inclusive education in classrooms, support provisions and teacher training, including pedagogical capabilities, across all levels providing for high-quality inclusive environments, including within breaks between lessons and through socialization outside “education time”;*

*(ii) Set up awareness-raising and support initiatives about inclusive education among parents of children with disabilities;*

*(iii) Provide sufficient, relevant data on the number of students both in inclusive and segregated education, disaggregated by impairment, age, sex*

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<sup>24</sup> Concluding Observations on the initial report of the United Kingdom of Great Britain and Northern Ireland, CRPD/C/GBR/CO/1, 3rd October 2017.

*and ethnic background, and on the outcome of the education, reflecting the capabilities of the students.”<sup>25</sup>*

**NICCY wishes to request information from the EA regarding how they intend to ensure that children attending Early Years SEN Centres will be fully included as part of the overall school population as a matter of urgency.**

As stated above, co-operation between the health and education authorities will also be a vital part of the success of the Early Years SEN Centres, particularly with regard to the provision of the therapies required to enable children to access an effective education. It will be vitally important to the successful operation of Early Years SEN Centres that there is no incentive for parents to choose a special school placement for their child, such as easier access to therapies. Children who attend Early Years SEN Centres should have access to all services required to enable them to avail of an effective education. For many children with SEN, access to therapies is essential in order for them to be able to fully participate in their education and to develop to their maximum potential. **NICCY wishes to receive assurances from the EA that agreement between education and health has been reached regarding the equitable and adequate provision of therapies for children attending Early Years SEN Centres prior to them being set up.**

In addition, under this proposal and proposal 6 which relates to special school nursery placements, children will have a minimum placement of 15 hours per week, with flexibility to meet the individual needs of the child. While the consultation document states that this is an increase for many children, no information is given about the number of children and the length of the increase in the school day. NICCY believes that the education received by all children must meet their needs. Where parents and children wish to access a full time place in preschool and where the child can manage this placement, a full time place should be offered. Flexibility to reduce hours where a child cannot cope with a full time placement should be the position, as opposed to flexibility to increase a part time placement where they can. This would ensure that children have access to a longer placement from the start of their school life, rather than having to wait for their needs to be assessed by the school Principal in collaboration with the EA, if an increase in their school day is possible. NICCY understands that not all children and young people who want a full time pre-school placement can access one due to limits on resources. However, if we wish to begin to meaningfully address educational inequalities, greater attention must be given

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<sup>25</sup> Para 53, *Ibid.*

to improving the educational outcomes of children with SEN. Currently over 70% of children in NI achieve 5 GCSE's grades A\* - C including English and Maths. This compares to 38.5% of children with SEN who do not have a statement and just 21.3% of children with a statement of SEN.<sup>26</sup> The Equality Impact Assessment (EQIA) indicates that the reduction in hours to a minimum of 15 hours per week may be considered a negative impact<sup>27</sup> and the NCB research also states that longer placements may be required for children with SEN to allow time for other duties such as feeding and care requirements, as well as supporting educational outcomes.<sup>28</sup> NICCY wishes to see the EA investing further in children with SEN and taking proactive measures as they are required to do under section 75 of the NI Act 1998 with regard to addressing the educational inequalities faced by children with SEN in education.

**Proposal 6 relates to Special School Provision** and the emphasis in this proposal is to ensure consistency of equitable provision which will meet the needs of children with complex SEN. Again, we welcome the emphasis on meeting the needs of all children with SEN and the emphasis in the consultation document on support, the development of links between school and home and the establishment of parents cluster groups. It is disappointing however, that there is no commitment given with regard to transport for children, particularly given NICCY's experience that children are having their access to education reduced due to transport difficulties and delays. NICCY believes that transport should be included in this review of Early Years SEN provision if we are to arrive at a framework for the future which is fit for purpose and meets the educational needs of all of our children and young people.

We note the inclusion under this proposal of the statement that in the future only children with, 'the most complex needs' will be placed in a special school nursery setting. No definition has been provided of what is meant by, 'the most complex needs' and no information has been provided regarding whether children whose parents wish to access a placement in a special school nursery setting will be able to access one if the child is not considered to have needs which come within this definition. **NICCY therefore wish to seek a clear definition from the EA of what is meant by the term 'the most complex**

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<sup>26</sup> Statistical Bulletin 6/2017 Qualifications and Destinations of Northern Ireland School Leavers 2015/16, Department of Education, 7<sup>th</sup> June 2017.

<sup>27</sup> Page 21, Draft Equality Impact Assessment of the Proposed Framework of Future provision for Children in the early years with Special Educational needs, March 2018.

<sup>28</sup> Page iii, The Education Authority Early Years Provision for Children with Special Educational needs, Supporting Desk Research Final Report, February 2017, National Children's Bureau.

**needs' and assurances from the EA that where a child wishes to avail of a special school nursery placement that they will not be prevented from accessing one.**

In addition, NICCY has concerns about the inclusion of the statement in this proposal that the EA will,

*“Make provision for children who are in their pre-school year and who have **relevant; up to date** professional advice regarding the complexity of their needs.”(Our emphasis)*

NICCY is acutely aware of the extreme delays that parents and carers of children with SEN routinely face when progressing through the statutory assessment process children's SEN. NICCY is extremely concerned that children may be precluded from accessing a special school nursery placement as a result of delays within the system preventing them from being able to provide, 'relevant and up to date' professional advice about the complexity of their needs which would assist in determining suitability of placement. In addition, it is extremely likely that if this proposal is implemented parents of children with SEN who do not have access to, 'relevant and up to date' professional advice will be forced, if equipped with the necessary resources, to pay for independent professional assessments and reports, placing them at a significant advantage to children and parents who cannot afford to pay. This is a significant adverse impact on enjoyment of equality of opportunity and should be addressed as a matter of urgency to ensure that this does not occur.

## **Equality Impact Assessment and Section 75 of the Northern Ireland Act 1998**

NICCY has serious concerns with regard to the robustness of the Equality Impact Assessment (EQIA). According to the Equality Commission for Northern Ireland (ECNI) an EQIA is, “...a thorough and systematic analysis of a policy”.<sup>29</sup> The EQIA that has been carried out on the proposed framework is not in NICCY's view sufficiently robust to be in compliance with this definition. In carrying out this EQIA the EA should have comprehensively examined the impact of all of its proposals against each of the nine section 75 categories and where the potential for adverse impact or ways to better promote equality are identified, measures to mitigate the adverse impact or alternative

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<sup>29</sup> Page 3, Practical Guidance on Equality Impact Assessment, Equality Commission for Northern Ireland, February 2005.

policies which would meet the policies aims while avoiding the adverse impact should have been identified.

The EQIA highlights the potential for adverse impact as a result of the reduction in hours in SEN placements in the early years and fails entirely to adequately address these and no mitigation is suggested. Annex 1 of the Equality Commission's Practical Guidance on Equality Impact Assessment<sup>30</sup> specifies that each EQIA must contain seven elements and outlines mandatory aspects, one of which is consideration of measures which might mitigate any adverse impact and alternative policies which might better achieve the promotion of equality of opportunity. The Practical Guidance is clear that the consideration of mitigating measures and alternative policies is at the heart of the EQIA process. Different options must be developed which reflect different ways of delivering the policy aims. The consideration of mitigation of adverse impacts is intertwined with the consideration of alternative policies. Mitigation can take the form of lessening the severity of the adverse impact.<sup>31</sup> Ways of delivering policy aims which have a less adverse effect on the relevant equality category, or which better promote equality of opportunity for the relevant equality category, must in particular be considered. Consideration must be given to whether separate implementation strategies are necessary for the policy to be effective for the relevant group. Clear evidence of the consideration of the impacts of alternatives must be apparent in the relevant consultation documentation.<sup>32</sup> The Practical Guidance document states that, if the Commission had to carry out an investigation into the undertaking of an EQIA the investigation would relate primarily to the mandatory aspects of the EQIA process.<sup>33</sup>

The EA appears, in carrying out this EQIA appears to believe that its proposals will apply equally to all children and will have a generally positive impact on everyone. While we appreciate that it is the intention of the EA that the impact of its proposals will have an overall positive impact on all section 75 groups, section 75 of the Northern Ireland Act 1998 requires more than avoidance of adverse impact. It also requires a proactive approach to be taken by designated public bodies to ensure the promotion of equality of opportunity where greater protections are required for groups who will be disproportionately impacted upon by proposals. Where there is a clear over-representation of one or more groups of children e.g. children with a disability, Traveller and looked after children, section 75 requires positive action to be taken to ensure the

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<sup>30</sup> *Ibid.*

<sup>31</sup> Annex 1, para. 4.1, *Ibid.*

<sup>32</sup> Annex 1, para 4.3, *Ibid.*

<sup>33</sup> Page 1, *Ibid.*

enjoyment of equality of opportunity by that group. The Equality Commission's Guidance for Public Authorities on Implementing Section 75 of the Northern Ireland Act 1998 states that,

*“The promotion of equality of opportunity entails more than the elimination of discrimination. It requires proactive measures to be taken to facilitate the promotion of equality of opportunity between the categories identified in Section 75 (1). The equality duty should not deter a public authority from taking action to address disadvantage among particular sections of society – indeed such action may be an appropriate response to addressing inequalities.”<sup>34</sup>*

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

**It is NICCY's considered view that the failure to consider and put forward any mitigation, despite the identification of adverse impact, has rendered the EQIA non-compliant with the statutory equality obligations under section 75 of the Northern Ireland Act 1998.**

NICCY is concerned by the lack of data considered in carrying out the EQIA on the Framework for Future Early Years SEN Provision resulting in a failure to fully consider the needs of children and young people and the potential equality impacts certain groups of children will face as a result of the proposals contained in the consultation document. Fundamental to the proper execution of an EQIA is the data relied upon by the public authority in carrying it out. We note in particular that statement that there will be no major impact on enjoyment of equality of opportunity on grounds of race. This is despite the fact that we know that 38.5% of Travellers are at stages 1-4 on SEN register and 15.8% have a statement of special educational needs, compared to 17.1% and 5% of all children respectively.<sup>35</sup> Also, we are aware that Newcomer children face particular adversities in

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<sup>34</sup> Page 24, Section 75 of the Northern Ireland Act 1998, A Guide for Public Authorities, Northern Ireland Equality Commission, 2010.

<sup>35</sup> Education data infographics 2015/16, 9<sup>th</sup> September 2016, Department of Education, <https://www.education-ni.gov.uk/publications/education-data-infographics-201516>.

education, specifically with regard to the identification of SEN. This has particular consequences for Roma children, 93% of whom are classed as newcomer children.<sup>36</sup> In addition, no reference is made in the EQIA to the much higher levels of SEN among looked after children who are also disproportionately more likely to be adversely impacted upon by the proposals. Having a statement of SEN continues to be more prevalent among the looked after children of school age (27%) compared with the general school population (5%).<sup>37</sup> Proper examination of the potential equality impacts of policy proposals will require disaggregated qualitative and quantitative data and its NICCY's considered view that this has not been done in this EQIA.

**NICCY firmly requests that in order to ensure compliance its statutory equality obligations under section 75 of the Northern Ireland Act 1998, the EA should carry out the EQIA on its proposals again, with the inclusion of sufficient data, proactive measures and mitigation and / or alternative policies to address the adverse impact identified through the reduction in hours.**

NICCY also notes that the consultation in this instance is 8 weeks only. We wish to request an extension of the timeframe in line with the EA's Equality Scheme commitments to 12 weeks. While paragraph 65 of the Stormont House Agreement, states that, "*The maximum consultation requirement on policy will be reduced from twelve weeks to eight.*" However, all designated public authorities have committed in their approved Equality Schemes to carrying out consultation for a minimum of 12 weeks on matters to which the section 75 duties are likely to be relevant and on the likely impact of policies adopted or proposed to be adopted by the designated public authority on the promotion of equality of opportunity. The Equality Commission's advice with regard to appropriate length of consultations is that in the case of a consultation on a policy which includes an Equality Impact Assessment (EQIA), the EQIA is subject to the arrangements in the Equality Scheme and therefore should normally be presented for a 12 week consultation in line with the Equality Scheme commitment. The current consultation is not in compliance with this advice or the EA's approved Equality Scheme commitment.

It will also be vitally important that the EA takes into account the views expressed through consultation in finalising the Framework for Future Early Years SEN Provision. There is a

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<sup>36</sup> The Department of Education states that the term 'newcomer' is used to refer a pupil who does not have satisfactory language skills to participate fully in the school curriculum and does not have a language in common with the teacher.

<sup>37</sup> 'Children in Care in Northern Ireland 2014/15 Statistical Bulletin' Department of Health, Social Services and Public Safety, 28<sup>th</sup> July 2016.

clear statutory obligation, under Schedule 9 paragraph 9(2) of the Northern Ireland Act 1998, on all Public Authorities to take into account any consultation carried out in relation to the policy. A firm commitment to this is also included within the EA approved Equality Scheme.<sup>38</sup> It is therefore essential that the EA fully complies with this commitment and clearly shows how views expressed through consultation on the current proposals have been taken into account in progressing the Framework for Future Early Years SEN Provision.

It is also essential that there is adequate consultation on the Framework for Future Early Years SEN Provision at the earliest possible stage, including direct consultation with children and young people as required under Article 12 of the UNCRC and Section 75 of the Northern Ireland Act 1998. NICCY believes that the emphasis on ensuring that children and young people with SEN are facilitated to fully participate in decision making should be a central tenet to the Framework for Future Early Years SEN Provision.

Article 12 of the UNCRC provides for the right of the child to be heard in all matters affecting them, with their views to be given due weight in accordance with their age and maturity. In 2008, following its examination of the United Kingdom's compliance with the UNCRC, the Committee on the Rights of the Child recommended that the State party, in accordance with Article 12 of the Convention, should promote, facilitate and implement, in legislation as well as in practice, within the family, schools, and the community as well as in institutions and in administrative and judicial proceedings, the principle of respect for the views of the child.<sup>39</sup>

The UN Committee on the Rights of the Child's General Comment No.12 on the right of the child to be heard emphasises the importance of the right to be heard and outlines the obligations on government. Article 12 discourages State Parties from introducing barriers either in law, or in practice, which would restrict the child's right to be heard.<sup>40</sup> General Comment No.12 is also clear that State Parties are under an obligation to ensure the implementation of the right to be heard for children experiencing difficulties in making their views heard.<sup>41</sup> It is therefore NICCY's view that there is a clear obligation on Government to ensure that, in the case of children with SEN, they take whatever measures are necessary to ensure that their voices are heard and that they receive the support they need to exercise their rights. This should include having access where required, to a

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<sup>38</sup> Para 3.2.10, Education Authority Equality Scheme, June 2015.

<sup>39</sup> Para 30, *Op cit.* 22.

<sup>40</sup> General Comment No 12, The Right of the Child to be Heard, CRC/C/GC/12 1 July 2009.

<sup>41</sup> Para 21, *Ibid.*

statutory advocacy service. Any failure to put measures in place where children are being prevented from realising their rights or encounter barriers which are not addressed and therefore adversely impact on the ability of children with SEN to exercise these rights, runs entirely counter to the Government's UNCRC obligations.

In addition to the Government's UNCRC obligations, Article 7 of the UNCRPD specifically refers to children with disabilities and obliges State Parties to take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.

**NICCY therefore wishes to request information on the extent and level of consultation that the EA has carried out with children and young people on its Proposed Framework for Future Early Years SEN Provision.**

## **Conclusion**

NICCY welcomes the opportunity to provide advice to the Education Authority on the Proposed Framework for Future Early Years SEN Provision and also to meet with Officials to discuss issues relating to the Proposed Framework for Future Early Years SEN Provision. The Commissioner calls on the EA to take into account the recommendations made in this submission, which she provides in her statutory advice capacity under Article 7(4) of 'The Commissioner for Children and Young People (Northern Ireland) Order' (2003). We would be happy to discuss any element of this submission or provide further information / clarification if required.