Addendum: NICCY Advice to the Department of Education on the Draft Special Educational Needs (SEN) Regulations and Code of Practice

March 2021

This paper has been prepared as an addendum to NICCY's previous advice papers on the draft Regulations and Code of Practice. It is intended to summarise and reinforce some of the key issues that need addressed within the draft Regulations and Code of Practice. This includes NICCY’s concerns about the proposed format of the Statement; the proposed separation of health and educational provision; advices to be sought at the statutory assessment stage; and some of the issues in the Code which are inconsistent with a child’s rights approach to inclusion.

As reflected in our previous submissions, NICCY is deeply concerned that significant alterations have been made to the draft Regulations which were not drawn out in the consultation documentation. In our previous advice papers, we called on the Department to provide detail on all changes and additions not referenced in the consultation documentation, a rationale for the changes, and a consideration of associated implications. We also highlighted that the consultation focused on discrete aspects of the Regulations and the Code, with the questions on the latter largely centred on clarity of the school role, and therefore did not invite comment on the SEN Framework in its entirety. As we previously highlighted, it is imperative that stakeholders are made clear on all revisions and have the opportunity to advise accordingly. As such, we stress the critical need for a meeting with the Department, as it progresses the analysis of consultation responses, to discuss the range of revisions to the Regulations and the key issues to be addressed. We have set out some of the predominant issues in the paragraphs that follow.

Proposed distinction in education and health provision

Amongst others, revisions to the draft Regulations affect health/education cooperation, and the format of, and therefore specification in Statements. We stress that it is unacceptable to separate educational and non-educational needs within the Statement. The proposal that health and social care provision is to be listed at Part 6 of the Statement ‘non-educational provision’, fundamentally weakens the duty to specify provision within Statements as Part 6 is not subject to the same legislative requirements re’ specificity and quantification as Part 3. It is also inappropriate to starkly distinguish health and education, as per part of Section 9 in the Code. This distinction between health and education in both the Regulations and Code is clearly at odds with the ethos of cooperation, which is integral to the new SEN Framework and to fulfilment of obligations as per the Children’s Services Co-operation Act (CSCA).

We welcome that the Code references the duty of relevant authorities to co-operate under CSCA and note acknowledgement that Section 4 of the SEND Act expands on this, setting out the specific ways in which health and education must co-operate in respect of children with SEN.  **NICCY recommends that the Regulations make further explicit reference 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 in the context of Annual Review**. We also express concern that the definition of children’s authorities and children’s service providers as set out at various parts of the Code including Section 1.7 and Section 9, is limited and does not adequately represent the definition set out in the CSCA. This needs to be addressed to reflect the CSCA.

Advices to be sought at the Statutory Assessment and Statementing stage

We reiterate profound concern that the newly proposed Regulation 10 no longer refers to health treatments and services at the list of provisions to be considered by the EA when obtaining advice for the purpose of assessment or for potential Statements, as was set out in the draft 2016 Regulations. We request clarity on the purpose and implications of other proposed edits to Regulation 10. For instance, we have some concern about the implications of Regulation 10(5) which states that the advices captured as per Regulation 10(1) *shall be written advice and not relate to any matter which is required to be specified in a statement by virtue of Article 16(4)(b).* We also have concern that Regulation 10(7) now states that the EA must not seek statutory advice when advice has previously been sought for the purposes of Part 2 of the 1996 Order and various parties are satisfied that it is sufficient. Further clarity is required on how this Regulation might impact on the accuracy and timeliness of the advice obtained.

Ensuring the new Framework protects children’s needs and best interests

With regards to the proposed format and content of the Statement, we are deeply concerned at the proposal that ‘primary need’ is to be recorded at Part 2. There is a very significant risk that this will result in the overlooking of a child’s other needs, with the unacceptable consequence that these further needs are not provided for at Part 3 of the Statement. There must be the facility to record for the full range of a child’s needs in the Statement.

At other stages of the Code, we note a focus on ‘resources’ which could be to the detriment of a child’s needs and best interests. For instance, at Section 4.41, we note that one of the proposed principles underpinning EA’s criteria for deciding whether it is necessary to make an assessment or Statement is that *‘the EA make best use of the resources available to it’.* We reiterate that any decision taken with regards statutory assessment or Statement should be in line with a child’s needs and best interests, not as per available resource.

Child’s Rights Framework

In order to ensure that the draft Regulations and Code of Practice are truly child’s rights compliant, we recommend that the Department engages in a Child’s Rights Impact Assessment (CRIA). This Framework examines the potential impacts on children and young people of laws, policies, budget decisions, programmes and services as they are being developed and, if necessary, suggests ways to avoid or mitigate any negative impacts. It focuses on how children’s rights may be affected by the decisions and actions of governments, institutions and others in the areas of law, policy and practice. Impacts are measured against the rights set out in the UNCRC, its Optional Protocols, and other international human rights treaties.

NICCY strongly urges the Department to engage in a CRIA to ensure that the draft Regulations and Code of Practice do not negatively impinge on children’s and young people’s rights. **We feel that this is essential in ensuring a robust consideration of any impacts that the** **proposals may have on children’s and young people’s rights, and the modifications required to mitigate any negative impacts.** NICCY has provided the Department with a CRIA Framework and would be pleased to support the Department to engage in this exercise relative to the Regulations and Code of Practice.

We feel that Section 14 of the Code particularly warrants further scrutiny by a CRIA. Whilst we welcome the Department’s intention to provide guidance to facilitate inclusive education, and also welcome that this section emphasises obligations on the EA and schools to produce accessibility plans, nonetheless, there are significant issues with this section including with regards the strategies proposed. Indeed, some of the proposals contained within Section 14 run the risk of exclusionary or discriminatory practices. We have particular concern about the detail at Section 14.36 which suggests that a reasonable adjustment may involve placing a child on a reduced school day. This is fundamentally flawed and must be omitted from the Code. In NICCY’s experience, pupils with SEN are almost twice as likely to be suspended as their peers and almost half of expulsions since 2015/16 have involved children with SEN in Northern Ireland. However, the scale of the issue is unclear due to the failure to record or document fully these “informal” suspensions, exclusions, or absences. It is therefore unfathomable that the Department has suggested that this practice may be used as a reasonable adjustment. Whilst we note that the Department has proposed this practice in ‘*very exceptional circumstances’*, ‘*with parents’ agreement’* and as a ‘*time bound measure… with schools ensuring that it is kept under regular review with the intention of increasing the child’s access to the curriculum and reintegrating them back into normal hours at the earliest opportunity’,* nonetheless, this is not permissible practice. As reflected by the Committee on the Rights of the Child (CRC) in its last Concluding Observations, UK State Parties must **forbid and abolish the practice of “informal” exclusions and further reduce the number of exclusions by working closely with social workers and educational psychologists in school and using mediation and restorative justice.**

**NICCY recommends that the Department re-write this Section of the Code to ensure no potential discriminatory or exclusionary implications. As previously noted, we are keen to discuss a child’s rights approach to inclusive practice, and how to counter some of the issues outlined in the Code, through the use of a child’s rights framework**.

Conclusion

To conclude, this addendum has been prepared to reinforce some of the key issues with the draft Regulations and Code of Practice. These should be considered alongside NICCY’s previous submissions. We reiterate that there are aspects of the Regulations that have been revised and not explicitly highlighted in the consultation. In order to facilitate meaningful engagement with the proposals, it is incumbent on the Department to highlight all changes, including with regards some of the language used in the Code, such as the outlined definition of learning difficulty. We reiterate the challenge in scrutinising all aspects of the Regulations and Code given the extensive detail of both, and the timing of the consultation. Therefore, we welcome the opportunity to engage the Department in iterative discussion. We emphasise the importance of meeting with Officials to further outline our concerns and to discuss some of the detail in the Regulations and Code which has not been drawn out in the consultation documentation.

**The Commissioner calls on the Department to take into account the recommendations made in this submission, which we provide in line with the statutory advice capacity under Article 7(4) of ‘The Commissioner for Children and Young People (Northern Ireland) Order’ (2003)**’.