Advice to the Department of Education on its Consultation on Draft Special Educational Needs (SEN) Regulations

19th January 2021

Introduction

The 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 up to 18 years, or 21 years, if the young person has a disability or experience of being 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 is required to have regard to all relevant provisions of the United Nations Convention on the Rights of the Child (UNCRC).

The Commissioner welcomes the opportunity to provide advice to the Department of Education on its revised draft SEN Regulations. We also welcome that the new SEN Code of Practice has been shared for consultation; we have submitted a separate advice paper on the ‘Code’ which we recommend is read simultaneously to this paper.

NICCY has long expressed the view that there is a pressing need for meaningful reform of the SEN Framework in a manner which ensures better outcomes for children and young people. Recent years have shone further light on the fundamental flaws in the current system and the myriad issues preventing children who have, or may have, special educational needs from enjoying their right to an effective education. There have been excessive delays in the assessment and statementing process and in too many cases children with SEN have not been receiving the support they need in a timely fashion. The delay in the commencement of the Special Educational Needs and Disability Act (Northern Ireland) 2016 (the SEND Act) provisions, together with the delay in consulting on the revised draft Regulations and Code of Practice, have exacerbated existing pressures on the SEN system.

The Commissioner’s recently launched second ‘Statement on Children’s Rights in Northern Ireland’[[1]](#footnote-1) sets out a clear call for the immediate commencement of the SEN Framework in order to facilitate the provision of appropriate, effective, and timely educational support and services to children and young people with SEN and disability. We therefore welcome this consultation as the first critical phase in enabling the commencement of the Framework.

United Nations Convention on the Rights of the Child (UNCRC)

This advice is framed in the context of the UNCRC, in ensuring that systems and processes are rights compliant, and remove the barriers to ensuring children’s and young people’s right to education.

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), 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 Consultation on the SEN Regulations. **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[[2]](#footnote-2) 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.[[3]](#footnote-3) 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 SEN Regulations, 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[[4]](#footnote-4) 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.[[5]](#footnote-5) 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).

Need for reform of the SEN system in Northern Ireland

NICCY has previously provided extensive advice on the SEN Framework and the previous draft of the revised Regulations. We welcome that the Regulations have been revised further to reflect stakeholder feedback and to ensure they remain relevant given the passage of the time since the previous consultation. Recent years have seen a rise in pressures on the SEN system. It is clear that now, more than ever, urgent and fundamental reform is required. *‘Too Little, Too Late’,* NICCY’s rights based review of SEN provision in mainstream schools[[6]](#footnote-6) highlighted a variety of significant flaws in the education system which have presented barriers for children and young people with SEN in mainstream schools from fully realising their right to an effective education. Specific barriers include:

* Lack of early assessment, identification of need, and subsequent provision of supports, compounded by the imposition of quotas or time allocation relating to the number of children that schools can refer for assessment by the Education Authority’s (EA) Educational Psychology Service;
* Timeliness and effectiveness of the statutory assessment and statementing process;
* Insufficient capacity and resource in schools to meet the rising numbers of children with SEN in mainstream settings and the diversity of need in schools;
* Poor quantity, quality and accessibility of supports for children at all stages of the SEN process;
* A lack of transparency in the SEN system, specifically with the statutory assessment process and the criteria for identifying and establishing the relevant provision for children with SEN in mainstream settings;
* A lack of clear and comprehensible information for parents/carers and other stakeholders from both the EA and schools at different stages of the SEN process;
* A lack of effort and opportunity provided by schools and services to involve children and young people, and their parents, in the SEN process; and
* Poor coordination and communication between education and health in relation to the initial identification and diagnosis, assessment and implementation of support needs, and the ongoing monitoring procedure in support of the child’s and family needs.

The Review revealed a system under extreme pressure, unable to respond to the scale of need and the complexity of issues that children are presenting. It yielded much evidence of the detrimental impact on children’s education, and mental health and wellbeing, when their needs are not met. It also highlighted the frustrations of many parents and professionals in trying to get their voices heard by an education system that has, to date, consistently demonstrated an inability to prioritise and respect the perspective of these key stakeholders. The final Report set out 40 recommendations to address the fundamental weaknesses in the system. NICCY recognises that the new SEN Framework provides an opportunity for systemic improvements to be made, and that the revised Regulations and new Code of Practice are vehicles through which the recommendations from ‘*Too Little, Too Late’* can be actioned.

Our response to this consultation is framed in the context of these recommendations as well as the findings from other reports that have highlighted the endemic barriers in the system preventing children and young people with SEN and disability reaching their full potential. This includes the Northern Ireland Audit Office’s SEN Impact Review[[7]](#footnote-7), the EA’s Improvement Plan and the DE SEN Learner Journey Project. We have also drawn on NICCY’s advice on the previous Regulations within this current paper, where this still pertains.

As noted in the introduction, this is one of two advice papers submitted by NICCY in response to the Department’s consultation on the revised Regulations and new Code of Practice. Whilst this paper predominantly focuses on the Regulations, it is recognised that the Regulations and Code of Practice work in tandem and we have therefore cross-referenced to the relevant parts of the Code when reviewing and advising on the revised Regulations. There is significant read-across between the two papers and some of the recommendationsin this paper also apply to the Code of Practice. Therefore, both advice papers should be read simultaneously.

General comments

The scope of the current consultation is on aspects of the Regulations which the Department has highlighted to have been revised in response to the findings of the 2016 consultation. These revisions relate to:

* Experience requirements for the Learning Support Coordinator (LSC);
* A new upper time limit for the EA to issue a completed statement;
* A streamlined Annual Review process for schools and the EA;
* Children over compulsory school age – assistance and support and who can raise a question about a young person’s lack of capacity; and
* Revised timescales for new mediation arrangements.

Our response is largely centred on these changes, however, we note that the revisions to the Regulations go further than those set out above and in the consultation documentation. Rather, further amendments have been made which have not been identified by the consultation. This, in itself, is deeply concerning and leads to questions about whether stakeholders have had the opportunity to become familiar with and sufficiently scrutinise the new Regulations. We have aimed to review the Regulations in their entirety, however, have not had the opportunity to scrutinise each section in-depth nor compare it with existing Regulations. This includes Part VIII Compliance with Tribunal Orders and Unopposed Appeals and Part IX Revocation and Transitional Provisions. Whilst we welcome the extension to the consultation timeframe, it is critical that the Department provides detail on any further additions or changes to the Regulations which have not been referenced in the consultation documentation, a rationale for the changes, and a consideration of associated implications. **It is imperative that stakeholders are made clear on all revisions and have the opportunity to advise accordingly.**

In the remainder of this paper, we have reflected on the proposed content of the Regulations more generally and have therefore advised further than the questions posed by the Department. We have also highlighted some gaps and issues that require further review and revision relative to the areas bullet pointed above.

It is very positive that Section 1 of the SEND Act came into operation on the 18th December 2020, as this introduces new duties on the EA, so far as is reasonably practical, to seek and have regard to the views of the child. The requirement on EA to have regard to the participation of the child in decisions affecting them, and to be required to provide the information and support necessary to enable the child’s participation in those decisions, is critical in ensuring fulfilment of Article 12 of the UNCRC and should be regarded as a central tenet of the new SEN Framework. We would welcome further discussion with the Department and EA on how this provision is to be taken forward to ensure that children and young people with SEN are meaningfully engaged throughout the SEN process.

We are supportive that Regulation 10 now states that contributions will be sought from the child, if the child is over compulsory school age, or the child in addition to their parent, in any other case, for the purposes of making an assessment. We also welcome that any representations made by the child and the child’s parent are to be considered by the EA when making an assessment as per Regulation 13. However, we note it is not intended that the EA will seek to consider any evidence submitted by, or at the request of, the child if they are not over compulsory school age. We are also extremely concerned that child and parent input at Regulation 10 is no longer considered advice, as per that obtained from other stakeholders, but is now presented as information. It is also unclear why this revision has been made, as it has not been highlighted in the consultation documents. This revision diminishes the child and parent contribution, seemingly placing it at lesser value than other stakeholders, and we are greatly concerned that this will have implications on the regard to and weight given to children’s and parents’ input in the statutory assessment. **Reference to contributions from children and parents must be revised and again presented as ‘advice’ in the new Regulations and Code of Practice.**

Whilst it is very positive that the Framework gives children above compulsory school age the ability to exercise their own rights at various stages of the SEN process, the Commissioner advises that **the Regulations and Code should be amended to more explicitly reference the requirement to involve children of all ages in line with Article 12 of the UNCRC and Section 1 of the SEND Act**. We note that Section 13 of the SEND Act provides for a pilot project to extend appeal rights and rights to take disability claims to children under compulsory school leaving age. In line with the requirements of Article 12 of the UNCRC as explained by General Comment 12, NICCY wishes to see the introduction of the pilot scheme to children and young people under school leaving age as soon as possible to ensure greater children’s rights compliance*.*

Furthermore, the duty on EA to publish, review and revise plans in relation to special educational provision under Section 2 of the SEND Act, and to which Part II of the revised Regulations pertains, is an important commitment which should provide greater transparency and clarity regarding the resources and advisory and support services which will be made available. **Therefore it is vital that this section of the Act is commenced as a matter of priority**. Please see our advice paper on the Code of Practice for further detail on NICCY’s expectations and requirements related to this Plan.

Section 4 of the SEND Act is a further critical provision which needs priority commencement. Once this comes into operation, we anticipate it will lead to much needed improvement in co-operation between education, health and social care authorities in identification, assessment and making provision for children with SEN.

We acknowledge that various parts of the Code detail the requirements on health, social care and education to co-operate in respect of children with SEN. It is positive that the Code references the duty of relevant authorities to co-operate under the Children’s Services Co-operation Act (Northern Ireland) 2015 (CSCA) but notes that Section 4 of the SEND Act expands on this, and sets out the specific ways in which health and education must co-operate in respect of children with SEN. **We would, however, welcome 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**.

It is with significant consternation that we note revisions to the Regulations which have resulted in the removal of references to health treatments and services; again, these revisions have been made without mention or explanation in the consultation documentation. 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. This is also at odds with the terminology presented in the SEND Act cooperation clause and ‘Duty of Authority to request help from health and social care bodies’. We are greatly concerned that this revision to the Regulations diminishes the obligations regarding cross-departmental co-operation with regard to the assessment of children’s needs and provisions as set out in the Statement, and request urgent clarity on the rationale for change and potential implications. **Much further consideration must be given to this issue, and detail provided by the Department on how it proposes to ensure that the EA is required to collect advice on all aspects of a child’s needs.**

We have similar concerns about the proposed format of the Statement set out at Schedule 2.We feel it is a significant shortcoming that the provision to be made by a Health and Social Care Trust is not to be identified at Part 3 of the Statement, as had been tentatively put forward in the proposed Schedule in the 2016 draft Regulations. We would appreciate clarity on why health and social care provision is no longer proposed to be included at Part 3 of the Statement. Rather, the new Regulations and Code propose that the health and social care provision is to be listed at Part 6 of the Statement ‘non-educational provision’. We have grave concerns that this weakens the duty to specify provision within Statements given that there remain issues with the legal enforceability of Part 6 of the Statement and it is not subject to the same legislative requirements re’ specificity and quantification as Part 3. **We strongly recommend that the Regulations and Code of Practice are revised to ensure health and social care provision is required to be detailed at Part 3 of the Statement.**

We note revisions to the restriction on disclosure of Statements at Regulation 22. Further information is required on the nature of the revisions from the previous draft of Regulations.

Experience Requirements of the Learning Support Coordinator (LSC)

There is currently no requirement for a special educational needs co-ordinator (SENCO) to have experience of working with children with SEN. Under the SEND Act, once commenced, every school will be required to have a Learning Support Coordinator (LSC - the new name for the SENCO) with responsibility for co-ordinating the special educational provisions for every child with SEN.

The Department reported that stakeholder feedback from the 2016 consultation broadly welcomed the concept of a LSC. However, some concern was raised about the experience needed to fulfil the role. Some people suggested that LSCs should have at least 2 years’ experience of working with children with special educational needs, while others thought 5 years was appropriate.

The Department is therefore proposing to introduce a minimum level of experience for this role as follows:

* In a mainstream school – at least 3 years’ full time equivalent of working with children with special educational needs;
* In a special school – at least 3 years’ full time equivalent of working with children with special educational needs, one of which is to be obtained in a special school.

NICCY welcomes that the revised Regulations require LSCsto be appropriately experienced in working with children with special educational needs. NICCY’s recent review of SEN provision in mainstream schools found that many teaching staff, including SENCOs, lacked sufficient training, and subsequent knowledge and skill, to identify and respond to the varied support requirements of children with SEN in mainstream schools. Stakeholder feedback highlighted that schools specifically lack the capacity and skill to support children with social, emotional and behavioural difficulties. We therefore greatly welcome that the revised Regulations stipulate a minimum level of experience to be had by LSCs in working with children with SEN.

However, as set out in our previous advice on the Regulations, we are concerned that the experience which are proposed for LSCs under the new SEN Regulations are at a higher level than many LSCs currently have. There is a risk that if LSCs do not meet the requirements of qualifications and experience, people who currently are employed as LSCs may not be in a position to continue in this role. The impact of potential gaps in such an eventuality, on the educational experiences of children with SEN is potentially damaging. Therefore there should be further consideration on exempting current LSCs from this requirement as long as appropriate training is provided.

There is clearly an early identifiable training need which arises under the revised Regulations. It is extremely important in ensuring the continuity of services for children with SEN in schools that LSCs are fully equipped to meet the requirements of this role.

We recognise that Regulation 8 places a requirement on schools’ Boards of Governors to ensure the necessary training for LSCs. The new Code of Practice further sets out the responsibility on Boards of Governors to designate a teacher from the school staff as an LSC with responsibility for co-ordinating the provision of education for those pupils attending the school who have SEN. The Code also outlines the responsibility of the Principal to ensure that the designated LSC has at least three years full time equivalent experience of teaching pupils with SEN and receives the necessary ongoing training to conduct their role effectively; sufficient time to conduct their role effectively; and an opportunity to provide regular information to the Board of Governors about SEN matters. Further to this, the Code outlines the responsibility of Principals to ensure that all staff have sufficient time and ongoing training to effectively perform their duties with regard to children with SEN.

Whilst we welcome the requirement for Boards of Governors and Principals to ensure that staff are sufficiently skilled and experienced, and to foster an inclusive culture, we have concern about the onus of responsibility being placed on both Boards of Governors and Principals to ensure that the designated LSC has the requisite experience. We are concerned about how Principals will fulfil these requirements, particularly in light of feedback received from school Principals and SENCOs through *‘Too Little, Too Late’*, who described a school system already under inordinate strain. They reflected that the capacity and resource in schools is not sufficient to meet the rising numbers of children with SEN in mainstream settings and the diversity of need in schools. Feedback from Principals also highlighted a lack of funding, combined with insufficient time, opportunity and resource, as impediments to schools’ ability to effectively and efficiently respond to children’s needs.

We are concerned that without the necessary support from the EA in terms of funding and professional development, that Principals and Boards of Governors will not be able to fulfil their duties as set out in the new Framework. This is all the more critical in light of the findings of *‘Too Little, Too Late’* which emphasised the importance of having appropriate training arrangements in place for all staff including LSCs.

The EA has an essential role in making available special educational provision for children with SEN and as part of that role needs to ensure there is an adequate supply of sufficiently trained staff. As recommended by *‘Too Little, Too Late’*, this must include ensuring that all school staff are trained, guided, supported, and assessed on their ability to meet the diverse needs of pupils with SEN and disabilities. The onus of responsibility should not lie solely on the Board of Governors and Principals, as is proposed. **The role of the relevant authorities in this regard, including the Department’s role in devising policy and the EA’s role regards operational delivery, should be explicitly outlined in the Regulations and Code of Practice.**

New Upper Time Limits for EA to Issue a Completed Statement

There is currently a 26-week statutory timeframe for the EA to complete a statutory assessment and issue a Statement. In its consultation on the draft Regulations in 2016, the Department proposed to reduce the number of weeks for the issue of a completed Statement from 26 weeks to 20 weeks. However, in light of reported difficulties surrounding the receipt of advice for the purpose of the assessment, e.g. advice from HSC Trusts, and that this was in turn, leading to significant delays in the statutory assessment and statementing process, the revised Regulations propose to reduce the time limit for the issue of a completed Statement from 26 weeks to 22 weeks, providing no exceptions apply.

NICCY is extremely supportive of the Department’s proposal to reduce the time limit for the issue of a completed statement. It is widely documented that the lack of early identification and intervention is a major failing of the current SEN system, with particular delays evident at the statutory assessment and statementing stages. In 2019-20, 85% of statutory assessments were issued outside the 26 week statutory timeframe[[8]](#footnote-8). NICCY’s *‘Too Little, Too Late’* report, highlighted the significantly detrimental impact of such delays on children’s and young people’s education, health and wellbeing. Therefore, we strongly welcome that the new SEN Framework proposes to reduce the timeframe that the EA has to issue final Statements from 26 weeks to 22 weeks.

However, as previously noted in *‘Too Little, Too Late’*, as the EA has previously consistently failed to issue the majority of Statements within the existing statutory timeframe of 26 weeks, this raises concerns about its ability to manage a shorter timeframe. It is therefore imperative that the source of existing delays is addressed and adequate resource and provision made available to enable the new timeframe to be met. It is alarming that the Department recently informed the Education Committee that the required funding to implement the changes is yet to be confirmed.[[9]](#footnote-9) Whilst we are fully cognisant of the current constraints on funding, this cannot be reason for continued and persistent delays in the system.

We recognise that adherence to the 22 week window is only applicable provided there are no ‘valid exceptions’. As set out in the Regulations and further detailed in the Code of Practice, these exceptions apply if, for example, a HSC Trust has not previously kept records or information on a child, a failure to keep an appointment or in instances where further advice or information is necessary. We note revisions to the valid exceptions which have not been identified in the consultation documentation e.g. the length of school closure. Having reviewed the detail at Regulation 15, we are concerned that the exceptions are too broad and subsequently open to interpretation and misuse. We also query whether an extension is absolutely necessary in all proposed instances of exception and question the suggested length of extension where such exceptions are proposed to apply. For instance, Regulation 15(7) notes circumstances where it may be impractical for the EA to complete the assessment within the requisite 8 weeks, enabling a new timeframe of 12 weeks. One proposed reason for valid exception at 15(7)(a) is where ‘exceptional circumstances affect the relevant party’. Such exceptional circumstances are not sufficiently defined and indeed, it can be argued that any such exceptional circumstances affecting the relevant party should not impinge EA’s ability to progress with the statutory assessment in the 8-week timeframe. We are also concerned that Regulation 15(7)(d) proposes to enable an extension to the statutory timeframe should the EA decide further advice is required. Although Regulation 15(7)(d) states that the EA will only seek further advice in ‘exceptional circumstances’, much greater clarity is required in the Regulations and Code as to what is deemed ‘exceptional’ and therefore grounds for extension.

We have specific concerns about the proposed length of extension to the statutory timeframes where the EA has agreed to a request from a HSC Trust to extend the timeframe for submitting advice, as this will result in a new 14 week timeframe which appears unduly extensive and contrary to the principles of early intervention and effective co-operation. We also have concern that Regulation 15(11)(d), which states *‘the relevant HSC Trust has not before the date on which it received the request for advice or information in accordance with regulation 10(1)(d) or (e) produced or maintained any information or records relevant to an assessment of the child under Article 15’*, may be regularly cited as grounds for request for an extension. It is also questionable whether such an extension is necessary simply because a child or young person is not previously known to the body from whom health and social care advice is being requested.

We recognise that at Regulation 15(13) and outlined in the Code that, where HSC Trust advice has not been received, the EA, ‘*should as a matter of good practice advise the relevant HSC Trust that it is moving to make its decision. The EA must make their decision based on all other representations made, previous advice, information and evidence available to it at that point in time.’***It is essential that clear explanation and evidence is provided in any such case where a HSC Trust has not provided advice in the requisite timeframe, and an outline of relevant sanctions to be imposed should statutory timeframes not be met.**

In theory, NICCY supports maximum time limits in the case of valid exceptions, given that, at present, there is no explicit ‘end date’ for the EA to complete the entire process once a valid exception applies. The lack of a timeframe regarding valid exceptions has exacerbated some of the extensive delays in the statutory assessment and statementing process, so it is positive that this is intended to be addressed. However, we have concern that the proposed maximum time limit, where exceptions apply, is too lengthy. Should valid exceptions be applied, a wait of up to 34 weeks is considerable, constituting the vast majority of a school year. We are concerned that this is too long as there is the potential for significantly adverse impacts on children's learning and development in that time. **We query whether the extent of the delay is warranted and, as noted above, request further detail on the rationale for the proposed length of the extensions.** We are also concerned about the language used with regard to exceptions, particularly reference that a new timeframe ‘shall’ apply where there are exceptions; this should read ‘may’ to negate any assumption that timeframes will be routinely extended.

**Whilst ideally no extensions will be required and the vast majority of assessments conducted in the requisite 22 week window, nonetheless, should an extension be necessary we strongly recommend that the statutory timeframe is extended by no more than 6 weeks, meaning an absolute maximum of 28 weeks.**

It is essential where exceptions apply that robust additional supports are provided to the child during the statutory assessment and statementing process.

Furthermore, it is absolutely crucial that there is robust monitoring and review of the timeframe within which statutory assessments are conducted and, critically, that a robust record is kept of the number of cases where valid exceptions apply. We have great concern that the exceptions may be routinely cited as justification for exceeding the 22 week time limit. This concern partly stems from the fact that *‘Too Little, Too Late’* found that 87.5% of cases issued outside of the 26 week target in 2018/19 were attributed to ‘valid exceptions’. Furthermore, we were informed by the EA that it was not possible to examine the reason for delay where valid exceptions did not apply as *‘this information is not currently held centrally’.*

In addition, the NIAO[[10]](#footnote-10) recently found a lack of routine management of information and monitoring of performance against the 26 week Statutory Assessment timeframe within the EA. This was also identified by the EA during its internal audit of practice and, promisingly, the EA has recognised the need for greater use of standardised management information reports to enable more effective monitoring. NICCY welcomes the EA’s intention for more proactive monitoring, however, we call on the Department to ensure that such information is collected on an ongoing basis and that reporting arrangements are put in place to ensure the new system is operating as it should.

To that end, **the Department must closely monitor the roll out of these new time limits as and when they are introduced, with particular scrutiny of the frequency with which exceptions need to be made.** **It is imperative that there is transparency regarding the requirement for valid exceptions and robust evidence provided to rationalise an exception. This must, in turn, be thoroughly reviewed by the Department and a centrally-held record of valid exceptions kept for monitoring purposes. No delays can be permitted without a reason for valid exception.**

*Further concerns regarding information and advice to be sought by the EA (Regulations 9 and 10)*

A new Regulation 9 has been included which reflects the option for EA to seek information from a school Principal, institution or any person responsible for the educational provision when considering whether to conduct a statutory assessment. The Regulation states that ‘*this information need not be in writing.*’ **This is not acceptable; a written record of any such information provided at the consideration stage must be provided and centrally retained for the purposes of transparency and accountability.**

Furthermore, draft Regulation 10 has also been changed to reflect that the EA may seek **“any or all”** of the advices listed for the purposes of statutory assessment. It is not clear why the decision has been taken to enable such optionality. This is a significant revision to the current Regulations and NICCY has grave concerns about enabling the EA the option of from whom such advice should be sought. This needs to be revised immediately and the requirement re-placed on the EA to seek advice from all relevant sources, whilst ensuring adherence to statutory timeframes to ensure no delay in provision to children and young people.

Annual Review of a SEN Statement

Part V of the draft Regulations relates to Statements of SEN and sets out the statutory rules regarding the periodic review of a statement and the first transition planning meeting. Specific updates made since the 2016 consultation relate to the frequency of facilitation of annual review meetings and the introduction of new timescales associated with the annual review.

***Flexibility regarding the facilitation of annual review meetings***

Under the Education (Northern Ireland) Order 1996 (1996 Order), a child’s Statement must be reviewed annually and a meeting involving parents and others, held each year to inform this review. However, the new Regulations modify the frequency with which annual review meetings are required to take place. Whilst an annual review must be conducted once a year and, as part of that, the Principal will have to seek representations and advice to complete an annual review report and submit it to the EA, an annual review meeting is not routinely required every 12 months. Rather, it is proposed that an annual review meeting is only required to be convened in the following circumstances:

* at least once in each key stage;
* when a child is preparing to transfer to another school or institution; and
* during the school year in which the child attains the age of 14.

NICCY has some concern about the reduction in the frequency of annual review meetings. We recognise that this has been proposed in light of concerns expressed during the previous consultation with regards the bureaucracy attached to the annual review process both for parents and schools. However, *‘Too Little, Too Late’* more recently found that some parents/carers deem the annual review meeting a critical opportunity to provide evidence regarding their child’s progress in the previous year. Some perceive this to be a valuable, and indeed more straightforward process, to providing representations on behalf of their child rather than in written form. **It is also vitally important that children and young people have the opportunity to inform the annual review process and that they can do so verbally, through the medium of a meeting, should they so wish.** We also remind the Department of its obligation to involve children and young people in all matters that affect them, as per Article 12 of the UNCRC.

The Code of Practice (section 7.15) notes that the EA is expected to produce school guidelines with regard to the conducting of annual reviews. These guidelines will be important in providing clarity for parents, young people, and children about the purpose of the annual review process, the making of written representations and the assistance and support arrangements for young people to exercise their rights within the SEN Framework. **This guidance must be available upon commencement of the SEN Framework**. In NICCY’s experience, as corroborated by the findings of *‘Too Little, Too Late’,* many parents/carers require further guidance on the purpose of the Annual Review; the potential implications for continued access to services to their child; and their role in the process in submitting evidence and verifying recommendations proposed in the school report. The reduction in the frequency of the review meetings may particularly disadvantage children whose parents/carers are not fully aware of the purpose or process regarding annual reviews.

We are therefore fully in support of the proposal that a parent or young person can ask for a meeting in a year that the Principal is not required to do so. We highlight the need for the EA to ensure that Principals are fully aware of their obligation to inform parents and young people that they can request a meeting to inform the periodic review, and ensure that schools deliver on this requirement as a matter of course. The EA guidelines will be absolutely crucial in reinforcing the requirement for Principals to inform the relevant party of their right to request a meeting, if no meeting is required that particular year. It must also be made clear that if a relevant party requests a meeting, the school is required to comply with the request (section 7.23).

It is particularly important that there is no change to the regularity of review meetings where a parent has elected to educate their child at home. In such cases, the annual review process, including the yearly meeting, is an important means of oversight in ensuring the Statement continues to meet the child’s needs.

*Timescales for annual review*

The Regulations propose **new timescales** with regards the annual review process. This includes that:

* EA should inform the school (at which a child with a SEN Statement is registered) by the second week of September each year, of the date that the annual review report needs to be submitted to the EA;
* Within 4 weeks after receipt of the annual review report, the EA should make its determination about the Statement i.e. whether it remains appropriate, or requires amendment, or the EA should cease it; for example, if the decision is not to amend the Statement then the EA will need to notify the parent or the young person if they are over compulsory school age within 14 days of its decision.

NICCY strong welcomes the new timeframes which the Department propose to build in to the annual review process. In our experience, parents have felt poorly informed about the status of the outcome of the annual review process, therefore, timely communication is essential. **It will be important for the Department to monitor compliance with these timeframes and to take robust and timely follow up action if either the EA or the school fail to comply with these new statutory timeframes**.

We note that the annual review report and, if appropriate, the pupil’s first or subsequent transition plan (once it is completed), is required to be shared with the relevant party by the member of school staff who completed it at the same time as it is shared with the EA. However, a shortcoming of the proposals is that the parent or young person does not have the opportunity to request changes or dispute the content of the report before it is finalised. **This should be addressed in the new Framework, and schools encouraged to share a copy of the report with children young people and their parents for consent before it is sent to the EA.**

*The decision not to amend a Statement carries a new Right of Appeal*

Section 8 of the SEND Act introduces a new right of appeal to the Tribunal for parents and young people over compulsory school age, where following an annual review of a Statement, the Authority does not make any change to the Statement. NICCY has previously welcomed this provision as it provides additional rights of appeal to the Tribunal. Whilst detail on the timescales and arrangements for appeals is included in the Code of Practice, **we recommend that this is more explicitly set out in the Regulations.**

*Duty to co-operate with regards annual reviews*

In our previous advice, NICCY welcomed that the initial draft of the Regulations (then Regulation 2) proposed a change to the definition of ‘transition plan’ by making explicit reference to the duty on health and education authorities to co-operate with each other in its preparation, under Section 4 of the SEND Act. The definition of transition plan has been revised in the latest Regulations. The focus is now predominantly placed on the fact that the transition plan is required to be prepared by the Principal and approved by an EA designated officer; there is no longer mention of the duty on education and health to co-operate in this initial definition. Whilst we welcome that Regulation 20(4) states that a representative of the HSC Trust should be invited to the first transition planning meeting, alongside other representatives including a person providing careers services advice under section 1 of the Employment and Training Act (Northern Ireland) 1950, we would welcome that **explicit reference is made to the statutory duty on health and education authorities to co-operate with each other at thetransition planning stage.**

With regards the annual review process more generally, we welcome reinforcement in the Code of Practice on the requirement for the EA to obtain HSC Trust advice, where a school has advised the EA that a child’s circumstances have changed which may warrant updated advice and/or information from a Trust representative (7.14) as per Regulation 18. NICCY is very supportive of the fact that the Code outlines a requirement for EA to put in place suitable arrangements, which are consistently applied across Northern Ireland, to request and obtain HSC Trust advice for the purpose of annual review. This will be important in ensuring consistency and streamlining of process across the region.

Children Over Compulsory School Age

When the SEN Framework is commenced, a young person over compulsory school age will automatically assume certain rights previously exercised by their parent. This marks an important shift in the transference of rights previously exercised by the parent under Part II of the Order including in relation to the assessment process, appeal against contents of Statement, and review of Statements.

The Code of Practice (section 13) further details what this transference of rights means in practical terms. It notes that the school will now be required to engage with the young person who has, or may have, SEN including within regards Personal Learning Plans (PLPs) and at annual review for a young person with a Statement. It notes that it is the young person who will be required to make decisions within the SEN Framework, for example, requesting a statutory assessment, making representations within the assessment process and meeting with the EA and advice givers within the assessment process, if they wish to do so.

NICCY has previously warmly welcomed the strengthened provision for the rights of children and young people with SEN by virtue of amendments to the SEN Framework**. It is essential that clear** **information and advice about the shift in rights to a young person is made available well in advance of the young person becoming of age where they are able to exercise those rights**. We welcome emphasis in the Code of the importance of ensuring that any concerns or issues raised by parents or the child are addressed; this must include a clear consideration of whatthe transference of rights means for the young person and their parent. It must also be made clear that **not all young people** **will wish to exercise the rights conferred on them by Part II of the Education (Northern Ireland) Order 1996, that young people should be presented with the option of whether they choose/wish to do so, and clarification provided to the young person, parent and school, on the processes to be followed where a young person has expressed that they do not wish to assume these rights.**  We note mention in the Code of Practice of proposed EA guidance to be made available to schools about the new rights of young people. We agree the benefit of such guidance and would welcome further detail on its proposed purpose and scope.

In our previous advice on the Regulations, we expressed concern about the proposed level of support and assistance to young people and the fact that this was not sufficient to enable young people to fully exercise their rights. We were particularly concerned that the previous draft Regulations did not ensure the necessary independent advocacy and support to enable children with SEN and disability to fully exercise their rights under the SEN Framework, and that the Regulations prohibited the young person from having a legal representative present to support them or advocate for them when having discussions with, or making representation to, the EA.

We therefore strongly welcome that Regulation 23 sets out the assistance and support to a child over compulsory school age exercising rights under Part II of the 1996 Order. It is positive that the Regulation now clarifies that a young person can appoint a parent; a representative (over age 18); and/or a solicitor, barrister or other legal representative, should they so wish. It is also positive that the Regulation sets out in detail the nature of the assistance and support that can be provided by the appointed person, including legal advice; services and representations; assistance with the young person’s understanding of any information or Notices received from the EA; attending meetings, discussions, mediation, appeals etc; assistance in the completion and submission of any necessary paperwork; provision of, or assistance with, representations for submission to the EA; or in accepting the service of Notices.

We generally welcome the Department’s proposals with regard to the support and assistance to be provided to a young person. However, there are some issues to be addressed. For instance, the Code reflects that the school should keep a record of the details of any person so appointed by the young person. However, we are concerned that Section 13.8 notes that ‘*as far as is practicable, the young person should be advised in good time in advance of any meeting or discussion planned about their SEN to allow the young person to arrange for the attendance of that person, if they wish them to attend.*’ It is essential that **in every instance, not just as far as is practicable, that the young person is advised well in advance of any meeting or discussion planned about their SEN so that the appointed person can attend. No meeting should go ahead without the attendance of the appointed person.** A failure to adequately support young people in exercising their rights will negate any progress made with regard to stronger children’s rights protections that have been contained in the SEND Act.

We welcome that the Regulations state that the EA will be required to respect the appointment and recognise the assistance and support for the young person (Regulation 23(3)). **However, we note that there is no mention of how legal representation might be funded and how young people might be able to access these funds. It is critical that clarification is provided on this matter.** Given the specific and particular vulnerabilities of children with SEN and/or a disability, it is vital that young people are provided with the necessary support and assistance to allow them to realise their rights; this should include the provision of funding to assist with access to legal support, should it be required.

*Capacity determination*

In our previous advice, NICCY made clear that there was a lack of clarity around how the actual ‘test for capacity’, for the purpose of the exercise of the child’s rights under Part II of the 1996 Order, would be conducted. We were also concerned that no information had been provided with regard to who would determine capacity in children and young people.

We welcome that Regulation 24 now further sets out the persons who can request a determination of the capacity of a young person over compulsory school age. We recognise that the Department proposes to add to the list of people who can raise a question about a young person’s lack of capacity to exercise their rights within the SEN Framework, with proposed additions/revisions including ‘the child’s school’ and separated out ‘healthcare professional’ and ‘social worker’. The proposed list of people who can raise a question about a young person’s lack of capacity to exercise their rights within the SEN Framework is largely comprehensive and relevant.

We recognise that the Code highlights that *‘the EA should make suitable arrangements for those persons to request a determination as to a young person’s capacity to exercise their rights under the SEN Framework and to act upon such requests’.* However, it remains unclear on what grounds a request for a determination of capacity can be made. **The Regulations and Code must address when, and for what reason, a request for determination can be made.** Furthermore, the Regulations and Code note that in the event of a request (for a determination of capacity), the EA is required to make that determination, as soon as is reasonably practicable. **NICCY recommends that more definitive guidance is provided on the timeframe within which EA is required to respond to a request for a determination of capacity.**

We welcome that the new Regulations provide further detail on the principles of capacity (Regulation 25). Further clarification has now also been provided on the meaning of lacking capacity and that it is to be measured with reference to ability to make a decision (Regulation 26); explanation provided on what is meant by ‘to be unable’ to make a decision (Regulation 27); and an overview of the support to be provided to a young person to make a decision (Regulation 28). NICCY welcomes that the young person is not to be treated as unable to make a decision for him or herself about the matter unless all practicable help and support to enable the child to make a decision has been given without success. It is also welcome that Regulation 28 sets out the various steps that should be taken before it can be considered that all practicable help and support has been provided. However, we have some concern that the Regulations note that these steps are to be taken ‘so far as is reasonably practicable’. We also query who makes an assessment of whether the steps as per the Regulations have been taken including, for example, who determines, and how it is determined, that all the information relevant to the decision has been provided.

With regards the determination of capacity, Regulation 29 sets out that the EA is to be taken to have sufficiently established that the young person lacks capacity, if the EA has:

* taken reasonable steps to establish whether a young person lacks capacity in relation to the matter;
* believes that the young person lacks capacity in relation to the matter concerned; and
* EA has complied with the principles in the Regulations 25(2) and (6) for “Supporting a person to make a decision”.

We are concerned about the language used, particularly that Regulation 29(2)(b) proposes that the EA is to be taken to have sufficiently established the young person lacks capacity if the ‘*EA* ***believes*** *that the young person lacks capacity.’* It is imperative that any such judgement is made firmly on the grounds of evidence, therefore, we expect clarity around how and on what basis the EA made such a determination. It is not sufficient that the Code simply states that ‘*it is recommended good practice that the EA explains how it has reached its decision’* **Clear detail on the EA’s deliberations and evidence for reaching a judgement must be a requisite** part of the determination of capacity, not just required as ‘good practice’. This is all the more critical in light of the fact that the Code of Practice section 13.28 clarifies that there is no right of appeal on the EA’s determination of capacity. **Further, the lack of a right of appeal is not acceptable; we strongly recommend that this is revised.**

Of further concern is that there remains a lack of clarity regarding who will conduct the test for capacity. Whilst the Code of Practice (section 13.19) notes that *‘the EA will appoint a suitable person to make a determination’* it is not clear who the appointed person may be nor their background, qualifications or experience. **The Commissioner seeks an assurance that those who run the capacity test for young people with SEN are suitably qualified and will receive appropriate training in children’s rights, child protection and how to communicate effectively with young people with SEN**in line with the Committee on the Rights of the Child’s General Comment No.5 which provides a detailed account of children’s rights training requirements on Governments.

Whilst the Code emphasises that the EA should consistently apply its arrangements regarding the raising of a question of a young person’s capacity and for providing its determination, it is not clear how and by whom, application of such process will be monitored. This is a fundamental omission that must be addressed in the Regulations and Code of Practice.

***Where a young person is determined to lack capacity***

The most significant omissions relative to this part of the Regulations and Code of Practice are with regards the arrangements to be made if a young person is determined to lack capacity.

Regulation 30 outlines that, where the EA has determined that a young person lacks capacity to exercise a right or make a decision about a particular matter at a relevant time (lacks capacity), a young person’s rights may be exercised by:

(a) an alternative person, if the young person has the capacity to determine the discrete matter of the appointment of an alternative person; or

(b) where the child does not have an alternative person, the parent.

In NICCY’s experience, where a child has been determined to lack capacity, the parent will more often than not fulfil this role. Regulation 30(4)(a) also highlights that the alternative person can be any person over the age of 18 appointed by the child to exercise any of the rights conferred on him or her in Part II of the 1996 Order where the young person has the capacity to appoint an alternative person. It is unclear who this alternative person may be but it is important that the definition is consistent with those appointed to provide advocacy and support. It is also unclear how it shall be determined that a young person has the capacity to appoint an alternative person and whether this is part of the overall test of a young person’s capacity.

Regulation 30 (4)(b) sets out who can fulfil the role of the alternative person in circumstances where the young person lacks capacity to appoint someone to this role. This includes:

1. any controller appointed for the child under Article 101 of the Mental Health (Northern Ireland) Order 1986 to make a decision in relation to the exercise of any rights conferred on the child by Part II of the 1996 Order;
2. any deputy appointed by the High Court for the child under section 113 (2)(a) of the Mental Capacity Act (Northern Ireland) 2016 once operational, to make a decision in relation to the exercise of any rights conferred on the child by Part II of the 1996 Order;
3. any attorney under a lasting power of attorney (within the meaning of section 97 of that 2016 Act once operational) appointed by the child, to make a decision on his or her behalf in relation to the exercise of any rights conferred on the child by Part II of the 1996 Order; and
4. any attorney in whom an enduring power of attorney (within the meaning of the Enduring Powers of Attorney (Northern Ireland) Order 1987) created by the child is vested, where the power of attorney is registered in accordance with Articles 6 and 8 of that Order.

The aforementioned proposals raise some issues and queries. Firstly, the Regulation appears to acknowledge that the provisions referred to in the Mental Capacity Act (Northern Ireland) 2016 are not yet operational. Until such time as these are operational, we assume DE will rely on provisions in the Mental Health Order (Northern Ireland) 1986 and the Enduring Powers of Attorney Order (Northern Ireland) 1987, as per above. Further detail should be provided on how the transition to the new legislative provisions under the Mental Capacity Act (Northern Ireland) 2016 will be managed as and when these provisions become operational.

Secondly, and most critically, the current draft Regulations and Code of Practice appear to create links between the SEN Framework and systems and processes embedded within the Mental Health, Mental Capacity and Enduring Power of Attorney frameworks. However, it is not clear what the interface between the systems will be, how this will operate in practical terms, the requisite role of the EA and other key stakeholders in ensuring application of, nor the intended alignment or expected co-ordination between the various legislative frameworks. It is imperative that both the Regulations and Code of Practice explicitly articulate how the various systems will interface with each other and the role of relevant professionals within them.

*Best interests*

We acknowledge and welcome the requirement that where the alternative person or the young person’s parent exercises the rights of a young person (acts on their behalf), the rights are required to be exercised or made in the young person’s best interests.

We also welcome that the Regulation sets out that, so far as is practicable the alternative person or the young person’s parent is required to encourage and help the young person to participate as fully as possible in the determination of what would be in their best interests.

Rights of children not over compulsory school age

While we realise that the statutory provisions relating to children and young people who can access the extended rights under Part II of the 1996 Order are contained in the SEND Act, NICCY wishes to reiterate its disappointment that these have been restricted only to children and young people over compulsory school leaving age. The UN Committee on the Rights of the Child’s General Comment on Article 12 interprets the obligations on Government by virtue of Article 12 of the UNCRC. It states that the Government shall,

*“...assure the right to be heard to every child “capable of forming his or her own views”. This phrase should not be seen as a limitation, but rather as an obligation for States parties to assess the capacity of the child to form an autonomous opinion to the greatest extent possible. This means that State parties cannot begin with the assumption that a child is incapable of expressing her or his own views. On the contrary, States parties should presume that a child has the capacity to form her or his own views and recognize that she or he has the right to express them.”*

It also states that, Article 12 imposes no age limit on the right of the child to express her or his views, and discourages State parties from introducing age limits either in law or in practice, which would restrict the child’s right to be heard in all matters affecting her or him. Article 12 is clear that the views of the child must be, “given due weight in accordance with the age and maturity of the child”. This requirement makes it clear that age alone cannot determine the significance of a child’s views. As the General Comment on Article 12 states:

*“Children’s levels of understanding are not uniformly linked to their biological age.”*

For this reason, **NICCY recommends that the views and wishes of the child have to be assessed on a case-by-case examination and children need to be facilitated and supported to participate fully in decisions impacting on their lives, regardless of their age.**

We also wish to draw attention to the fact that case law, specifically Gillick, does not put a specific age limit on the capacity of a young person to consent to medical treatment. Instead, competency is the guiding criteria. There is therefore a discrepancy in respect of when a young person can request and consent to medical treatment and when they can request input with regards their SEN under the new Framework. NICCY is not necessarily asking the Department to apply Gillick principles to the SEN framework as we appreciate different legal tests apply. However, we thought it important to draw this discrepancy to your attention and would ask if any further account needs to be taken of this in the SEN framework.

***Role of the parent***

As evidenced throughout this response, we are extremely supportive that young people over compulsory school age are to be given their own rights within the SEN Framework. **We reiterate the importance of optionality and that young people have a say in whether they wish to exercise these rights**. We also acknowledge the Department’s assessment that the transference from the parent to the young person should not be a significant shift if the fundamental principles of the Framework have been adhered and children and young people are routinely and actively enabled to contribute to the SEN process such as the personal learning plan (PLP) process, the annual review and transition planning processes. It will be imperative to monitor whether this is borne out in practice.

We welcome that the young person can choose to appoint a person to support them to provide them with assistance and support when exercising their rights, and that this may be the parent. However, as we reflected in our 2016 advice, the transference of rights to the young person should not preclude EA from seeking advice or input from parents or carers when the child is over compulsory age. Whilst it is entirely appropriate that the young person is the rights holder, it remains the case that parents of children with SEN, regardless of their children’s age, will have a valuable contribution to make to the process.

In our previous advice, we recommended that the Regulations be re-drafted in a manner which permits parents to provide advice on their child’s SEN. We welcome that it is now written into the Code that, if the young person is not yet age 18, the EA is required to inform the young person’s parent in writing if a Notice has been issued to the young person, and to provide the parent of a copy of any such Notice. Where applicable, the EA is also required to issue a copy of a proposed Statement (or otherwise) or a copy of a completed Statement (or otherwise) to the parent. Regulation 13 states that the parent of the child over compulsory school age may be present during any consultation if the child agrees. NICCY also welcomes that, in the case where a young person is under 18 but over compulsory school age, that Regulation 21 sets out a requirement to notify the parent that:

* a young person has been invited to attend an annual review meeting;
* a young person has been asked to provide written representations to inform the annual review report;
* a copy of an annual review report has been shared with the young person and with the EA; and
* in the case of the first transition plan being prepared.

It is important that, although the young person has become the rights holder, parents/carers also continue to have an opportunity to inform decisions regarding their child’s SEN. Article 5 of the UNCRC places an obligation on the Government to respect the role of parents in their children’s lives. The above provisions are welcome in enabling that duty and it is important that these provisions facilitate parents/carers to advise on and support their child over compulsory school age at various stages of the process.

Revised Timescales for Mediation Arrangements

NICCY has previously welcomed that the SEND Act, once commenced, will provide parents and young people with an informal way of resolving disputes about a decision made by the EA which carries a right of appeal to the Special Educational Needs and Disability Tribunal (SENDIST). We have welcomed the requirement on EA to make arrangements for the provision of mediation and to provide for the appointment of an independent person who can facilitate the resolution of disputes or act as a mediator. It is NICCY’s view that if mediation is effectively managed and implemented, with the best interests of the child as the primary consideration, it could provide a more positive resolution process than the Tribunal.

NICCY is firmly of the opinion that the opportunity to take part in mediation should be made available to individuals in a timely manner in order that the process can begin promptly and issues can be resolved as quickly as possible. We therefore warmly welcome the new proposed timescales set out within the mediation arrangements, particularly the requirement on the mediation adviser to provide information and advice about how to pursue mediation within 2 working days of the person making contact and that a mediation certificate is to be issued within 3 working days from the information and advice about mediation being provided. The latter is especially critical given that, once the new SEN Framework is commenced, a parent or young person must have a mediation certificate should they wish to appeal to the Tribunal regardless of whether they avail of mediation services, as per Section 10 of the Act. Therefore, we welcome that this certificate is required to be issued in a timely fashion.

NICCY also welcomes that the EA is required to comply with the terms of any mediation agreement within specified timeframes, similar to if an Order came from SENDIST.

We welcome that the Code emphasises that mediation does not take away the right of parents or young people if they wish to appeal to the Tribunal and that it is entirely a matter for the relevant party to decide if they wish to engage in mediation. It is important that clear guidance is provided to the young person and parent about the necessity for contact to be made with the mediation adviser and the legislative requirements regarding the need for a mediation certificate within the set timeframes.

It is especially important that parents or young people are clear on the necessity to contact the mediation advisor to inform of their intention to appeal or pursue mediation, and the associated timeframes, as per Regulations 35 and 36. Such a requirement should not intervene with or diminish the opportunity to appeal.

NICCY has previously called on the need for the mediation process to be genuinely independent and that individuals perceive it to be so, otherwise they may be reluctant to participate. We have also highlighted the importance of the mediation mechanism demonstrating its effectiveness at an early stage in order to engender confidence in the process and encourage other individuals to participate. As recommended by *‘Too Little, Too Late’,* an evaluation of the effectiveness of the new mediation mechanism should be conducted in order to engender confidence in the process and encourage other individuals to participate.

We request further information from the Department regarding the viability of the mediation model, including information regarding the current numbers of suitable mediators in Northern Ireland, its intentions regarding the appointment and training of additional mediators and the levels of resource required to establish and maintain a mediation service.

Conclusion

NICCY wishes to express our gratitude to the Departmental Officials who met with us in November 2020 to discuss the developments to the SEN Framework. We reiterate that there are aspects of the Regulations that have been revised and not explicitly highlighted in the consultation. In order to facilitate consultees, many of whom have competing priorities, it is incumbent on the Department to highlight all changes. Therefore NICCY reiterates our deep concern that there are aspects of the Regulations that have been revised but not explicitly highlighted in the consultation.

We welcome further opportunity to discuss changes to the Regulations. We would also be happy to discuss any element of this submission or provide further information / clarification if required.

There are some core aspects that must be addressed before commencing the SEN Framework. This includes the provision of appropriate funding and resources to enable the Framework to be effectively implemented. We reiterate our concern that the additional resources to implement the changes are yet to be confirmed[[11]](#footnote-11); dedicated and recurrent funding must be prioritised to enable expedient commencement of the Framework.

When the new legislative framework is implemented it will be important to ensure all the systems and processes work in the way that is intended. We anticipate robust governance and stringent monitoring of the Framework’s implementation which should include close review of relevant authorities’ adherence to the new legislative requirements. This must be enabled from the outset to ensure the new legislative framework beds down properly and meets its intended objectives.

Finally, the transition period from the current SEND Framework to the 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 Department should ensure that children and their parents are given access to as much information about the transition – including timeframes - 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. When transferring to the new Framework all pupils must continue to have unfettered access to all the educational and or health-related support and services they require. This responsibility on the Department and the Education Authority as duty bearers must be discharged in a manner which places the child at the centre of the process.

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)’.

1. NICCY (November 2020) Statement on Children’s Rights in Northern Ireland 2 [↑](#footnote-ref-1)
2. United Nations Committee on the Rights of the Child, General Comment No. 1 (2001) ‘The aims of education’ CRC/GC/2001/1. [↑](#footnote-ref-2)
3. *Ibid*. [↑](#footnote-ref-3)
4. *Ibid* [↑](#footnote-ref-4)
5. *Ibid,* para 6*.* [↑](#footnote-ref-5)
6. NICCY (March 2020) ‘*‘Too Little, Too Late’*’, A Rights Based Review of Special Educational Needs Provision in Mainstream Schools. Available at: [www.niccy.org/senreviewreports](http://www.niccy.org/senreviewreports) [↑](#footnote-ref-6)
7. NI Audit Office (2020) Impact Review of Special Educational Needs. Available at: https://www.niauditoffice.gov.uk/sites/niao/files/media-files/242135%20NIAO%20Special%20Education%20Needs\_Fnl%20Lw%20Rs%20%28complete%29.pdf [↑](#footnote-ref-7)
8. NI Audit Office (2020) Impact Review of Special Educational Needs. [↑](#footnote-ref-8)
9. 2nd December - <https://www.bbc.co.uk/news/uk-northern-ireland-55163044> [↑](#footnote-ref-9)
10. NI Audit Office (2020) Impact Review of Special Educational Needs. [↑](#footnote-ref-10)
11. Departmental Officials evidence to Education Committee, 2nd December 2020 [↑](#footnote-ref-11)