DEPARTMENT OF EDUCATION

CONSULTATION ON DRAFT SPECIAL EDUCATIONAL NEEDS (SEN) REGULATIONS

INTO Response

30 September 2020

ANNEX 3

CONSULTATION QUESTIONS ON THE NEW DRAFT SEN REGULATIONS

1. **Your Name**

Nuala O'Donnell

2. **Are you responding:**

☐ **as an individual (please complete a) to b) below)**

☒ **on behalf of an organisation / company (please complete c) to f) below)**

If you are responding as an individual:

a) Email address

b) Address

If you are responding on behalf of an organisation/company:

c) Organisation/Company

Irish National Teachers' Organisation

d) Position within Organisation/Company

Senior Official

Contact Details

e) Email address

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f) Address

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Experience Requirements of the Learning Support Co-ordinator (LSC) – (regulations 5 to 8 refer)

Current position: There is 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 (on the start or commencement date), every school will be required to have a LSC (the new name for the SENCO) with responsibility for co-ordinating the special educational provision for every child with SEN.

Feedback from the 2016 Consultation: The concept of a LSC was broadly welcomed. 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.

Department's proposal: 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.

3. Do you agree that the proposed experience requirements for LSCs are sufficient for them to fulfil their role?

Strongly agree	Agree	Neither agree or disagree	Disagree	Strongly disagree	Don't know
			x		

Part III does not clarify if the existing SENCO in a school will automatically take up post as the LSC. According to a recent INTO survey there are SENCOs already in post in most schools, many of whom are in receipt of Teaching Allowance(s) to fulfil their role. In addition, the regs specify that the BoGs 'shall ensure that any teacher, designated as a LSC by it under article 8(1) has at least 3 years' full time equivalent experience of teaching pupils with special educational needs', without any explanation of what that means and how BoGs can measure this.

The role of a SENCO/LSC will be varied depending on the school they are working in. There is no detail in the Regulations of the role & responsibility of the EA to provide for the wide-ranging on-going training that will be required to support SENCO/LSCs with the complex and diverse needs of the growing population of children in schools. The training to date does not cover the comorbidity many children are presenting. Yet the regs place the responsibility on the BoG to ensure the LSC receives 'the necessary ongoing training to conduct their role effectively'. There is a lot of responsibility placed on BoGs with no detail as to how they are to deliver on the responsibilities. The regs appear to ignore the fact that BoGs are voluntary bodies, generally made up of people who have fulltime jobs and families of their own. There is no realism in the aspirations of these regs.

INTO Propose: EA training for BoGs detailing the workload involved in the SENCO/LSC role to ensure BOGs are fully informed and can meet their responsibility to ensure training and time for the SENCO/LSC to complete their role.

New Upper Time Limits for the EA to Issue a Completed Statement (regulations 14 & 15 refer)

Current Position: There is a 26 week statutory timeframe for the EA to complete a statutory assessment and make a Statement (if necessary). This timeframe includes the making of an assessment (if one was necessary), issuing a proposed Statement (if one is necessary) and then issuing the completed Statement following representations by a parent. This timescale may be subject to circumstances which make it impracticable for the EA to meet the required timescales – these circumstances are known as "exceptions". These exceptions mean that the issue of a completed Statement can, and does in practice, take longer if advice and information is required, for example from a Health and Social Care Trust (HSC Trust). At present, there is no explicit 'end date' for the EA to complete the entire process once a valid exception applies. There is significant criticism of EA delays in statutory assessment and issuing a completed Statement.

Feedback from the 2016 Consultation: The 2016 proposal was to reduce the number of weeks for the issue of a completed Statement from 26 weeks to 20 weeks. Some stakeholders felt that meeting these time limits would be unachievable. Comments highlighted difficulties surrounding the receipt of advice for the purpose of the assessment, e.g. advice from HSC Trusts. This in turn was leading to significant delays in completing the assessment in order to determine if a Statement is necessary and issuing a completed Statement.

Departmental Proposal: The Department's proposal in the new draft SEN Regulations is to reduce the time limit for the issue of a completed Statement from 26 weeks to 22 weeks (providing no exceptions apply). The Department further proposes that if exceptions do apply, there is a new upper time limit of up to a maximum of 34 weeks within which the EA must issue a completed Statement to a parent or young person. The SEN Regulations set out those exceptions which include, e.g. 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.

4. Do you agree with the proposal to introduce a maximum upper time limit for the EA to issue a completed Statement?

Strongly agree	Agree	Neither agree or disagree	Disagree	Strongly disagree	Don't know
			x		

There are extensive reports and examples of statements taking excessive periods of time (34wks+) in recent practice. This fails children and schools and has been identified, in some cases as a result of extremely concerning practice at the EA.

Each week a child is waiting for an assessment and statement to outline provision, a school may be struggling to meet need, this impacts not only on the child with SEN but also their peers.

INTO is concerned that any additional weeks it may take to complete an assessment will see pressure increasing in a school supporting the child's needs. Though the setting of a maximum is welcomed. 34 weeks translates to potentially 90% of a child's school year.

INTO propose that a review of the Regulations includes an addition of practical support, a 'holding provision' to be put in place by the EA and funded from a central budget until the completion of the assessment and possible statement eg. Allocated hours of support, reduced class size or specialist provision.

INTO would also highlight the need for dedicated channels of communication between HSC & education that can meet need with an increasing population of children with complex and/or significant need. Though there is mention in the regulations of communication between education and HSC clarity is needed on whether there will be a dedicated centre to coordinate regionally.

The EA plan of arrangements for SEN must include in its evaluation how many statements were completed within timeframes: <22wks, <26wks, <34wks, >34wks. INTO calls for transparency with the process and if there are extensions to the 22wks required EA share with stakeholders individually impacted, including school, and through their annual evaluation of plan the causes for the delay.

Trust in EANI has been impacted due to previous practice, it is essential that the regulations ensure a transparent and trust based system that works for all.

Completed statements **must** be sent electronically to schools going forward as well as correspondence linked to statementing and attached to the pupil school file at source (EA), thus ensuring that a track of updated statements is maintained in school.

Annual Review of a SEN Statement (regulation 18 refers)

Current position: Under the 1996 Order a child's SEN Statement must be reviewed annually. A meeting involving parents and others must be held each year to inform this review. There are no timescales set for the EA to inform the parent about the outcome of the annual review i.e. whether the EA will maintain, amend or cease a SEN Statement.

Feedback from the 2016 Consultation: There was little mention of annual review. However feedback from the stakeholder engagement by the Education Committee and through talking to schools highlighted the anxiety felt by parents about the annual review and the bureaucracy attached to the annual review process both for parents and schools.

Department Proposal: The Department's proposals relate to flexibility with regard to holding an annual review meeting and introduce timescales for the EA to inform parents or a young person (child over compulsory school age) of the outcome of the annual review. In every year, the principal will have to seek representations and advice to complete an annual review report and submit it to the EA. It is proposed that the principal may have a meeting in any year, but there should always be an annual review meeting**:**

- 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.

In a year **that there does not have to be an annual review meeting, a parent or young person or the EA can ask for one**. It is expected this would be if it was thought the special educational provision needed to change. However, if all parties are content that the provision in place for the child is working and everyone agrees that a meeting is not needed, then one is not required.

The **new timescales** associated to annual review in the draft SEN Regulations include the EA informing 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 the receipt of the 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. The decision not to amend a Statement carries a new right of appeal.

* Years 1-2 = Foundation Stage, Years 3-4 = Key Stage 1, Years 5-7 = Key Stage 2, Years 8-10 = Key Stage 3 and Years 11-12 = Key Stage 4.

5. Where an annual review of a Statement is taking place in any year a meeting is not required, do you agree that the parent or young person over compulsory school age can ask for a meeting?

Strongly agree	Agree	Neither agree or disagree	Disagree	Strongly disagree	Don't know
			x		

The phrasing annual review implies that there is always an option for any stakeholders in a child/young persons' statement to request a meeting.

The regulations do not provide guidance on Emergency Reviews.
INTO Propose within the Regulations Part V a specific section details the format of an emergency review, the obligation of EA & HSC attendance and provision, and the timescale that EA & HSC will respond to the findings of the emergency review.

6. Do you agree with the introduction of time limits for the EA to inform the parent or young person over compulsory school age of the outcome of the annual review of a Statement?

Strongly agree	Agree	Neither agree or disagree	Disagree	Strongly disagree	Don't know
			x		

Time limits alone do not deliver what is needed in the system for both the child/parent and the school.
INTO Propose: The Regulations expand the information the EA is to share following the outcome of the review including:
In the event the EA decide that no amendment is required inform the school, parent and child of the rationale for that decision so that a focused and sped up appeal, if necessary can be carried out
In the event that amendments have been made, the timeframe for implementing the revisions.

Children over Compulsory School Age – assistance and support, and who can raise a question about a young person's lack of capacity (regulations 23 and 24)

Current Position: Currently the rights in the SEN Framework are exercised by a child's parent. Once commenced, the SEND Act brings in new rights for young people (children over compulsory school age) who have, or may have, SEN.

Feedback from the 2016 Consultation: The opportunity for children over compulsory school age to participate in decision making was welcomed. However, there was opposition to the regulation prohibiting the child to have a legal representative to act on their behalf or participate in discussions with the EA. In addition, there were a wide range of comments regarding lack of capacity of a child over compulsory school age to exercise their rights.

Departmental Proposals: The Department proposes that children over compulsory school age can appoint someone to help them exercise their rights, if they so wish to do so. The EA will be required to respect the appointment and recognise the assistance and support for the young person. Such assistance and support can include: 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. The proposed people are:

- A parent.
- A representative (over age 18).
- A solicitor, barrister or other legal representative.

The Department also proposes to add to the list (when compared to the 2016 draft version of the Regulations) those who can raise a question about a young person's lack of capacity to exercise their rights within the SEN Framework. Namely, the Department has added 'the child's school' and separated out 'health care professional' and 'social worker'. The proposed people are:

- The young person (child over compulsory school age).
- The parent of the child.
- The EA.
- The child's school (the responsible body).
- The Tribunal.
- A health care professional who has experience working with the child in a professional capacity.

- A social worker who has experience working with the child in a professional capacity.

7. Do you agree with the proposed list of people who can assist and support a young person (child over compulsory school age) to exercise their rights within the SEN Framework?

Strongly agree	Agree	Neither agree or disagree	Disagree	Strongly disagree	Don't know
			x		

INTO has a number of concerns with the section regarding capacity to make a decision. The information is not clear, this includes no mention of a time frame when the determination of lack of capacity will be decided by the Authority.
Is the Regulations definition of 'lacks capacity' fully in line with the Mental Capacity Act 2016?
The regulations make limited reference to the Mental Capacity Act 2016 specifically though selected phrases have been quoted.
INTO propose that to ensure users of the regulations are clear about the legal rights of the child over 16 reference to the MCA 2016 enables a clearer, simplified delivery of information, including reference to specific articles:

"*1. (4) The person is not to be treated as unable to make a decision for himself or herself about the matter unless all practicable help and support to enable the person to make a decision about the matter have been given without success*
(5) The person is not to be treated as unable to make a decision for himself or herself about the matter merely because the person makes an unwise decision."

"*Supporting person to make decision*

5.—(1) A person is not to be regarded for the purposes of section 1(4) as having been given all practicable help and support to enable him or her to make a decision unless, in particular, the steps required by this section have been taken so far as practicable.
(2) Those steps are—
(a)the provision to the person, in a way appropriate to his or her circumstances, of all the information relevant to the decision (or, where it is more likely to help the person to make a decision, of an explanation of that information);
(b)ensuring that the matter in question is raised with the person—
(i)at a time or times likely to help the person to make a decision; and
(ii)in an environment likely to help the person to make a decision;

(c)ensuring that persons whose involvement is likely to help the person to make a decision are involved in helping and supporting the person.
(3) The information referred to in subsection (2)(a) includes information about the reasonably foreseeable consequences of—
(a)deciding one way or another; or
(b)failing to make the decision.
(4) For the purposes of providing the information or explanation mentioned in subsection (2)(a) in a way appropriate to the person's circumstances it may, in particular, be appropriate—
(a)to use simple language or visual aids; or
(b)to provide support for the purposes of communicating the information or explanation.
(5) The reference in subsection (2)(c) to persons whose involvement is likely to help the person to make a decision may, in particular, include a person who provides support to help the person communicate his or her decision.
(6) Nothing in this section is to be taken as in any way limiting the effect of section 1(4)."

8. Do you agree with 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?

Strongly agree	Agree	Neither agree or disagree	Disagree	Strongly disagree	Don't know
			x		

Capacity determination 24 (2) definition of "a responsible body" is required within the regulations themselves – currently this is only identified in the consultation to mean the child's school.

Is the definition of 'parent' widened to include LAC guardians and officials when children are wards of the court or safeguarding concerns has put them onto the at risk register?

The regulations do not detail the format in which a question about a young person's lack of capacity is completed.
INTO propose that an agreed 'form' is provided within the Annex to the regulations. A checklist may ensure that the MCA 2016 has been complied with and information being provided to the Authority is concise and complete. This will ensure minimal delay in provision and support.

Revised timescales for new Mediation Arrangements (regulations 35 & 36)

Current Position: The requirements surrounding mediation, as under the SEND Act, have not commenced (or started). It is a new process within the SEN Framework. 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 Tribunal - the Special Educational Needs and Disability Tribunal (SENDIST). Mediation does not take away the right of parents or young people if they still wish to appeal to the Tribunal. A parent or young person does not have to engage in mediation but they must seek information about mediation and if they wish to make an appeal, they must have a mediation certificate.

Feedback from the 2016 Consultation: While the introduction of independent mediation was broadly welcomed, parents expressed their concern about some of the timescales. For example the 3 day timescale proposed in the 2016 draft SEN Regulations, in relation to the time they had to tell the mediation adviser (after receiving information about mediation), that they want to pursue mediation. This was considered too short and it could disadvantage parents**.**

Departmental Proposals: The new proposed timescales for the required steps within the mediation arrangements are:

- If a person is considering making an appeal, then contact must be made with a mediation adviser **within 4 weeks** of the date of the EA's Notice which included the decision.
- The mediation adviser must provide information and advice about how to pursue mediation **within 2 working days** of the person making contact.
- A mediation certificate is to be issued **within 3 working days** from the information and advice about mediation being provided.
- If a person intends to pursue mediation, they must contact a mediation adviser **within 6 weeks** of the date of the EA's decision (a Mediation Certificate will only be issued if a parent or young person has made contact with the mediation adviser **within 6 weeks** of the date of the EA's Notice which included the decision).

The EA are required to comply with the terms of any mediation agreement within certain timeframes, the same as if an Order came from SENDIST.

Whilst not exhaustive, the appealable decisions include a decision not to make an assessment; not to make a Statement; about the content of a Statement; and a decision not to amend a Statement following annual review (new).

9. Do you agree with the timescales regarding the mediation process?

Strongly agree	Agree	Neither agree or disagree	Disagree	Strongly disagree	Don't know
			x		

There is a lack of clarity about how the mediation process will be funded, the projected numbers who will be initially directed to mediation could see a system overwhelmed and unable to meet the timescales outlined. The effectiveness of any system is reliant on funding & resourcing.
There is also a lack of clarity in relation to how a 'person' is supposed to access mediation, if they do not inform the mediation adviser. para 35(4) which states 'the person……is not required to inform the mediation adviser whether they wish (or, as the case may be, do not wish) to pursue mediation.'
This issue is further confused by para 36(1) which indicates the timeframe within which the person has to contact the mediation adviser to pursue mediation.

There is concern over the capacity for the system to provide the potential number of mediations given the requirements for the 'Training and Experience' of Mediators

General Comments

10. Do you have any other comments you wish to make on the draft regulations?

The timing of the consultation, even with the extended deadline, has come at a time of crisis in schools and for parents and unfortunately key stakeholder views may not then be truly reflected in the amount and content of responses received. Schools, BoGs and parents have been unable to meet to discuss the issues contained within these lengthy documents at this time, which must cast doubt on the validity of the consultation at this time.
The seriousness of this consultation is significantly undermined by its focus upon only a few of the regulations does not therefore provide the opportunity to feedback on important aspects of the regulations.
INTO would draw attention to:

Part II EA plan of arrangements
The Regs specify 4.(1) (a) "have regard to financial resources available to it"

- INTO believes that the plan should include detail of what has been omitted due to financial constraints, the contingency for these omissions, assessment of impact and intent to forward plan for future years.
- **INTO propose The Regulations should specify:**
  HOW the consultation will be shared with stakeholders and that any consultation is written in 'plain speak' to ensure full participation from all involved or impacted.
  Information on whether the plan has been completed with input and commitment from HSC?
  when the EA plan of arrangements is evaluated and shared with stakeholders.

Part III Board of Governors

- In ensuring that the LSC (SENCO) has access to ongoing training and sufficient time there may be additional demands made on the school budget.
  INTO propose that a Governor should be identified for SEN, in line with there being a Governor for finance or safeguarding, who would support the LSC directly in their role.
  The Regulations fall short of detailing the process the Board of Governors follow if the budget needs reviewed to support SEN in the school, for example additional release time up to 5days.

Part IV Assessment

- Though the dates for completion of an assessment laid out INTO notes under psychological advice that the Authority does not appear to have adequate Ed Psy and may engage outside the authority. This illustrates one of the overarching concerns INTO has with regard to the SEN Framework Regs/COP – the EA is neither resourced nor operating at a level adequate to meet need currently, never mind into the future.
- **INTO propose** a definition of 'relevant party' to be noted in the opening section Part I

Part V Statement

- INTO has already identified the use of the term 'outcomes' in place of objectives or targets. Setting "expected outcomes" on a statement for pupils whom DE have identified in COP as being "the most significant and/or complex difficulties" is not phrasing fit for purpose and suggests something which may be unachievable.
  INTO propose DE return to the use of terminology of targets, this reflects the current wording and practice in schools.
- INTO has been unable to identify within the regulations, COP or the extensive Annexes index a copy of the proposed Annual Review form.
  INTO propose that the Annual Review form that is completed can be done so electronically, automatically linking to the pupil's SEN record – this should reduce workload and ensure that records can be maintained easily.
- The Regulations only identify a child over compulsory school age as being invited to a review meeting. If the views of the child are to be gained **INTO propose** that the Regulations specify that the child should be invited regardless of age.
- **INTO propose** that the determination from the designated officer of the Authority within 4 weeks of the review report being submitted to the authority is forwarded to all relevant parties electronically and attached at source to the pupil record.

Part VI Children over Compulsory School Age

- INTO has concerns over the resources within EA to determine capacity and report to schools. Where the determination is the child OCSA does have capacity is the EA resourced to support the school in moving forward? Has the training plan for all relevant schools been planned and financed.
  INTO Propose the Regulations outline the EA/school role where a determination is made the child OCSA **does** have capacity.

Part VII Mediation & Appeals

- It would be hoped that if the SEN system of assessment, statementing, provision, revision is run effectively the need for mediation will be reduced. However, the trust in the process, due to well recorded failings in the delivery by EANI CYPS has been significantly damaged. INTO concerns remain that the resourcing and funding of a mediation system will exceed

available budget. The % of children being identified, pending and diagnosed has seen significant increase since the SEN review began.
INTO is concerned that though the dates have rightly been extended for the parents of children wishing to pursue tribunals the dates for response are extremely short.
INTO Propose a review of the EA capacity and current provision before implementing regulations that will force the system into collapse.

Part IX Revocations and transitional arrangements

- It would assist parents and teachers if this section, which carries important information of the transition period to the Regulations, was clear. The parent summary carries no detail.
  INTO Propose clarity at all points of the Regulations

20 years into the 21st century and EA still operates on paper documents. For a revised SEN framework to have purpose and transform the administration (which ultimately reduces workload and streamlines services) EA must have the ability to attach files directly to a pupil's record – the proposed system is SIMs.

INTO request that references throughout the document to 'him/he or her/she or himself/herself' are amended to 'they/them/themselves' this does not change the meaning or context but does recognise inclusivity for all.

INTO would welcome the opportunity to further discuss with DE/EA the issues raised and proposals for planning a way forward.