RESPONSE TO THE REVIEW OF THE COMMON FUNDING SCHEME FOR SCHOOLS

Executive Summary

A. The Northern Ireland Human Rights Commission (NIHRC) pursuant to Section 69 (1) of the Northern Ireland Act 1998 reviews the adequacy and effectiveness of law and practice relating to the protection of Human Rights. In accordance with this function the following statutory advice is submitted to the Department of Education (DENI) through the Common Funding Review Panel.

B. The NIHRC advises that the review should consider the principles of a human rights based approach when assessing the performance of the existing system of schools funding in delivering the right to education for every child. It should also allow for the participation of children.

C. The NIHRC is concerned that the current system of funding may not be delivering equal access to an effective education, despite the use of targeted needs based factors. The NIHRC advises that additional measures such as ring-fencing may be considered.

D. The NIHRC is concerned at the lack of outcome based monitoring of the Common Funding Scheme and advises DENI to make provision for robust accountability in the spending of funds allocated across all the needs based factors, so as to measure their impact on the delivery of effective education.

E. The emphasis on the age-weighted pupil units in the allocation of funding could have a disproportionate impact on the right of parents in rural locations to choose education in conformity with their own religion and philosophical convictions and the NIHRC advises DENI to avoid unjustified retrogressive measures in this regard.
The NIHRC advises some changes to the needs based factors covering Newcomer, TSN, and Traveller and Roma children. The NIHRC also advises consideration of additional factors for Looked After Children and young carers.

**Introduction**

1. The Northern Ireland Human Rights Commission (the NIHRC) pursuant to Section 69 (1) of the Northern Ireland Act 1998 reviews the adequacy and effectiveness of law and practice relating to the protection of Human Rights. In accordance with this function the following statutory advice is submitted to the Common Funding Scheme Review.

2. The NIHRC welcomes the opportunity to comment on the Department of Education (DENI) review of the Common Funding Scheme for Schools through contributing to the Call for Evidence. This response will outline the human rights issues engaged by the finance arrangements for schools, with reference to specific duties relevant to the questions posed in Section A and Section B of the Call for Evidence.

3. The NIHRC bases its position on the full range of internationally accepted human rights standards, including the European Convention on Human Rights as incorporated by the Human Rights Act 1998 (HRA) and the treaty obligations of the Council of Europe and United Nations systems. The relevant international treaties in this context include:

   - The European Convention on Human Rights, 1950 (ECHR) [UK ratification 1951];
   - The International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) [UK ratification 1976];

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1 *Northern Ireland Act 1998, s69(1).*
4. The Northern Ireland Executive is subject to the obligations contained within these international treaties by virtue of the United Kingdom’s ratification. The NIHRC, therefore, advises that the Panel scrutinises the arrangements for schools funding for full compliance with international human rights standards.

Section A: The Education Funding System

A human rights based approach to delivering public services.

5. The OFMDFM guide to the Human Rights Act advises public authorities that, in order to ensure compliance with the HRA, “you must make sure that you always think about the impact of your actions on the human rights of people”. Adopting a human rights based approach to policy and programming is considered best practice in this respect. The NIHRC has previously noted the recommendation of the UN Committee on Economic, Social and Cultural Rights in 2009 that the UK adopt a human rights based approach to poverty reduction programmes, as well as noting the broader importance across all areas of governance since “a human rights based approach not only ensures that legal requirements are met but also leads to better quality of outcomes”.

6. The Office of the UN High Commissioner for Human Rights has developed a human rights based approach for the realisation of individual rights as well as on generic programmes and initiatives. A human rights based approach highlights the need for governance to respect the principles of “participation, empowerment, non-discrimination, transparency and accountability and to always devote paramount attention to the most vulnerable in society”. In addition, the participation rights of children are protected under Article 12 of the UNCRC which defines this as the right to express their views freely in all matters affecting them.

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2 Office of the First Minister and Deputy First Minister (2006) Get in on the act: Learning about the Human Rights Act, p10
5 United Nations Convention on the rights of the Child 1989, Article 12, 1
7. The NIHRC welcomes the aim of the Common Funding Scheme (under Local Management of Schools legislation) to promote participation and be responsive to the needs of rights-holders.

8. The NIHRC advises that the Department consider the principles of a human rights based approach when assessing the performance of the existing system of schools funding in delivering the right to education for every child. The review should also reflect the views of children by including a mechanism for meaningful participation in the review process, as required under Article 12 of the UNCRC. 6

*Equal access: The right to equality and non-discrimination*

9. Article 2 of the First Protocol to the ECHR requires that “no person shall be denied the right to education”. 7 Article 14 of the ECHR also prohibits any direct or indirect discrimination in the exercise of Convention rights, including the right to education. 8

10. Article 13 of the ICESCR and Article 28 of the UNCRC require that primary education is “compulsory and available free to all” 9 and that secondary education should be “available and accessible” 10 to all through the use of “every appropriate means” 11, including the “progressive introduction of free education” 12 and, as outlined in the UNCRC, “offering financial assistance in case of need” 13. Article 5 of the UNCEDER and Article 24 of the UNCRPD also set out the requirements on DENI to ensure equal access to education without discrimination on the grounds of disability or race.

11. As with all human rights, the state parties are obligated to respect, protect and fulfill the right to education. The obligation to fulfill incorporates both an obligation to facilitate and an obligation to provide: 14

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6 Ibid.
7 European Convention on Human Rights 1950, Protocol 1, Article 2
8 Ibid, Article 14
10 United Nations Convention on the Rights of the Child 1989, Article 28, 1(b) and International Covenant on Economic, Social and Cultural Rights 1966, Article 13, 2(b)
11 Ibid.
12 Ibid.
14 UN Committee on Economic, Social and Cultural Rights, General Comment No. 13 on The right to Education (1999) para. 46
“The obligation to fulfill (facilitate) requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education... As a general rule, State parties are obliged to fulfill (provide) a specific right in the Covenant when an individual or group is unable, for reasons beyond their control, to realise the right themselves by the means at their disposal.”\[^{15}\]

12. The obligation to fulfill has been shown to allow for the use of special measures where they are necessary to address need and where individuals have been denied “equal enjoyment or exercise of human rights and fundamental freedoms.”\[^{16}\] Notably, both the Council of Europe\[^{17}\] and the Committee on the Elimination of Racial Discrimination have made recommendations for States to take “affirmative measures”\[^{18}\] in order to secure equal access to education for Roma and Traveller children.

13. There is evidence to suggest that the current funding system may not be delivering equal access to education. For example, the publication of DENI’s viability audit in March 2012 revealed a number of schools failing to provide an effective education as well as an obvious disparity between the quality of outcomes achieved for pupils in the Controlled Sector compared to the Maintained and Integrated Sectors. A 2011 report by the working group on education disadvantage of the Protestant working class highlighted “insufficient flexibility” in the funding of schools and suggested this “weakens the ability of educators to respond creatively to the needs of students who are not achieving”.\[^{19}\]

14. The NIHRC welcomes the use of needs based factors in the Common Funding Formula as a measure to improve access to

\[^{15}\] Ibid, para. 47
\[^{16}\] Ibid, para 32 states, “The adoption of temporary special measures intended to bring about de facto equality for men and women and for disadvantaged groups is not a violation of the right to non-discrimination with regard to education, so long as such measures do not lead to the maintenance of unequal or separate standards for different groups, and provided they are not continued after the objectives for which they were taken have been achieved.”
\[^{17}\] Council of Europe Recommendation of the Committee of Ministers on the education of Roma and Travellers in Europe (2009) 4
\[^{18}\] Concluding observations of the Committee on the Elimination of Racial Discrimination : United Kingdom of Great Britain and Northern Ireland, 2003 CERD/C/63/CO/11
education for children who have been unable to fully realise their right to education. In the context of shrinking budgets for schools generally, funding allocated under needs based factors should not be allowed to be directed away from the children whose right to education may be at risk. The NIHRC advises that ring-fencing of these funds is permissible under international human rights standards and may be considered as a special measure where there is evidence that needs based funding does not adequately result in improved outcomes for children.

**Access to an effective education.**

15. When considering the right to education enshrined in the ECHR, the jurisprudence of the European Court has determined this to mean the right to an *effective* education, in that “the individual who is the beneficiary should have the possibility of drawing profit from the education received.”

16. General Comment 13, issued by the UN Committee on Economic, Social and Cultural Rights advises that “States parties must closely monitor education - including all relevant policies, institutions, programmes, spending patterns and other practices - so as to identify and take measures to redress any de facto discrimination. Educational data should be disaggregated by the prohibited grounds of discrimination.”

17. Where a funding policy based on autonomy of financial management, such as the Common Funding Scheme, is implemented without regard to outcome, it may result in reduced access to effective education. For example, Data from the OECD PISA 2009 research shows that “autonomy and accountability go together” and that while greater autonomy in resource allocation is linked to better outcomes for pupils where performance indicators are publicly available, “in countries where there are no such accountability arrangements, schools with greater autonomy in resource allocation tend to perform worse.”

18. The NIHRC notes that current monitoring systems do not fully capture the performance of schools in delivering the right to an

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20 European Court of Human Rights, *Belgian Linguistic Case* No.1 (1967), Series A, No.5 (1979-80) 1 EHRR 241; and No.2 (1968), Series A, No.6 (1979-80) 1 EHRR 252.


effective education for all children across all locations and sectors. For example, while the accountability mechanism for spending targeting social need (TSN) allocations requires school leaders to outline “how the funds have been deployed to tackle educational underachievement and to support pupils from disadvantaged backgrounds”\(^\text{23}\) as part of the School Improvement Planning Process, there is currently no outcome based monitoring of the extent to which these funds ensure the right to an effective education for pupils facing socio-economic barriers.

19. The NIHRC advises DENI to make provision for robust, outcome based accountability in the spending of funds allocated across all the needs based factors of the Common Funding Scheme, so as to measure their impact on the delivery of effective education.

20. The NIHRC further advises the inclusion of an additional principle to those outlined in Para 2.4 of the consultation document, which highlights the need for the funding scheme to be underpinned by a system of outcome based monitoring so as to fulfil the requirements of General Comment 13 on the right to an effective education.

Section B: Delegated Schools Funding: Formula Content

Pupil numbers: Effective education and parental choice.

21. Protocol 1, Article 2 of the ECHR outlines the State duty to “respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”\(^\text{24}\)

22. The significance of the age weighted pupil units in determining the majority of the budget allocation for schools raises two issues.

- The NIHRC notes the continuing decline in pupil numbers overall and the widening gap between enrolment in urban and rural schools.\(^\text{25}\) The NIHRC advises DENI to attend to the issue of

\(^{23}\) Department of Education, *Local Management of Schools: Common Funding Scheme 2011-12* para 3.34

\(^{24}\) *European Convention on Human Rights, 1950 Protocol 1, Article 2*

\(^{25}\) Rural Development Council, *Striking the Balance: Toward a Vision and Principles for Education in Rural Northern Ireland* (2008) found that 90% of rural schools have below 200 pupils compared to 37% of urban ones.
equal access to an effective education for children in rural communities. While the small school factor goes some way to addressing this, it is by no means a significant enough commitment to resourcing small schools to deliver all aspects of the curriculum.

- The closure of small schools could also have a disproportionate impact on the right of parents in rural locations to choose education in conformity with their own religion and philosophical convictions given the unequal distribution of small schools across urban and rural areas. The NIHRC advises that failure to address this issue could constitute retrogression in light of the enhanced protection of the right of parents to choose education in these sectors under the Education Reform Order (1989).\(^\text{26}\) With regard to the right to education, any deliberately retrogressive measures must "have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State party’s maximum available resources."\(^\text{27}\)

Using existing resources to promote the right to education.

23. The Interim report of the Special Rapporteur of the United Nations Human Rights Council on the Right to Education (2011) is devoted to the issue of domestic financing of basic education. The report deals with the importance of securing adequate resource for education and also highlights that "it is of equally critical importance to ensure their effective and optimal utilisation."\(^\text{28}\) In particular, the report recommends that "specific resources must be ensured to address the root causes of the exclusion of girls, those living in poverty or with disabilities, ethnic and linguistic minorities, migrants and other marginalised and disadvantaged groups."\(^\text{29}\) The NIHRC therefore welcomes the emphasis on needs based factors within the Common Funding Formula.

24. **Newcomer children:** The NIHRC welcomes the extension of support for newcomer children from the original two year duration to cover the first three years of their school life. However, any arbitrary restriction on funding might fail to

\(^{26}\) Education Reform Order (Northern Ireland) 1989, Article 64

\(^{27}\) United Nations Committee on Economic, Social and Cultural Rights, General Comment 13 on The Right to Education (1999) para. 45

\(^{28}\) United Nations General Assembly, 66th Session, The right to education (2011) para. 44

\(^{29}\) Ibid, para. 47
address pupils’ continuing language needs as evidence suggests a longer period of support may be necessary. The NIHRC advises that DENI take a more evidence based approach that better reflects the needs of individual children.

25. **Targeting Social Need:** Allocating this factor on a per pupil basis alone, may not be sufficient in improving the access of all children to an effective education. There is considerable evidence that schools with higher concentrations of pupils from disadvantaged backgrounds affect the educational outcomes of all pupils regardless of background. The NIHRC advises this broader rise in cost should be considered in the allocation of needs based funding.

26. **Traveller and Roma children:** The NIHRC welcomes the fact that funding allocated to support children from the traveller community, including Roma children, is given a distinct category within the needs based factors. The recommendations of the Traveller Education Taskforce have set out clearly the key responsibility of the Department in ensuring full access to education, choice and outcomes parallel with the range of outcomes for all other children. It also highlights the need for a commitment to gathering data and delivering an adequately monitored action plan with a focus on equality of outcomes for traveller children. The NIHRC advises the application of outcome focused accountability to the monitoring of the allocation of funds under this factor.

27. The NIHRC notes evidence that the educational outcomes of Looked After Children are significantly lower than their peers, with only 17% of children who left care in 2009/10 achieving 5 or more GCSEs (Grades A*-C) compared with over 70% of general school leavers. The NIHRC recalls DENI’s commitment to fulfilling their obligations to these children in stating “one of the key education priorities is closing the gap and increasing

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30 J. Cummins (2008) *BICS and CALP: Empirical and Theoretical Status of the Distinction* page 74: found that students learning English as an additional language take, on average, 5 to 7 years to catch up academically with their peers despite reaching conversational proficiency at an earlier stage.
access and equity”. The NIHRC advises that DENI consider introducing a needs based factor to address this and support other policy commitments in this area.

28. While little research has been completed on the educational experiences of young carers, evidence suggests they represent a group of young people who “may be at risk from losing out educationally and may be in need of additional support.” The NIHRC advises that DENI give further consideration to the educational needs of young carers, monitor their access to education and consider introducing a needs based factor in the Common Funding Formula.

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34 Department of Education Circular (2011) The Introduction of Personal Education Plans for Looked After Children