



# The Integration Jigsaw: Education and Health

**Author:** Emma Smith (LLM, MSc, MBPsS, MAPM)

**Date:** June 2022

**Email:** [emma@escmanagementservices.co.uk](mailto:emma@escmanagementservices.co.uk)



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## 1.0 Context and Introduction

- 1.1 The SEND Review sits within wider system reforms across education, health and care. This critical juncture presents an opportunity to make meaningful improvements and long-lasting change. The 2022 Green Paper acknowledges that the 2014 reforms had the right aspirations but delivery had fallen short. Proposals for system fixes include national standards, clarity on roles and responsibilities and strengthened accountabilities. These approaches should be welcomed. But for the children and young people that require healthcare to access education, there is a need to rectify the missteps of the past before moving forward. This means scrutinising the Children and Families Act (CFA) 2014 reforms.
- 1.2 The 2014 reforms were described as landmark changes.<sup>1</sup> The Education, Health and Care Plan (EHCP) was intended to be the vehicle to deliver integrated, improved and consistent services for children and young people with SEND. However, reports and reviews have consistently highlighted a failing system and inadequate joint working across the sectors.<sup>2,3</sup> In 2019, the House of Commons Education Committee noted that the role of health was integral but “*the meshing of the systems had not worked*”.<sup>4</sup> The Committee stood behind the 2014 reforms, citing poor implementation as the issue and it did not shy away from calling out unlawful practices.
- 1.3 More recently, the Green Paper reported that it was “*local discretion*” that had resulted in inconsistencies.<sup>5</sup> Certainly, from an EHCP ‘health’ perspective, the CFA 2014 obligations on health bodies do not permit the degree of discretion commensurate with the geographical inconsistencies seen in health provision. In the past, criticisms levelled at EHCPs have included poor quality health input and CQC and Ofsted noted, “*common weaknesses*” in processes for securing health contributions.<sup>6,7,8</sup> In 2022, EHCP ‘health’ issues remain including confusion between Section F Special Educational Provision and Section G Health provision.<sup>9</sup>
- 1.4 A golden thread running through the CFA 2014 and current system reforms is integration. Aspirations for integration are now even more ambitious than ever but greater integration, inherently means greater complexity. Ironically, this increasing complexity will require far greater clarity regarding sector functions and services. This integration context is important and the jigsaw analogy is helpful. With a jigsaw, a complete, joined-up picture is based on three principles; distinct pieces, defined boundaries and clear links. Similarly, these are the characteristics of an effective and navigable integrated system. It is only with these characteristics that a truly integrated system will have a positive impact on the provision, experiences and outcomes for children and young people with SEND.

<sup>1</sup> Timpson, E. (2014) Reforms for children with disabilities come into effect. DfE Press Release <https://www.gov.uk/government/news/reforms-for-children-with-sen-and-disabilities-come-into-effect>

<sup>2</sup> Local Government and Social Care Ombudsman. (2017) Education, Health and Care Plans: Learning lessons from complaints. <https://www.lgo.org.uk/assets/attach/4197/EHCP%20FINAL2.pdf>

<sup>3</sup> National Association of Headteachers (NAHT) Written Evidence to the House of Commons Education Committee SEND Inquiry <http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Education/Special%20educational%20needs%20and%20disabilities/Written/85046.html>

<sup>4</sup> House of Commons Education Committee (2019) Special Educational Needs and Disabilities. First Report of Session. <https://publications.parliament.uk/pa/cm201919/cmselect/cmeduc/20/20.pdf>

<sup>5</sup> DfE (2022) SEND review: right support, right place, right time. Pg. 22

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1063620/SEND\\_review\\_right\\_support\\_right\\_place\\_right\\_time\\_accessible.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1063620/SEND_review_right_support_right_place_right_time_accessible.pdf)

<sup>6</sup> Local Government and Social Care Ombudsman (2019). Focus Report: Not going to plan? Education, Health and Care Plans two years on.

<https://www.lgo.org.uk/information-centre/news/2019/oct/a-system-in-crisis-ombudsman-complaints-about-special-educational-needs-at-alarming-level>

<sup>7</sup> Sales, N. and Vincent, K. (2018) Strengths and limitations of the Education, Health and Care plan process from a range of professional and family perspectives. BJSN, Vol. 45, No. 1, pp. 61-80. doi:10.1111/1467-8578.12202

<sup>8</sup> CQC and Ofsted (2017) Local Area Inspections: One Year On. Pg. 6.

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/652694/local\\_area\\_SEND\\_inspections\\_one\\_year\\_on.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652694/local_area_SEND_inspections_one_year_on.pdf)

<sup>9</sup> Council for Disabled Children (CDC) (2022) Mapping ‘pinch points’ across the Education, Health and Care Plan Process.

<https://councilfordisabledchildren.org.uk/sites/default/files/uploads/attachments/Visualisation%20of%20pinch%20points%20in%20the%20EHCP%20process.pdf>



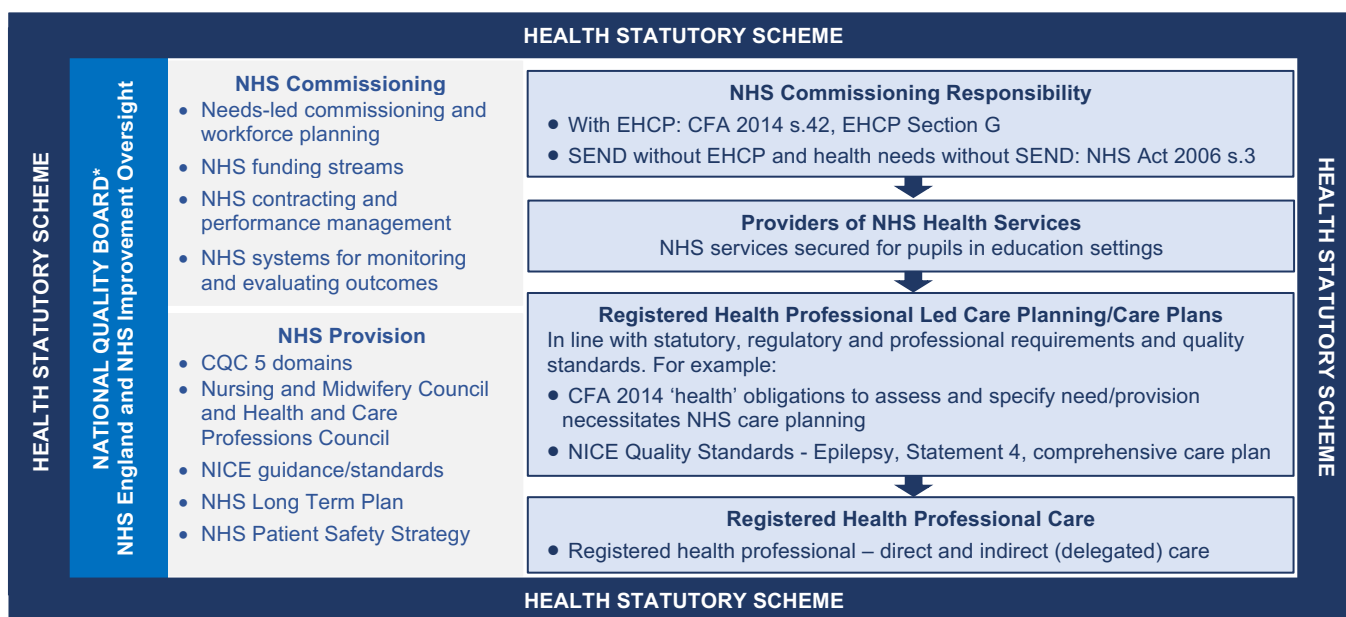
## 2.0 The Integration Jigsaw - Health

2.1 The CFA 2014 and the NHS Act 2006 duties should be sufficient to secure high-quality provision for all children and young people that require healthcare to access education. The CFA 2014 obligations on NHS bodies includes the s.42 duty to arrange EHCP 'health' provision. For children and young people without an EHCP, under the NHS Act 2006 s.3, NHS commissioners are responsible for supporting children and young people with additional health needs, long-term conditions and disabilities in the school setting.<sup>10</sup> Whilst local authorities (LAs) are responsible for public health school nursing, NHS commissioners and LAs should have joint commissioning arrangements in line with their respective statutory obligations.<sup>11,12</sup>

2.2 'Health' must be acknowledged as a distinct component within the integration jigsaw. In 2017, Judge Ward highlighted the importance of sector distinctions, stating;

*"The systems of special educational needs, care provision and health provision are the subject of differing statutory provisions, with differing duties imposed on differing bodies and differing governance arrangements."<sup>13</sup>*

An NHS commissioning responsibility should trigger an NHS pathway of care which sits within the 'health' statutory scheme and governance arrangements. A raft of legislation is embedded in this NHS pathway to ensure high-quality healthcare. For example, the Health and Social Care Act 2012 s.26 duties on NHS commissioners to improve quality and promote the NHS constitution<sup>14</sup> and the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 duties to deliver safe care. Figure 1 summarises the NHS pathway.



\*As a consequence of joint health and care legislation some structures and systems to ensure quality care span both health and care.<sup>15</sup>

Figure 1: The NHS Pathway

<sup>10</sup> DfE (2015) Supporting pupils at school with medical conditions. See pg. 16 Clinical Commissioning Group Responsibilities. [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/803956/supporting-pupils-at-school-with-medical-conditions.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803956/supporting-pupils-at-school-with-medical-conditions.pdf)

<sup>11</sup> CFA 2014 s.26, NHS Act 2006 s. 75 and NHS Act 2006 s.14Z1

<sup>12</sup> Public Health England (2021) Best start in life and beyond. Guidance to support commissioning of the healthy child programme 0 to 19. Guide No. 2. See pg. 5. [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/982107/Commissioning\\_guide\\_2.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/982107/Commissioning_guide_2.pdf)

<sup>13</sup> East Sussex County Council v KS (SEN) [2017] UKUT 273 [2018] AACR3. Para. 64 [https://assets.publishing.service.gov.uk/media/5bb61b1ce5274a4f75596b3b/2018\\_AACR\\_3\\_ws.pdf](https://assets.publishing.service.gov.uk/media/5bb61b1ce5274a4f75596b3b/2018_AACR_3_ws.pdf)

<sup>14</sup> Note: The Health and Social Care Act 2012 s.26 duties are replicated in the Health and Care Act 2022 s.25 Integrated Care Boards: General Functions

<sup>15</sup> For example, see National Quality Board (2022) National Guidance on Quality Risk Response and Escalation in Integrated Care Systems. <https://www.england.nhs.uk/wp-content/uploads/2022/06/B1497-nqb-guidance-on-quality-risk-response-and-escalation-in-ics.pdf>



2.3 In general terms, it would be fair to conclude that the ‘health’ element has fallen short of the CFA 2014 goals. If there is to be any hope of a meaningful move forward, it is imperative that legislators and policy makers acknowledge and address a fundamental flaw in the system. This requires a full understanding of the ‘what’, ‘why’ and ‘how’.

### 3.0 The What: Health Services in Schools

- 3.1 Over recent decades, the national prevalence of life-limiting and life-threatening conditions in children and young people has significantly increased.<sup>16,17</sup> Whilst the rising numbers of children and young people with complex health needs accessing education is positive, this has corresponded with a trend of reducing NHS services in schools. NHS policy drivers such as care closer to home and personal health budgets, NHS financial pressures and rising health professional workloads has meant an increasing reliance on unregistered/non-health support workers and unpaid carers to deliver healthcare in the community.<sup>18,19</sup>
- 3.2 Although there are examples of high-quality NHS services in the school setting,<sup>20</sup> this is by no means a consistent picture. Despite the backdrop of rising health needs, there has been a shift in responsibility for health provision from the NHS to schools. There is an expectation and indeed, a reality that schools will meet pupils’ health needs, often regardless of the complexity of the needs and interventions involved. This impacts on all education settings but is particularly acute in specialist settings where clinical activity and the potential for harm is greatest. Schools either take on the role of ‘health’ commissioner, independently securing health services or as provider with school staff, predominately teaching assistants, delivering registered health professional interventions.
- 3.3 When school staff deliver healthcare interventions, they do so either via a registered health professional ‘delegating’ tasks or by staff undertaking stand-alone ‘training’. The Nursing and Midwifery Council (NMC) defines delegation as “*the transfer to a competent individual, of the authority to perform a specific task in a specified situation.*”<sup>21</sup> Both the NMC and the Health and Care Professions Council (HCPC) have professional standards and requirements for registrants delegating tasks.<sup>22,23</sup> Delegation should encompass risk assessment, training, competency assessment, supervision, ongoing support and incident management protocols.<sup>24</sup>
- 3.4 The range of interventions delegated to school staff is extensive covering several specialisms including nursing and therapies. RCN guidance listed registered nurse tasks considered suitable and unsuitable for delegation to the school workforce.<sup>25</sup> Clinical procedures deemed suitable included assisting with inhalers, intermittent catheterisation, oral suctioning,

<sup>16</sup> Fraser et al., (2020) ‘Make Every Child Count’ Estimating current and future prevalence of children and young people with life-limiting conditions in the United Kingdom. <https://www.york.ac.uk/media/healthsciences/documents/research/public-health/mhrc/Prevalence%20reportFinal.pdf>

<sup>17</sup> Pinney, A. (2017) Understanding the needs of disabled children with complex needs or life-limiting conditions. Council for Disabled Children.

<http://councilfordisabledchildren.org.uk/testing/effusion3.dh.bytemark.co.uk/sites/default/files/field/attachemnt/Data%20Report.pdf>

<sup>18</sup> NHS England <https://www.england.nhs.uk/commissioning/comm-carers/carer-facts/>

<sup>19</sup> NHS England (2017) Delegation of healthcare tasks to personal assistants within personal health budgets and integrated personal commissioning.

[https://www.england.nhs.uk/wp-content/uploads/2017/06/516\\_Delegation-of-healthcare-tasks-to-personal-assistants\\_S7.pdf](https://www.england.nhs.uk/wp-content/uploads/2017/06/516_Delegation-of-healthcare-tasks-to-personal-assistants_S7.pdf)

<sup>20</sup> For example, see Health Education England. Kent Community NHS Foundation Trust. Medicines Optimisation in Special Schools.

<https://www.lasepharmacy.hee.nhs.uk/quality-management/transformation/medicines-optimisation-in-special-schools/> Also, see Sussex Community NHS FT

<https://www.sussexcommunity.nhs.uk/news/NHS-in-Sussex-wins-prestigious-national-award.htm>

<sup>21</sup> NMC (2018) Delegation and accountability: Supplementary information to the NMC Code. Pg. 3 <https://www.nmc.org.uk/globalassets/sitedocuments/nmc-publications/delegation-and-accountability-supplementary-information-to-the-nmc-code.pdf>

<sup>22</sup> NMC (2018) The Code. <https://www.nmc.org.uk/globalassets/sitedocuments/nmc-publications/nmc-code.pdf>

<sup>23</sup> HCPC. Standards of conduct, performance and ethics. Standard 4 – Delegate appropriately. <https://www.hcpc-uk.org/standards/standards-of-conduct-performance-and-ethics/>

<sup>24</sup> NICE (2022) Disabled children and young people up to 25 with severe complex needs. Para. 1.15.25 pg. 63

<https://www.nice.org.uk/guidance/ng213/resources/disabled-children-and-young-people-up-to-25-with-severe-complex-needs-integrated-service-delivery-and-organisation-across-health-social-care-and-education-pdf-66143773521349>

<sup>25</sup> RCN (2018) Meeting health needs in educational and other community settings. **Note:** Guidance now removed from RCN website.

<https://drive.google.com/file/d/1Dp3X0BWxlE09QepJQMozt9qnZn71IDk/view?usp=sharing>



tracheostomy care and administering medication. This RCN list might equally serve as a list of nursing tasks that would fall under the CFA 2014 s.42(3) and the NHS Act 2006 s.3 commissioned services.

3.5 The education sector has painted a stark picture of health services in schools: decreasing and insufficient NHS input, 'postcode lottery' of provision, over-burdened school staff, high levels of risk, inappropriate use of the LA high needs block (HNB) and lack of NHS accountability.<sup>26</sup> Concerns are not limited to the education sector, issues around risk and variability of provision have been echoed by leading paediatric nurses.<sup>27,28</sup> NHS England has also expressed concerns around variability of both commissioning models and training and support available for school staff.<sup>29</sup>

3.6 ESC research has identified poor practices around the delegation and incident management of nursing interventions.<sup>30</sup> Both these elements of practice have the potential to expose children and young people to increased risk and avoidable harm. Understandably, school leaders are reluctant to publicise when things go wrong but when they do, it is clear that the potential for harm and the impact on pupils and staff is immense.<sup>31,32</sup> Furthermore, ESC is aware of numerous worrying local arrangements that include:

- Teaching assistants providing registered nursing interventions that the RCN deemed **unsuitable** for delegation to unregistered support workers
- Children and young people with NHS continuing care packages to manage complex health needs that in effect stop and start at the school gates
- School staff in special schools responsible for writing healthcare plans for pupils with no/minimal input from local NHS services
- NHS provider trusts explicitly instructing Special School Nursing Teams **not** to undertake competency assessments when delegating to 'training' school staff. Presumably, to mitigate against liability risks.

3.7 So, what is going wrong? The fundamental flaw is the current service delivery model for health provision in schools sits outside the 'health' statutory scheme. The fact is, the majority of health provision delivered in schools is not part of an NHS commissioning arrangement and so to varying degrees, this health activity circumvents the NHS pathway. The delivery model has diverged from the NHS pathway and the gap between the two has widened over time.

3.8 Where NHS 'health' services should be, schools have extended their 'education' offer. Paradoxically, this education 'health' activity has on one hand, visibly filled the void so there is no gap in provision but on the other, the activity has crossed into a 'no-man's land' which is hidden, falling between the spheres of health and education functions. And because this health provision

<sup>26</sup> See House of Commons Education Committee Evidence Submissions. For example, Southfield Grange Trust SCN0461 <http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Education/Special%20educational%20needs%20and%20disabilities/Written/85259.html> and Federation of Leaders in Special Education SCN0448 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/education-committee/special-educational-needs-and-disabilities/written/85244.html>

<sup>27</sup> See RCN Bulletin, Ward T. (2018) Improving Care in SEN Schools <https://www.rcn.org.uk/magazines/bulletin/2018/october/improving-care-in-sen-schools>

<sup>28</sup> RCN (2020) Futureproofing Community Children's Nursing. See pg. 50 Williams C. (2019) Special Needs School Nursing Project <https://www.rcn.org.uk/professional-development/publications/pub-007844> Full report at, <https://www.miss-shanidar.org.uk/archive/>

<sup>29</sup> Mulrone L. (2018) Special Educational Needs and Disabilities. NHS England. Slide 10 'Current Concerns' <https://www.rcn.org.uk/-/media/royal-college-of-nursing/documents/forums/children-and-young-people/professional-issues-forum/ukccypn-lorraine-mulronev-12-june-2018.pdf?la=en&hash=5ECC0AB50DD8E3622C3BE06D8A5EC57C>

<sup>30</sup> ESC (2020) Nursing Provision in Specialist Settings. Commissioned by Special Schools' Voice, sample of 179 specialist education settings.

<sup>31</sup> Dickens J. (2019) Pupils 'at risk' as special school staff stand in for nurses. Schools Week <https://schoolsweek.co.uk/investigation-pupils-at-risk-as-special-school-staff-left-to-fill-gaps-providing-complex-medical-care/>

<sup>32</sup> Wall D. (2022) Why the SEND review must address medical provision in special schools. Tes <https://www.tes.com/magazine/analysis/specialist-sector/why-send-review-must-address-medical-provision-special-schools>



is generally not associated with any formal commissioning, there are no national metrics/databases to measure and monitor this activity. Figure 2 illustrates what can only be described as the epitome of a two-tier system; NHS-led v's Education-led health services.

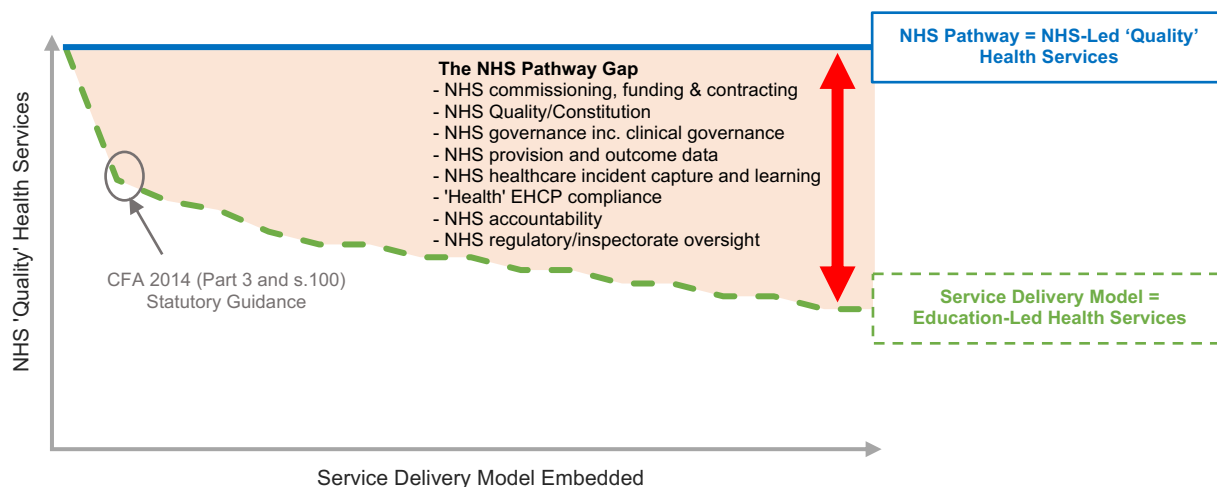


Figure 2. The NHS Pathway Gap

3.9 In practical terms, the process for securing EHCP Section G 'Health' provision illustrates how the service model is at odds with the 'health' statutory scheme. Figure 3 outlines the process. Importantly, the CFA 2014 framework dictates that 'health' needs and provision must be specified in the EHCP before a parent/young person requests a particular school. This means that before a prospective school is involved in the process, the relevant health bodies should have specified the type of provision required including **who will provide it** and agreed the provision. Therefore, based on the statutory process, it makes no sense that a school, having no prior involvement in these 'health' steps, would then be the EHCP 'health' provider. But this is exactly what happens.

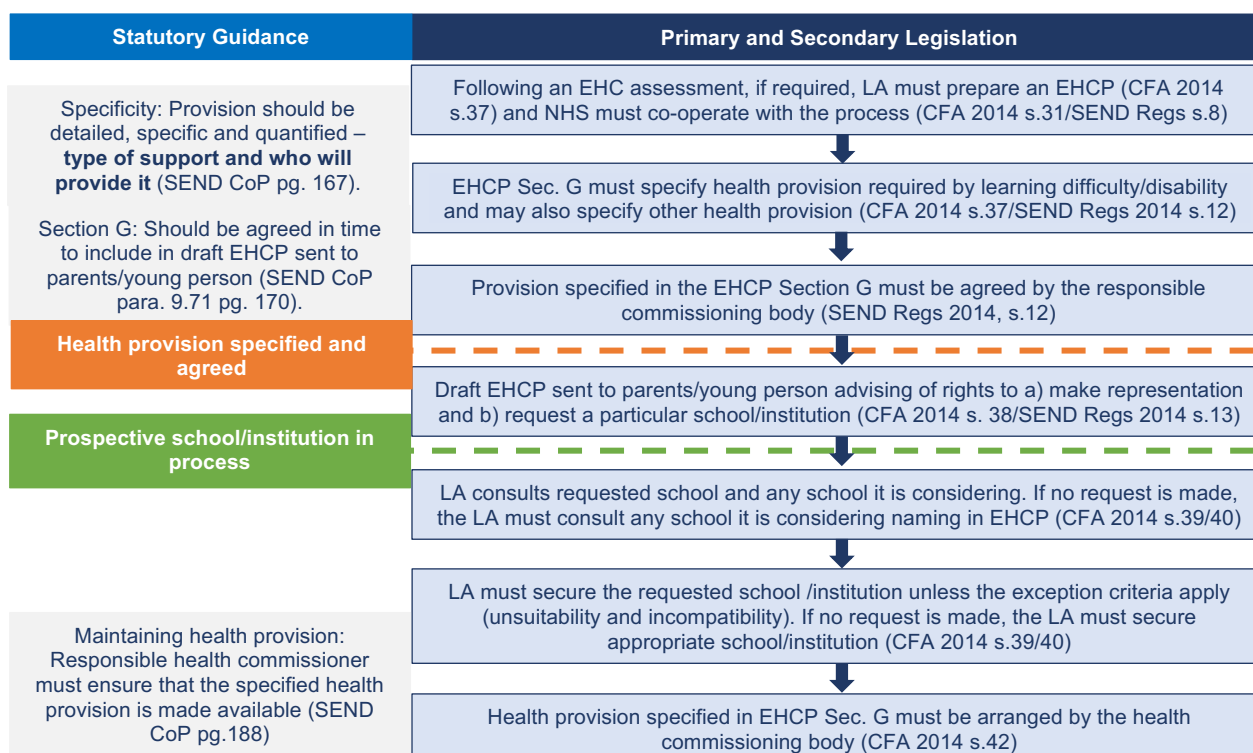


Figure 3: CFA 2014 - EHCP 'Health' Process



## 4.0 The Why: Delegation – The Fault Line

- 4.1 So why has the service model diverged from the ‘health’ statutory scheme and the NHS pathway? The answer is simple; the fault line is registered health professional delegation. More specifically, the system-wide failure to recognise the concept of delegation and the legal implications of delegating health activity to the school workforce. Unfortunately, this failure has led to a series of missteps of significant magnitude and is a root cause of why the ‘health’ aspects of the CFA 2014 reforms have failed to deliver. There are three critical points.
- 4.2 **Point 1** - If an NHS commissioning responsibility exists for services, a registered health professional delegating the activity to an unregistered support worker does not remove the NHS commissioning responsibility. This has been established in case law and is recognised in NHS policy and guidance.<sup>33,34,35</sup> Therefore, where there is an NHS commissioning responsibility, the appropriate NHS commissioner should be securing the services required in their entirety i.e., registered health professional direct and indirect (delegated) care.
- 4.3 **Point 2** - Assuming the current service model is implemented in accordance with NHS statutory obligations, this would mean NHS bodies commissioning schools i.e., NHS funding and contracting to provide delegated services. Acknowledging sector distinctions, this would appear problematic. For example, case law has established that LAs have neither the responsibility nor the power to pay for EHCP Section G ‘health’ provision.<sup>36</sup> There are difficult questions to be asked and answered. Do schools operating within the education statutory scheme have the legal duty or power to function as an NHS service provider? Furthermore, if this is *intra vires* activity, education’s governance arrangements are not set up to deliver NHS ‘quality’ healthcare and so how would/could NHS ‘quality’ standards be achieved and monitored?
- 4.4 **Point 3** - Delegate and train are not interchangeable terms. The term ‘train’ is often used when the term ‘delegate’ should be used.<sup>37</sup> As noted in 3.3, although training is an important component of delegation, they are not one in the same. Where there is an NHS commissioning responsibility, the NHS pathway should be followed and registered health professionals should be delegating the tasks. Surely, by virtue of the fact that a procedure is deemed suitable for delegation, makes it a task that should be delegated within the appropriate governance framework. Downgrading the activity from ‘delegating’ to ‘training’ side-steps the NHS pathway governance arrangements. This is likely to expose children and young people, providers (schools/NHS) and professionals (education/health) to avoidable clinical, organisational and professional risks, respectively.
- 4.5 It should be noted, there are complexities with cross-organisation delegation around accountability, supervision and liability. The CQC makes the distinction between “*under the supervision of*” and delegation and recognises delegation across provider organisations.<sup>38</sup> However, the Royal College of Speech and Language Therapists (RCSLT) has taken the stance that Speech and Language Therapists do not have the authority to delegate tasks to the wider workforce unless they have managerial or supervisory responsibilities for their actions. Instead, RCSLT guidance refers to ‘upskilling’ the wider workforce which includes school staff.<sup>39</sup>

<sup>33</sup> R (T, D and B) v Haringey LBC. [2005] EWHC 2235 (Admin) <https://www.bailii.org/ew/cases/EWHC/Admin/2005/2235.html>

<sup>34</sup> R (Juttla and others) v Herts Valleys CCG [2018] EWHC 267 (Admin) <https://www.bailii.org/ew/cases/EWHC/Admin/2018/267.html>

<sup>35</sup> NHS England (2017) Delegation of healthcare tasks to personal assistants within personal health budgets and integrated personal commissioning. [https://www.england.nhs.uk/wp-content/uploads/2017/06/516\\_Delegation-of-healthcare-tasks-to-personal-assistants\\_S7.pdf](https://www.england.nhs.uk/wp-content/uploads/2017/06/516_Delegation-of-healthcare-tasks-to-personal-assistants_S7.pdf)

<sup>36</sup> East Sussex County Council v KS (SEN) [2017] UKUT 273 [2018] AACR3 [https://assets.publishing.service.gov.uk/media/5bb61b1ce5274a4f75596b3b/2018\\_AACR\\_3.ws.pdf](https://assets.publishing.service.gov.uk/media/5bb61b1ce5274a4f75596b3b/2018_AACR_3.ws.pdf)

<sup>37</sup> For example, see NICE Guideline Disabled children and young people up to 25 with severe complex needs. Draft guideline consultation, ESC highlighted inappropriate use of the term ‘train’, NICE confirmation of revised wording using the term ‘delegate’. Pg. 116/117.

<https://www.nice.org.uk/guidance/ng213/documents/consultation-comments-and-responses-3>

<sup>38</sup> CQC (2015) Scope of registration. Pg. 29

[https://www.cqc.org.uk/sites/default/files/20151230\\_100001\\_Scope\\_of\\_registration\\_guidance\\_updated\\_March\\_2015\\_01.pdf](https://www.cqc.org.uk/sites/default/files/20151230_100001_Scope_of_registration_guidance_updated_March_2015_01.pdf)

<sup>39</sup> RCSLT guidance available on website via a login. ESC was sent a copy of the guidance in June 2020 following an email request.



## 5.0 The How: The Integration Jigsaw – Education

5.1 The ‘why’ is relatively simple but the ‘how’ is highly complex. The CFA 2014 part 3 has not been applied in isolation, it is set within a tangle of wider legislation, policy and practice. Over the years, delegation coupled with an inter-play between these factors has embedded this service model as established custom and practice. When this is explored, there is evidence that the education piece of the jigsaw has been stretched and skewed by imperceptible shifts at different points to give the appearance that this delivery model ‘fits’.

### Schools’ Health Related Duties

5.2 Statutory duties on schools relevant to pupils’ health have limits and seemingly, do not extend to a duty or power for schools to function as NHS commissioners/providers. Again, referring to Judge Ward’s comments;

*“But the fact that the differing bodies are exhorted to collaborate, in the interests of delivering a more integrated result to the children and young people affected, does not mean that the underlying statutory distinctions do not exist, nor that the powers of the various bodies concerned can be stretched so as to yield a joined-up solution in the interests of the child where such a solution does not otherwise emerge.”<sup>40</sup>*

5.3 **CFA 2014:** Ironically, it is likely that the application of the CFA 2014 s.42 duty on health commissioners to arrange EHCP ‘health’ provision has been hindered in part by the CFA 2014 framework. The CFA 2014 part 5, s.100 welfare duty on schools to make arrangements to support pupils with medical conditions was intended to support inclusion for pupils<sup>41</sup> and whilst well intentioned, this duty is problematic in its construction and implementation.

- **Construction:** An early iteration of the Children and Families Bill included an NHS duty to co-operate with schools/governing bodies and despite warnings that this was needed, it was not included.<sup>42,43</sup> So a crucial legal lever to ensure appropriate links between the NHS and schools was omitted.
- **Implementation:** Corresponding DfE guidance fails to recognise the concept and legal implications of delegation.<sup>44</sup> This means that the NHS pathway obligations and responsibilities on NHS bodies and registered health professionals have been overlooked. As a consequence, a wide interpretation has been applied to a school’s duty to ‘make arrangements’<sup>45</sup> with no boundaries or limits. Headteachers, governing bodies and school staff are positioned as responsible for preparing healthcare plans, ensuring appropriate ‘training’ and delivering healthcare provision. However, where there is an NHS commissioning responsibility, these activities should sit within the NHS pathway but the DfE guidance presents NHS involvement as optional, “*may provide advice*” and “*may be able to support*.”<sup>46</sup>

<sup>40</sup> East Sussex County Council v KS (SEN) [2017] UKUT 273 [2018] AACR3. Para. 65

[https://assets.publishing.service.gov.uk/media/5bb61b1ce5274a4f75596b3b/2018\\_AACR\\_3\\_ws.pdf](https://assets.publishing.service.gov.uk/media/5bb61b1ce5274a4f75596b3b/2018_AACR_3_ws.pdf)

<sup>41</sup> Children and Families Bill June 2013 Column 204, 205 and 206. <https://hansard.parliament.uk/Commons/2013-06-11/debates/13061171000001/ChildrenAndFamiliesBill>

<sup>42</sup> Parliament, Children and Families Bill. Ninth Marshalled List of Amendments. Line 223 <https://publications.parliament.uk/pa/bills/lbill/2013-2014/0032/amend/ml032-IX.htm>

<sup>43</sup> Children and Families Bill. October 2013 Column 381, 5.15pm <https://hansard.parliament.uk/Lords/2013-10-23/debates/13102369000129/ChildrenAndFamiliesBill>

<sup>44</sup> DfE (2015) Supporting pupils at school with medical conditions.

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/803956/supporting-pupils-at-school-with-medical-conditions.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803956/supporting-pupils-at-school-with-medical-conditions.pdf)

<sup>45</sup> For a legal view of ‘make arrangements’ see Landmark Chambers. (2018) Commissioning NHS Services. Para. 5.3 and 5.4, pg.12. <https://www.landmarkchambers.co.uk/wp-content/uploads/2018/06/Commissioning-NHS-Services.pdf>

<sup>46</sup> DfE (2015) Supporting pupils at school with medical conditions pg. 14.

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/803956/supporting-pupils-at-school-with-medical-conditions.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803956/supporting-pupils-at-school-with-medical-conditions.pdf)



- 5.4 In Haringey 2005, Judge Ouseley warned that a broad interpretation of a local authority's welfare duties to cover medical provision would turn social services into a "*substitute or additional NHS for children*" and this would be "*an impermissibly wide interpretation.*"<sup>47</sup> There is no great leap from these description and the current education-led health services, particularly in specialist settings with high levels of medical needs. Given the statutory distinctions, a reasonable interpretation of the s.100 duty to 'make arrangements' would be that schools' support pupils' health needs outside NHS commissioning responsibilities, facilitate access to NHS commissioned services and have appropriate joint working arrangements. In essence, there would be a school-led support pathway that sits alongside and complements the NHS pathway.
- 5.5 **CFA 2014 Part 3 – Statutory Guidance:** The SEND Code of Practice describes in detail the s.42 statutory obligation on health commissioners to arrange EHCP health provision. The guidance also refers to health professionals advising and 'training' "*education services on managing health conditions such as epilepsy and diabetes, and health technologies such as tube feeding, tracheostomy care and ventilation in schools.*" But the NHS is responsible for arranging provision for all these conditions and interventions in the school setting. Again, there is no acknowledgement of the concept or implications of delegation. It is likely that as with the point in para 5.3, this statutory guidance has hindered the application of the CFA 2014 health duties i.e., EHCP 'health' provision specificity and delivery.
- 5.6 **Duties to Safeguard and Promote Welfare:** Similar to the point raised in para 5.4, the Education Act 2002 duties on schools to make arrangements to promote welfare have limits. With respect to health and well-being, the DfE Keeping Children Safe in Education guidance signposts to the DfE guidance, Supporting Pupils with Medical Conditions.<sup>48</sup> Thereby, looping back to the points made in para. 5.3 and 5.4.
- 5.7 **Equality Act 2010:** The reasonable adjustment duty is frequently drawn on when discussing a school's responsibility for health provision including delivering complex healthcare. Given the limitations on the reasonable adjustment duty, this is often inappropriate.<sup>49</sup> Equality and Human Rights Commission (EHRC) guidance sets out examples of reasonable adjustments where school staff deliver healthcare e.g., tracheostomy care. In 2020, ESC contacted the EHRC to highlight issues with this guidance i.e., the overlooked NHS commissioning responsibilities. In April 2021, the EHRC written response advised that clarification was indeed required and the guidance should and would be updated. As yet, no update has been issued.
- 5.8 **Health and Safety Duties:** First aid in schools should be in line with health and safety legislation and relevant guidance.<sup>50,51</sup> A premise of first aid is that support is not on a named basis i.e., it is outside the routine management of a health condition. Within the first aid framework, there are also limits on administering medicines.<sup>52,53</sup> Despite this, in recent years, there has been a proliferation of independent companies offering 'training' to schools to manage pupils' medical conditions such as epilepsy and administering buccal midazolam.<sup>54</sup> This is probably a direct result of the DfE guidance (para 5.3). Training offers are generally based on a first aid model i.e.,

<sup>47</sup> R (T, D and B) v Haringey LBC. [2005] EWHC 2235 (Admin) para.68 <https://www.bailii.org/ew/cases/EWHC/Admin/2005/2235.html>

<sup>48</sup> DfE (2021) Keeping Children Safe in Education. Pg. 141 (or pg. 49 of the September 2022 version)

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1021914/KCSIE\\_2021\\_September\\_guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1021914/KCSIE_2021_September_guidance.pdf)

<sup>49</sup> DfE (2014) Equality Act 2010 and schools. See para. 4.15 and 4.19.

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/315587/Equality\\_Act\\_Advice\\_Final.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/315587/Equality_Act_Advice_Final.pdf)

<sup>50</sup> DfE (2021) Statutory framework for the early years foundation stage. See pg. 27 and 42.

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/974907/EYFS\\_framework\\_-\\_March\\_2021.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/974907/EYFS_framework_-_March_2021.pdf)

<sup>51</sup> The Health and Safety (First-Aid) Regulations 1981

<sup>52</sup> HSE. The Health and Safety (First-Aid) Regulations 1981. 2013, reissued 2018. Medicine Para 42, 43 pg. 17 First aid 'does not include giving tablets or medicines to treat illness.' Exceptions include aspirin for a cardiac event (see also ref 56 below). <https://www.hse.gov.uk/pubns/priced/I74.pdf>

<sup>53</sup> See also Human Medicines Regulations 2012, schedule 19. <https://www.legislation.gov.uk/uksi/2012/1916/schedule/19>

<sup>54</sup> For example, see Opus Training <https://opuspharmserve.com/product/supporting-pupils-buccal-midazolam-epilepsy/>



not on a named basis and include on-line and ‘train the trainer’ approaches. However, this is inappropriate for pupils with a recognised medical condition, as this should be within the NHS pathway of health professional-led care planning and delegation on a named basis.

5.9 **Common Law Duty of Care/in loco parentis:** Schools and their staff have a common law duty to take care of pupils in their charge. There can be no doubt that it is commonplace for parents/carers to provide healthcare, some of which can be highly complex.<sup>55</sup> But this landscape has probably skewed the picture and there is a widespread view that because parents provide interventions at home, schools should do the same.

5.10 There are three key points. Firstly, whilst it is understandable that parents/carers provide these interventions, there is no statutory obligation on parents/carers to provide what would be considered NHS services.<sup>56</sup> Secondly, parents/carers providing healthcare for their own child, in their own home, is a different proposition to a school operating as a publicly funded body, undertaking distinct statutory functions. Thirdly, where there is an NHS commissioning responsibility, the assumption would be that these interventions would require some form of specialist skill and knowledge. These points are likely to take the interventions outside the realms of what would be considered reasonable under the common law duty of care.

### **Policy and Practice – CFA 2014 Misunderstood and Misrepresented**

5.11 The House of Commons Education Committee highlighted the confusion around legal responsibilities, EHCPs and school nursing.<sup>57</sup> Narratives on this topic appear to be biased in the way CFA 2014 duties have been presented and interpreted. Even in the context of EHCPs, focus has tended to be on the s.100 duty on schools to make arrangements to support pupils with medical conditions, whilst overlooking the s.42 duty on health commissioners to arrange EHCP ‘health’ provision. Examples shown below:

- **National Association for Special Educational Needs (nasen):** Guidance on SEND reforms and responsibilities covered in detail the EHCP statutory responsibilities but there was **no reference** to the duty on health commissioners to arrange EHCP health provision.<sup>58</sup>
- **RCN:** Guidance on meeting health needs in schools included a section on policy and legislation.<sup>59</sup> Reference was made to EHCPs and the Code of Practice but only the s.100 duty on schools was mentioned with **no reference** to the s.42 duty on health commissioners.
- **NHS England:** SEND guidance states the Children’s Community Nursing Team role includes “providing clinical training for school staff aligned to the child’s EHC plan.”<sup>60</sup> Again, ‘training’ and not ‘delegating’ and **no acknowledgement** that ‘health’ provision in an EHCP should be part of an NHS commissioned service.

### **Policy and Practice - LA High Needs Funding/Banding Models**

5.12 Many LA high needs funding/banding models have conflated health needs/medical conditions with the four areas of SEN outlined in the SEND Code of Practice. The category of SEN ‘Sensory

<sup>55</sup> Page, B., et al (2020) The challenges of caring for children who require complex medical care at home: ‘The go between for everyone is the parent and as the parent that’s an awful lot of responsibility’. Health Expectations 24:1144-54. <https://onlinelibrary.wiley.com/doi/epdf/10.1111/hex.13092>

<sup>56</sup> Parliamentary and Health Service Ombudsman (2019). Family failed by Trust’s decision to remove specialist care, Ombudsman finds. <https://www.ombudsman.org.uk/news-and-blog/news/family-failed-trusts-decision-remove-specialist-care-ombudsman-finds>

<sup>57</sup> House of Commons Education Committee. (2019) Q843 and 844. Emma Hardy MP Oral evidence <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/education-committee/special-educational-needs-and-disabilities/oral/102393.html>

<sup>58</sup> nasen (2016) The SEND reforms: Who should do what? ISBN 978-1-901485-90-5

<sup>59</sup> RCN (2018). Meeting health needs in educational and other community settings. Pg. 8 **Note:** Guidance now removed from RCN website.

<sup>60</sup> NHS England (2018) Quick Guide: Guidance for health services for children and young people with special educational needs and disability (SEND). Pg.18 <https://www.england.nhs.uk/wp-content/uploads/2018/07/send-health-services-children-young-people.pdf>



and/or physical needs' is often expanded to incorporate 'health'. Consequently, health provision descriptors are included in models. Examples include;

- **North Somerset Council:** Category E 'Physical/Medical', descriptors include uncontrolled epilepsy, suctioning and colostomy care.<sup>61</sup>
- **City of York Council:** Threshold document sets out the four broad areas of SEN including "Sensory and/or physical needs" and makes the point that the document refers to "Physical and Health Needs".<sup>62</sup> Health provision listed includes "invasive medical procedures such as catheterisation, tube feeding."
- **Cornwall Council:** High Needs Banding Matrix Element 3 Specialist Settings 'Medical' row includes the descriptor "Chronic or degenerative medical condition. The severity and or the unpredictability of medical condition/s require constant adult intervention by staff with the competency standards required to undertake the necessary procedures."<sup>63</sup>

5.13 It is not difficult to see how health provision described in HNB funding/banding models would then be specified in an EHCP Section F. So, what should be Section G 'health' provision becomes Section F special educational provision. Case law has shown that even if medical support is essential for a child or young person to be educated, that in itself does not make it special educational provision.<sup>64</sup> In 2020, the initial ESC report that raised the delegation issue included this funding point and formed part of a discussion with the DfE. And in 2021, the High Needs Funding Operational Guide 2021 to 2022 included a new Annex – Health and Social Care Costs. This reiterated the Schools and Early Years Finance Regulations restrictions. It stated that the HNB should not be used for non-educational costs and that the relevant health commissioner was responsible for the costs of securing EHCP 'health' provision.<sup>65</sup>

## 6.0 Changes Needed

6.1 National and local work is underway to improve health services for children and young people with SEND.<sup>66,67,68</sup> Whilst this is commendable, unless the issues with delegation and the current service model are resolved, these efforts will be limited in their impact. Although there are changes required within the CFA 2014 framework primarily, improvements will be reliant on compliance with the legislation as it is and reconciling the gap between the NHS pathway and the current delivery model.

6.2 There needs to be acknowledgement that 'health' and 'education' are distinct pieces in the integration jigsaw with differing target functions, statutory schemes and governance arrangements. The failure to recognise the concept and legal implications of delegation in the CFA 2014 framework (and wider legislation and policy) has meant this distinction has been lost. Revisiting statutory obligations and the service model will undoubtedly lead to challenges and

<sup>61</sup> Somerset County Council. Top-up Funding Guidance 2022-23 Pg.14 and 27. <https://www.supportservicesforeducation.co.uk/Page/10238>

<sup>62</sup> City of York (2018). Banding Thresholds Physical and Health Needs. Pg. 2 and 11. <https://www.york.gov.uk/downloads/file/1843/physical-and-health-needs>

<sup>63</sup> Cornwall Council. High Needs Banding Matrix Element 3 Specialist Settings 2017-2018. Pg.4. <https://www.cornwallhousing.org.uk/media/29837731/high-needs-banding-matrix-element-3-2017-2018.pdf> Note: Cornwall Council SEND Funding Banding Descriptors is also available but is undated. <https://www.cornwall.gov.uk/media/wwjlv3t/send-funding-banding-descriptors.pdf>

<sup>64</sup> East Sussex County Council v KS (SEN) [2017] UKUT 273 [2018] AACR3 para. 89 [https://assets.publishing.service.gov.uk/media/5bb61b1ce5274a4f75596b3b/2018\\_AACR\\_3\\_ws.pdf](https://assets.publishing.service.gov.uk/media/5bb61b1ce5274a4f75596b3b/2018_AACR_3_ws.pdf)

<sup>65</sup> ESFA (2021) High needs funding 2021 to 2022. Operational Guide. See Annex 3 Health and Social Care Costs pg. 63.

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/961708/High\\_needs\\_funding\\_operational\\_guide\\_2021\\_to\\_2022.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/961708/High_needs_funding_operational_guide_2021_to_2022.pdf)

<sup>66</sup> CDC (2022) See National Event Slides. Lancashire and South Cumbria SEND in the Integrated Care Board.

<https://councilfordisabledchildren.org.uk/resources/all-resources/filter/health/cdc-national-virtual-event-recordings-march-2022>

<sup>67</sup> NICE (2022) Disabled children and young people up to 25 with severe complex needs. <https://www.nice.org.uk/guidance/ng213/resources/disabled-children-and-young-people-up-to-25-with-severe-complex-needs-integrated-service-delivery-and-organisation-across-health-social-care-and-education-pdf-66143773521349>

<sup>68</sup> Slater J. (2022) Role of the named nurse for SEND. Bradford District Care NHS FT [https://www.youtube.com/watch?v=ktiiZZQbhZU&list=PLH9gGlgF\\_vZQpcsUV\\_u7XkOuhjFBToQv&index=7](https://www.youtube.com/watch?v=ktiiZZQbhZU&list=PLH9gGlgF_vZQpcsUV_u7XkOuhjFBToQv&index=7)



difficult conversations but if there is to be any chance of fixing this part of the SEND system, these issues must be tackled head on.

6.3 ESC's stance is that the delivery model for 'health' services in schools should be aligned to the NHS pathway which inevitably will mean increased NHS involvement, the extent and form of this will need to be determined. Having shared these insights, ESC is aware that this will be met with resistance. There are many possible organisational and individual factors that may underlie this; NHS pressures, reluctance to accept missteps, 'investment' in the current service model, potential scale of change required, wider system repercussions and status quo bias. All strong barriers to change but not sufficient justification to accept a two-tier system of healthcare.

6.4 The idea of increased NHS input is often met with warnings of 'medicalising' schools. This should be considered in the context of the medical v's social models of disability. The negative connotations around the term 'medical' means that reference to 'medicalising' tends to be an effective way of shutting down the discussion but this is perhaps based on oversimplified reasoning. The social model of disability is built on the principles of rights and equality. This should mean that if children and young people need NHS commissioned healthcare to access and fully participate in education, then they have a right to NHS-led quality services.<sup>69,70</sup>

6.5 The issues highlighted in this paper amount to a double disservice to children and young people with SEND. Downgrading healthcare from NHS-led to education-led services may be the easier option, the path of least resistance but it denies children and young people their basic entitlement to NHS quality services. Additionally, already stretched HNB funding is being diverted away from special educational provision, its intended purpose, to fund health provision. Therefore, this current approach is detrimental to both the health **and** the special educational provision for children and young people with SEND.

6.6 Children and young people with SEND have consistently worse outcomes than their peers on every measure.<sup>71</sup> If the genuine intent is to improve provision, experiences and outcomes for this group of children and young people, then the way forward must include revisiting how the NHS commissions services to meet needs in the school setting. The starting point for any service delivery model **must** be statutory compliance along with sufficient funding for the NHS, LAs and schools to meet their statutory obligations under the SEND framework. Proposed future fixes of national standards, clarified roles and responsibilities and strengthened accountabilities will only succeed if a compliant, appropriately resourced delivery model is identified and implemented.

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<sup>69</sup> United Nations. United Nations Convention on the Rights of Persons with Disabilities. Article 25 'Health'

<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-25-health.html>

<sup>70</sup> Department of Health and Social Care (2021) The NHS Constitution in England. <https://www.gov.uk/government/publications/the-nhs-constitution-for-england/the-nhs-constitution-for-england>

<sup>71</sup> DfE (2022) SEND review: right support, right place, right time.

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1063620/SEND\\_review\\_right\\_support\\_right\\_place\\_right\\_time\\_accessible.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1063620/SEND_review_right_support_right_place_right_time_accessible.pdf)



## 7.0 Recommendations

### Education and Health – Distinct Pieces in the Integration Jigsaw

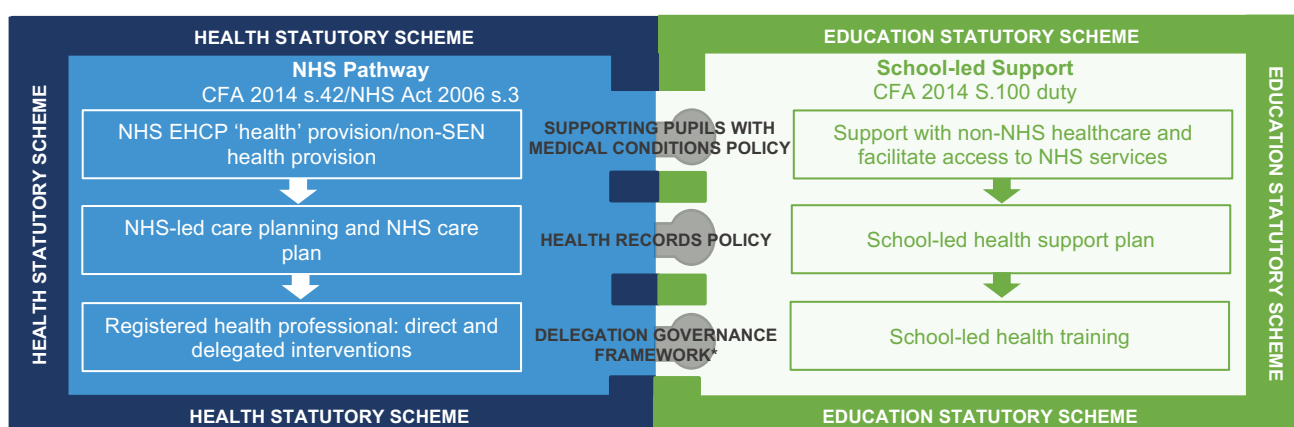
- 7.1 **Recommendation 1:** The legality of the service model must be reviewed in terms of delegation and the health and education statutory functions, obligations and powers.
- 7.2 **Recommendation 2:** The CFA 2014 s.100 duty should be amended to include a duty on NHS bodies to work jointly with schools/governing bodies. The extent of this duty will be dependent on the outcome of Recommendation 1.
- 7.3 **Recommendation 3:** The CFA 2014 part 3 and s.100 statutory guidance must recognise the concept and legal implications of delegation. Delegation must be positioned appropriately including how it fits with the health and education sector distinctions.

### Education and Health – Defined Boundaries

- 7.4 **Recommendation 4:** The CFA 2014 statutory guidance must explicitly define the boundaries between the NHS duties and the school s.100 duty. In effect, this will mean describing the divide between health activity that is and is not an NHS commissioning responsibility. This would determine the scope of the NHS-led and school-led pathways. The s.100 guidance should be reframed to adopt this pathway approach.
- 7.5 **Recommendation 5:** Beyond the CFA 2014 framework, the policy, guidance and practice relating to wider statutory obligations on schools e.g., reasonable adjustments and first aid must be revisited to ensure they 'fit' with a compliant service delivery model.

### Education and Health – Clear Links

- 7.6 **Recommendation 6:** CFA 2014 statutory guidance should describe the links between the NHS pathway and the school-led support pathway including robust, jointly developed policies for integrated working. For example, a health records policy that covers how health records e.g., NHS-led care plans and school-led health support plans are managed in school in line with sector requirements and best practice.<sup>72,73</sup> Figure 4 is a simplified illustration.



\*Dependent on legal clarification on school's role in delivering NHS health provision, an NHS/school delegation governance framework.

**Figure 4:** NHS Pathway and School-led Support Pathway Links

<sup>72</sup> DfE (2018) Data Protection: toolkit for schools.

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/747620/Data\\_Protection\\_Toolkit\\_for\\_Schools\\_OpenBeta.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/747620/Data_Protection_Toolkit_for_Schools_OpenBeta.pdf)

<sup>73</sup> NHSX (2021) Records Management Code of Practice. <https://www.nhs.uk/information-governance/guidance/records-management-code/>