

Professor David Croisdale-Appleby
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23rd September 2022

Re. NICE Guideline [NG213] Disabled children and young people up to 25 with severe complex needs: integrated service delivery and organisation across health, social care and education

Dear Professor Croisdale-Appleby,

I am writing to you in your capacity as Chair of the Advisory Committee for Disabled Children and Young People up to 25 with Severe Complex Needs. I am the Director of ESC Management Services (ESC), a company that works with health and education organisations to improve healthcare provision in education settings. I am contacting you to seek clarification on the NICE Guideline NG213, section 'Delegated Clinical Tasks'.

As the Committee will be aware, this section of NG213 has particular significance. It is the first national guidance to be published since questions were raised about the legality of the current service delivery model for healthcare services in education settings. In 2020, ESC's analysis described the current approach as flawed, with delegation acting as a fault line within the system.^{1,2} Which as a consequence has led to a two-tiered system of healthcare for children and young people; an NHS-led service and an education-led service, with the divergent education service lacking vital 'health' governance arrangements. This gap exposes children and young people to avoidable risk and in some cases actual harm. In specialist education settings, the cumulative effect of healthcare levels and complexity, present even greater risks and potential for harm.^{3,4}

Whilst I fully support addressing the current gaps in governance, in my opinion, the route to an effective remedy is statutory compliance and anything short of this would be an ineffective 'sticking plaster'. With this in mind, work to integrate health, care, and education services must recognise and adhere to the fundamental principle of sector distinctions in terms of functions, statutory schemes and governance arrangements.^{5,6} It is the distinct 'health' sector framework that secures NHS 'quality' and the appropriate governance to deliver on the NHS Constitution.

¹ Smith (2020) Clinical nursing services in special schools: Why we need to revisit statutory duties. <https://escmanagementservices.co.uk/wp-content/uploads/2022/09/Nursing-Services-in-Special-Schools-Statutory-Duties-February-2020.pdf>

² Smith (2020) Digging deeper into delegation. Pg. 42-44 <https://nasen.org.uk/resources/nasen-connect-magazine-january-2020>

³ Dickens (2019) Pupils at risk as special school staff left to fill gaps in medical care. Schools Week <https://schoolsweek.co.uk/investigation-pupils-at-risk-as-special-school-staff-left-to-fill-gaps-providing-complex-medical-care/>

⁴ Wall (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>

⁵ 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

⁶ Smith (2022) The Integration Jigsaw: Education and Health. <https://escmanagementservices.co.uk/wp-content/uploads/2022/09/The-Integration-Jigsaw-Education-and-Health-June-2022.pdf>



1) NICE Guideline NG213

The NG213 definition of ‘Support Worker’ relates to clinical tasks and specifically refers to education roles, but no other sector roles.⁷ For many, this will be inconsequential but for others, myself included, this is significant. This explicit reference ‘ties in’ education staff to delivering clinical interventions and, in turn, positions education settings as providers of clinical healthcare services.

Whether intentional or not, this serves as a NICE endorsement of the current service model which relies on the education sector providing clinical services that are an NHS commissioning responsibility. As the Committee is informed on this topic, it would be reasonable to conclude that taking this step was a considered decision. This presented an opportunity to tackle the thorny issues associated with this area of practice and to provide compliant commissioning approaches and evidence-based service models. However, I note that the Committee felt that this was outside the guideline remit;

‘Whilst the committee are aware of the issues around health services that are delivered within the education sector sitting outside NHS commissioning, this guideline does not have a remit to specify what the commissioning arrangements should be for delegated clinical activity.’⁸

This is unfortunate to say the least, particularly in light of the guideline context. According to the final scope document, under the section ‘*Policy, legislation, regulation and commissioning*’, the guideline aimed to take a practical ‘*what works*’ and ‘*how to*’ approach and address the key question ‘*1.1 What are the effective commissioning and practice models to deliver joined-up health, social care and education services?*’⁹ Presumably, this question was the rationale for the comprehensive (138 page) ‘*Evidence review for commissioning, practice and service delivery models*’ document.¹⁰

An observation highlighted in ESC’s work, was that one of the main issues with the current approach is that the delegated clinical activity sits in a ‘no-man’s land’. However, clinical activity that is delivered must legitimately ‘exist’ and therefore, it must sit within a sector statutory framework, either as an education service or as an NHS service. Whilst acknowledging that the Committee felt the detail of this model was outside the guideline scope, the fact that NG213 takes such an affirmative step towards the model means it would be beneficial if the Committee could clarify this basic but critical point.

Question 1

Given the importance of sector distinctions, does the Committee consider delegated clinical activity delivered by the education workforce to be an education service or an NHS service?

A response of either an education service or an NHS service does raise additional questions.

⁷ NICE (2022) NICE Guideline pg. 79 <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>

⁸ NICE (2022) Draft Guideline Consultation Comments and Responses ESC Management Services – ‘Developer’s Response’ pg. 109 <https://www.nice.org.uk/guidance/ng213/documents/consultation-comments-and-responses-3>

⁹ NICE (2019) Final Scope Document pg. 3 and pg. 11. <https://www.nice.org.uk/guidance/ng213/documents/final-scope>

¹⁰ NICE (2021) Evidence Review [N] Commissioning, practice and service delivery models <https://www.nice.org.uk/guidance/ng213/evidence/n-commissioning-practice-and-service-delivery-models-pdf-396240122201>



2) Delegated Clinical Tasks – Education Services

As noted, delegated clinical activity delivered by the education workforce generally sits outside an NHS commissioning arrangement and this is the case, even when there is an NHS commissioning obligation. When registered health professionals delegate clinical tasks to education staff, there is a transfer of responsibility, accountability and liability for this activity.^{11,12} Although the clinical nature of the activity (and commissioning responsibility) remains unchanged by delegation,¹³ this transfer does appear to transform the activity from being an NHS service to an education service. This is certainly the case outside NHS commissioning arrangements.

The ESC draft guideline consultation response expressed concern that the definition of support worker coupled with recommendation 1.15.28 (1.15.25 in the final NG213) was an attempt to transpose the governance arrangements of the health sector to the education sector. The intent to reconcile the gaps in health governance is understandable but as a remedy, stretching health sector mechanisms to cover the education sector is problematic. Practically, stipulating that a school, as employing organisation, must follow guidance/requirements set by health sector regulatory/professional bodies (e.g. Care Quality Commission, Nursing and Midwifery Council and Health and Care Professions Council) that have no reach into education services would be challenging to implement.¹⁴

Aside from the obvious implications of ineffective governance arrangements for children and young people with complex care needs, this has wider implications for education service providers. As the Committee will know, NICE guidance provides authoritative, evidence-based standards and within the health sector, it can play a key part in establishing breaches in duty of care and negligence.^{15,16} It is conceivable that NG213 recommendation 1.15.25 could feature in a similar way in the education sector. Therefore, setting standards that are potentially inappropriate and unattainable for the education sector would be a significant issue.

There appears to be no evidence-base underpinning recommendation 1.15.25 in relation to education sector employers and in fact, there is no documented record that the Committee considered this point.¹⁷ ESC's related comment was unpublished and so did not receive a 'Developer's response.' Clearly, there is a subtle but yet highly significant difference between clinical healthcare delivered *in* education settings and clinical healthcare delivered *by* education settings. So if the Committee does consider delegated clinical activity to be an education service, it is necessary to ensure that this recommendation has a firm basis.

¹¹ See All Wales Guidelines for Delegation – Accountability based on GMC, NMC and HCPC professional standards. Pg.15

<https://heiw.nhs.wales/files/weds-practicing-appropriate-delegation/all-wales-guidelines-for-delegation-2020/>

¹² NICE Guideline [NG213] Section 1.15.25 pg. 66 Employers of support workers must have indemnity insurance for delegated tasks <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>

¹³ R (T, D and B) v Haringey LBC. [2005] EWHC 2235 (Admin) para. 67 <https://www.bailii.org/ew/cases/EWHC/Admin/2005/2235.html>

¹⁴ See ESC (2021) NICE draft guideline response including unpublished comments (15-23). Comment 16 pg. 13

<https://escmanagementservices.co.uk/wp-content/uploads/2022/09/NICE-Comments-Form-ESC-Management-Services-Ltd.pdf>

¹⁵ Bleasdale (2018) Hill Dickinson Insight. NICE guidelines: not just the gold standard. <https://www.hilldickinson.com/insights/articles/nice-guidelines-not-just-gold-standard-practice>

¹⁶ Weightmans (2020) Breach of healthcare guidelines in clinical negligence claims – guidelines or tramlines?

<https://www.weightmans.com/insights/breach-of-healthcare-guidelines-in-clinical-negligence-claims-guidelines-or-tramlines/>

¹⁷ NICE (2022) [K] Evidence review of barriers and facilitators of joined up care pg. 40. **NOTE:** The Committee discussed registered health professionals following health sector guidance and 'employers would need to follow the same guidance'. No reference to sector distinctions and potential implications for the education sector. However, the Committee did note that if the recommendation was not followed, clinical tasks may not be performed safely and there would be the potential for harm to the child or young person.

<https://www.nice.org.uk/guidance/ng213/evidence/k-barriers-and-facilitators-of-joinedup-care-pdf-396240122198>



NICE has explicit statutory functions and powers which include preparing guidance and making recommendations relating to NHS services, public health services and social care in England.¹⁸ In January 2019, the guideline draft scope was limited to health and social care services.¹⁹ In June 2019, the final scope was extended to include the integration of health, care *and* education services and consultation responses probably had a bearing on this decision.²⁰ But this does raise a question regarding NICE's powers and education services.²¹

Question 2

Based on the statutory functions and powers of NICE, could NICE/the Committee clarify what is the legal basis for NG213 making recommendations for education services/providers?

3) Delegated Clinical Tasks – NHS Services

Legislation is in place to ensure that children and young people with complex care needs receive the NHS services they may require to access education. NG213 recommends that commissioners use Education, Health and Care (EHC) plan provision sections to commission appropriate services.²² Although problems with 'health' participation in EHC statutory processes are well recognised,^{23,24} if we assumed that 'health' duties were discharged throughout the EHC plan process, under the current service model, this would mean that NHS commissioning bodies would be funding and contracting education providers to deliver delegated clinical activity.

This would formalise the current approach so that education service providers were also NHS-funded healthcare providers. In this scenario, a key question would be, does an education provider operating within the education statutory scheme have the statutory power to be an NHS-funded healthcare provider? Due to this query and the associated organisational risks, ESC advised that NICE should consider taking legal advice on the draft guideline.²⁵ This comment was unpublished and so there was no 'Developer's response'. However, the DfE consultation response also requested that the guideline be reviewed by a lawyer;

'We are also concerned that the advisory information reflects the views of the Committee and whilst this is a group of experts, it is necessarily narrower than the wide consensus which was secured in the production of the Code of Practice (with the content ultimately reflecting the will of parliament). The guideline also contains a number of inaccurate or misleading interpretation of elements of the Code which could result in unlawful practice. We request that the whole document is checked by lawyers to ensure no dilution of the intent and accepted interpretation of the Code or SEND legislation.'²⁶

¹⁸ Health and Social Care Act 2012 Part 8 see s.237(1) <https://www.legislation.gov.uk/ukpga/2012/7/part/8> and The National Institute for Health and Care Excellence (Constitution and Functions) and the Health and Social Care Information Centre (Functions) Regulations 2013 Part 2 see s.5(1) <https://www.legislation.gov.uk/uksi/2013/259/part/2/made>

¹⁹ NICE (2019) Draft scope <https://www.nice.org.uk/guidance/ng213/documents/draft-scope>

²⁰ NICE (2019) Final scope <https://www.nice.org.uk/guidance/ng213/documents/final-scope>

²¹ **NOTE:** The (perceived?) scope of NICE was likely to have contributed to the low levels of education sector engagement in the NG213 development process e.g. registered stakeholders (11 out of circa 500) and draft guideline consultation respondents (4 out of 40).

²² NICE (2022) NG213 1.4.10 pg. 31 <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>

²³ 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>

²⁴ Local Government & Social Care Ombudsman (2019) Not going to plan? <https://www.lgo.org.uk/information-centre/news/2019/oct/a-system-in-crisis-ombudsman-complaints-about-special-educational-needs-at-alarming-level>

²⁵ ESC (2021) Draft guideline response inc. unpublished comments. Comment 17 pg.14 <https://escmanagementservices.co.uk/wp-content/uploads/2022/09/NICE-Comments-Form-ESC-Management-Services-Ltd.pdf>

²⁶ NICE (2022) Draft Guideline Consultation Comments and Responses pg. 70-71 DfE Response. <https://www.nice.org.uk/guidance/ng213/documents/consultation-comments-and-responses-3>



The 'Developer's response' to the DfE's request referred to the content being reviewed by the Committee.²⁷ Initially, in 2019, the Committee membership referred to a lawyer as a co-opted member '*under recruitment*' but the membership in 2022 does not include a lawyer.^{28,29,30} The 'Developer's response' to the DfE comment made no reference to legal advice and so it is unclear if this was sought.

Question 3

If relevant,

- i. **could the Committee confirm that the draft guideline was reviewed by lawyers with the appropriate specialisms (i.e. including education law)?**

Assuming the appropriate legal advice was sought;

- ii. **could the Committee confirm that the NG213 endorsed service model (i.e. education staff/providers delivering clinical healthcare activity) is statutory compliant? Specifically, in relation to health commissioner duties and education provider powers.**

The positioning of education staff/employers as providers of clinical services in NG213 confers a degree of legitimacy to the current service model. This is against a backdrop of legality questions and governance issues. Although this NG213 positioning has significance, there appears to be no corresponding evidence or documented consideration for this aspect of practice in the guideline/evidence reviews. As such, the seemingly supportive stance, does warrant clarification on these fundamental points.

In the interests of children and young people with severe complex needs and the professionals (education/NHS) and organisations (education/NHS) providing healthcare, it is imperative that the NG213 recommendations are sufficiently robust to withstand scrutiny. Therefore, I would appreciate a response to the questions as relevant and I look forward to this clarification.

yours sincerely,

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²⁷ NICE (2022) Draft Guideline Consultation Comments and Responses pg. 71 DfE Response 'Developer's Comments'.
<https://www.nice.org.uk/guidance/ng213/documents/consultation-comments-and-responses-3>

²⁸ NICE (2019) Committee Membership Disabled children and young people up to 25 with severe complex needs.
<https://www.nice.org.uk/guidance/ng213/documents/committee-member-list>

²⁹ NICE (2022) Committee Membership Disabled children and young people up to 25 with severe complex needs.
<https://www.nice.org.uk/guidance/ng213/documents/committee-member-list-3>

³⁰ **NOTE:** Although Committee membership included representatives from health, education and care sectors, this was not equally weighted. Of the 14 professional members, there was 1 education sector representative, a second left the Committee in 2020.