

Digging deeper into delegation

Emma Smith shares her thoughts on why delegation of nursing services to school staff is a fault line in EHCP health provision.

In 2014, Education, Health and Care Plans (EHCPs) were introduced – the vehicle for the SEND reforms promising integrated, improved and consistent services for children and young people with SEND. Sadly, this is yet to be realised. The increasing numbers of children and young people with complex health needs accessing education is positive but, ironically, this backdrop corresponds with a

national picture of variable and reducing NHS support.

Schools are increasingly providing clinical nursing care with the accompanying shift in clinical responsibility and risk. This impacts on all education settings but is particularly acute in special schools, where clinical activity and potential for harm is greatest.

In October 2019, the House of Commons Education Committee SEND Report was published. The inquiry aimed to scrutinise implementation of the Children and Families Act (CAFA) 2014. The report

showed the stark reality of systemic failings. It urged against making fundamental changes to the law, indicating problems concerning implementation. Echoing previous reviews, the report criticised health providers for failing to fully engage.

But do problems run deeper? When EHCPs include nursing care that can be delegated, school staff are often trained to provide this care which then sits outside

The role of health providers is pivotal, but unsurprisingly, the meshing of the two systems has not worked.



BIO

EMMA SMITH

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Clinical Commissioning Group (CCG) commissioning and oversight. However, the legality of this is questionable. In my opinion, in this model, delegation is a fault line which has shifted boundaries and is potentially causing system-wide statutory non-compliance.

LEGAL FRAMEWORK

To consider the issues, it is essential to have an understanding of the legal framework.

Children and Families Act 2014

Section 42 imposes legal duties for EHCP provision. The local authority (LA) must secure specified special educational provision which may include 'traditional' NHS therapy services. The relevant NHS commissioning body must arrange the specified health provision

which is services covering clinical nursing (NHS Act 2006).

The section 100 duty states schools must make arrangements to support pupils with medical conditions. Located in Part 5, this is not limited to pupils with SEND. Importantly, this is not a duty or power to provide NHS Act 2006 services. The Supporting Pupils with Medical Conditions guidance clarifies how this duty fits with SEND. It states that for pupils with EHCPs, 'compliance with the SEND code of practice will ensure compliance with this guidance'. Therefore, the primary reference is the SEND code. The guidance also reiterates CCGs remain responsible for commissioning the clinical support for pupils with long term conditions and disabilities.

Safeguard and promote welfare

Case law has shown limits to this duty. The Haringey case (2005) involved a dispute about whether tracheostomy nursing care was an NHS or social services responsibility. The judge ruled it was an NHS Act service and the safeguarding duty did not extend to meeting essential medical needs. Cautioning against a wide interpretation of this duty the judge stated this would create 'a substitute or additional NHS for children'.

Wider legislation

The Equality Act, common law duty of care and in loco parentis commonly feature in these discussions but these obligations are framed by 'reasonable'. Therefore, it is likely that both specialist health skills and services outside a school's legal power would be beyond the scope of 'reasonable'. Also, parents/carers may choose to provide NHS nursing care for their child, but this is not a legal obligation.

DELEGATION

A fault line?

Delegation involves registered nurses transferring authority to an individual e.g. a teaching assistant to perform a specific task. Delegation does not change the task's clinical nature. The Nursing and Midwifery Council, the

nursing profession's statutory regulator, has explicit delegation standards including ensuring training, competency assessment, supervision and ongoing support. Also, the Royal College of Nursing provides an advisory list of clinical procedures suitable for delegation (RCN, 2018). Arguably, this equally serves as a list of NHS Act 2006 nursing services.

Critically, what is the legal basis for schools, as the employing organisation, to provide NHS Act 2006 services? Schools appear to have no legal duty nor power; this is the fault line.

Shifting boundaries

The CCG duty to arrange EHCP health provision is underpinned by a range of commissioning activities, broadly covering workforce planning, funding and contracting and performance

monitoring. Embedded within this are vital governance and accountability frameworks to assure the quality and safety of services. When CCGs fail to fully comply with this duty there is a significant gap.

Other parts of the system may appear to fill this gap, but this would be inadequate, inappropriate and possibly contrary to law. Unfortunately, this might be the case.

LAs secure special educational provision via High Needs Block (HNB) funding and spending is governed by statutory regulations. These regulations allow for the provision of NHS services classed as special educational provision but must be viewed in the context of CAFA duties. Evidently, interpretation has been wider i.e. a 'catch-all'. HNB funding models can include medical categories featuring EHCP health/nursing descriptors. This falls outside LA statutory duties; fuel for an interesting debate on the lawfulness of these policies.

HNB funding models have undoubtedly been a factor in embedding this service model as established practice and schools have risen to the challenge of meeting health needs. On the surface this may appear to be working but persistent workforce and governance issues indicate fundamental flaws.



Firstly, the burden of additional health duties on the workforce cannot be underestimated, especially in settings with high medical needs. School staff are under no obligation to provide health care unless it is explicit in employment contracts. Consequently, care is frequently reliant on goodwill, which is an extremely fragile basis for provision.

Secondly, headteachers are increasingly responsible for NHS services, and are 'muddling' through the best they can. Realistically, how can individual headteachers and governing bodies develop and implement clinical governance systems that match the NHS? Despite best efforts of school leaders and staff these arrangements are no substitute for a CCG commissioned service.

Worryingly, the national narrative positions delegation as something that should happen, seemingly overlooking statutory duties. For example, NHS

England (2018) guidance refers to Children's Community Nursing Teams providing 'clinical training for school staff aligned to the child's EHC plan'.

WHAT NOW?

We need to pause to consider the legal issues concerning delegation. Questioning the legality of the model for EHCP nursing provision emphasises the need for increased NHS involvement. However, it is not the intention to advocate an overly medical model. First and foremost, schools are education settings, but they can also be unique clinical environments too. As a system, we need to think innovatively about tailoring services to incorporate the vital NHS components for school settings.

My legal perspective forms part of a Bradford DAP work programme aiming to improve nursing provision in special schools. Initially, this involved a DAP commissioned project to review nursing need in four geographical areas (RCN Bulletin, 2018). Recently, there has been further collaboration with partners including the Yorkshire and The Humber Special School Leaders Network and engagement with stakeholders campaigning for better national policy and commissioning.

Ultimately, statutory compliance has to be the starting point for any service model to provide EHCP health services. It is only on this firm foundation that clinical health services for children and young people in school settings will have NHS quality and safety at its core.

REFERENCES Haringey, 2005, National Framework for Children and Young People's Continuing Care. Annex C. Summary of the Haringey Case. **RCN, 2018**, Meeting Health Needs in Educational and other Community Settings. **NHS England, 2018**, Guidance for health services for children and young people with special educational needs and disabilities. **RCN Bulletin, 2018**, Improving Care in SEN Schools.