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Equality and Human Rights Commission
Arndale House
The Arndale Centre
Manchester
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Tuesday 31st October, 2023

Re: Guidance - Reasonable Adjustments for Disabled Pupils and Technical Guidance for Schools in England.

Dear 

Over recent years, I have communicated with the Equality and Human Rights Commission (EHRC) regarding its guidance for schools and healthcare services.

In 2020, I wrote to the EHRC to highlight issues with the guidance which at that time presented an example of a school providing tracheostomy care as a reasonable adjustment. This example overlooked the fact that tracheostomy care is an NHS Act 2006 nursing service and as such, it is the responsibility of the relevant local NHS commissioning body to arrange this nursing care in school. In 2021, the EHRC response confirmed that this did require clarification and, in 2022, the guidance was reissued with this example removed.

In 2022, I also raised concerns that the EHRC guidance presented examples of schools providing clinical nursing care for pupils with long-term medical conditions as a reasonable adjustment. Although long-term conditions may be defined as a disability under the Equality Act 2010, this should not mean that the statutory functions of NHS bodies regarding healthcare services should be substituted by a school providing nursing services as an 'adjustment'. As with tracheostomy care, the activities described in the EHRC long-term medical conditions examples are NHS Act 2006 nursing services and it is the responsibility of NHS Integrated Care Boards (ICBs) to arrange the clinical support required to meet these needs in school.^{1,2}

As stated in previous correspondence, when clinical nursing services are inappropriately moved from the NHS to the education sector under the guise of a 'reasonable adjustment', it is those at the sharp end that bear the consequences. Children and young people can be exposed to compromised standards of healthcare, high levels of avoidable risk, and in some cases can suffer actual harm. In addition, education providers shoulder an inappropriate burden of clinical healthcare responsibilities, risks and liabilities.

In September 2023, the EHRC issued updated guidance for schools and it was disappointing to see that the new guidance included all three previous examples relating to long-term medical conditions. It is highly concerning that the EHRC guidance appears to completely and persistently overlook the NHS duties and obligations for children and young people with health needs in education settings.

¹ DfE (2015) Supporting pupils at school with medical conditions pg.16
<https://assets.publishing.service.gov.uk/media/5ce6a72e40f0b620a103bd53/supporting-pupils-at-school-with-medical-conditions.pdf>

² Department of Health and Social Care (DHSC) (2023) The NHS Constitution, principle 5 – The NHS works across organisational boundaries <https://www.gov.uk/government/publications/the-nhs-constitution-for-england/the-nhs-constitution-for-england>



Therefore, I am writing to seek clarification from the EHRC on a school's reasonable adjustment duty and NHS statutory duties in relation to long-term conditions. In providing this clarification, I would be grateful if the EHRC could consider the areas set out below; 1) NHS Act 2006 s.3 nursing services and delegation 2) EHRC examples and 3) Education, Health and Care Plans.

1) NHS Act 2006 s.3 Nursing Services – Delegation

It is well recognised that some registered nursing activity can be delegated to unregistered, non-health workers. 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'*.³

Central to the act of delegation is the concept of transferring authority and in this case, it is the transfer of authority to deliver NHS Act 2006 nursing services. Individual-level delegation is an ongoing relationship between the delegator (registered nurse) and the delegatee (e.g. support worker), each with their own responsibilities and accountabilities. As a consequence, there are corresponding responsibilities, accountabilities and liabilities for the employing organisations.

When the delegation of nursing services occurs across sectors/organisations, this individual-level delegation should sit within an organisation-level delegation framework comprising statutory, governance and funding components, as appropriate. Statutory provisions need to be in place to allow an organisation to delegate the activity and for an organisation to accept the delegated activity. For example, this framework is in place for NHS Act 2006 healthcare services in adult social care in the form of the Care Act 2014 s.22 and the NHS Act 2006 s.65Z5 and s.75.⁴ This organisation-level delegation framework is not in place for the education sector. There appears to be no statutory obligations or powers for a school, functioning in the education statutory scheme, to arrange/provide NHS Act 2006 nursing services.

The Children and Families Act (CFA) 2014 s.100 duty to make arrangements to support pupils with medical conditions was intended to strengthen the existing welfare duties. This duty *'to make arrangements'* sits within the wider health-related NHS and local authority (LA) statutory framework. Therefore, a reasonable interpretation of the CFA 2014 s.100 duty is that a school's duty to make arrangements is two-fold. Firstly, to have school-led arrangements to provide health-related welfare and wellbeing support. Secondly, to have effective joint working arrangements to enable partner organisations to discharge their statutory duties i.e. facilitating access to NHS and LA commissioned health services. Importantly, the CFA 2014 s.100 duty does not confer obligations or powers on schools in relation to NHS Act 2006 nursing services.

2) EHRC – Examples

An NHS commissioning responsibility initiates an NHS pathway of care that includes NHS providers and health professionals planning care and developing care plans.⁵ National-level guidance and standards set out that children and young people with long-term conditions should have NHS-led personalised healthcare plans.⁶

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

⁴ NHS (2023) Statutory Guidance – Arrangements for delegation and joint exercise of statutory functions located at <https://future.nhs.uk/system/login?nextURL=%2Fconnect%2Eti%2FICSGuidance%2Fview%3FobjectID%3D146725541>

⁵ 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>

⁶ **Note:** For example, see NICE guidance NG18, NG80 and QS27 and NHS England Bundles of care for asthma and epilepsy.



The DfE's guidance supporting pupils with medical conditions allows for health professionals to take the lead in developing a healthcare plan for an individual child or young person, as appropriate.⁷ When an NHS-led plan specifies nursing activity, if this care is to be delegated to an unregistered worker, presumably, this should be within a statutory compliant framework.

a. Asthma

An infant school disabled pupil with attention deficit hyperactivity disorder (ADHD) receives some individual teaching assistant support through the SEN framework. He is diagnosed with severe asthma and needs assistance with his nebuliser. Although this is likely to be a disability for the purpose of the Act and so failure to provide a reasonable adjustment will place him at a substantial disadvantage. The school trains his teaching assistant and she provides him with the assistance that he needs. This would be a reasonable adjustment for the school to make.

(Reasonable adjustments for disabled pupils pg. 8, Technical guidance for schools pg. 98)

In 2022, The Medicines and Healthcare products Regulatory Agency (MHRA) issued guidance on the use of nebulisers for children with asthma.⁸ This included the following:

Concerns over nebulisers in paediatric acute asthma

Nebulised rescue (or reliever) asthma medicines are prescription-only medicines. Clinical guidance from NICE recommends use of nebulised rescue medicines only in severe or life-threatening acute exacerbations of paediatric asthma, or, on a regular basis, only in patients with severe asthma when they are unable to use other inhalational devices. Use of a nebuliser under both of these circumstances should be strictly under medical supervision – see NICE treatment summary.

This advice is specific to use of nebulisers to deliver asthma rescue medication in paediatric asthma.

Healthcare professionals have expressed concern to the MHRA that use of nebuliser devices at home to deliver asthma rescue medication to children and adolescents, without adequate medical supervision, could mask a deterioration in asthma control and result in delays in seeking medical attention. These delays could increase the risk that a deterioration of asthma goes unrecognised, which may be fatal or may have serious consequences for the patient. The MHRA is aware of a number of fatal cases in children in England, which occurred between 2008 and 2022, in which clinically unsupervised use of a nebuliser was a potential contributory factor in the child's death from asthma.

Whilst this health intervention may be considered suitable for delegation, this is NHS Act 2006 clinical healthcare activity and as stated, presumably, this should only be delegated within a compliant framework. Furthermore, the phrase '*school trains his teaching assistant*' is a concern. This healthcare intervention should be specified in a pupil's NHS-led personalised asthma action plan. As such, the registered health professional delegating this intervention to another worker is professionally accountable for ensuring adequate training. It is inappropriate to state that a school would take responsibility for training a teaching assistant to provide this clinical support.

⁷ DfE (2015) Supporting pupils at school with medical conditions pg. 28

<https://assets.publishing.service.gov.uk/media/5ce6a72e40f0b620a103bd53/supporting-pupils-at-school-with-medical-conditions.pdf>

⁸ MHRA (2022) Nebulised asthma rescue therapy in children: home use of nebulisers in paediatric asthma should be initiated and managed only by specialists <https://www.gov.uk/drug-safety-update/nebulised-asthma-rescue-therapy-in-children-home-use-of-nebulisers-in-paediatric-asthma-should-be-initiated-and-managed-only-by-specialists>



b. Diabetes

A disabled pupil at an infant school has diabetes, and requires daily support with reading blood sugar levels and insulin injections. He is not classified as having SEN and therefore, receives no support through the SEN framework. He is however, disabled and therefore, if the lack of daily support places him at a substantial disadvantage, the school would be under a duty to make the adjustment of providing the support, if it would be reasonable to do so.

(Reasonable adjustments for disabled pupils pg. 9, Technical guidance for schools pg. 98)

This EHRC example is immediately followed by the statement *‘There will be some instances in which a disabled pupil is provided support from another agency. In these cases, it would not be reasonable to expect the school to duplicate this support’*. As stated, NHS ICBs have the statutory responsibility to arrange the clinical nursing support for children or young people with long-term conditions and disabilities in school, regardless of whether the child or young person is classified as having SEN. It is unclear from this example, in what instances this NHS commissioning responsibility would not apply.

Within the health and social care sectors, monitoring blood glucose levels and administering insulin is a nursing intervention that is used as an example of healthcare activity that may be delegated within an individual and organisation-level delegation framework.⁹ To support this, robust governance arrangements have been developed for the delegation of this nursing intervention which is underpinned by organisation-level delegation.¹⁰ These frameworks do not extend to cover the education sector.

c. Epilepsy

A disabled pupil with epilepsy applies to be admitted to his local primary school. His parents speak to the head teacher and express their concern that someone at the school needs to be trained to provide the necessary medical support if the pupil has a seizure in school. The head teacher carries out a risk assessment, and seeks advice from the local authority and from another school in the area with a pupil with epilepsy. She identifies that the risks decrease the more members of staff are trained and able to assist in the case of a seizure. The head teacher decides to provide training to all staff, teaching and non-teaching, as part of an inset day; then, after the training has been undertaken, she asks staff to volunteer to agree to support the pupil to administer the necessary medication. The headteacher also puts in place an individual care plan for the pupil, which includes instructions on how the medication is to be administered, and the need for a second adult to witness the dosage and administration of the medication. Although no individual member of staff is required to undertake the training, by offering it to all staff it is possible to maximise the number of people who can assist, to raise awareness generally and to minimise the health risk for the pupil. This could be a reasonable adjustment for the school to make.

(Reasonable adjustments for disabled pupils pg. 9, Technical guidance for schools pg. 98)

⁹ DHSC (2023) Delegated healthcare activities guiding principles see pg. 4 and pg. 15

<https://www.skillsforcare.org.uk/resources/documents/Developing-your-workforce/Care-topics/Delegated-healthcare-interventions/Delegated-healthcare-activities-Guiding-principles.pdf>

¹⁰ **Note:** For example, see Organisational checklist for the delegation of insulin administration and Competency framework

<https://www.diabetes.org.uk/Professionals/Resources/shared-practice/pharmacy-and-medicines/delegation-of-insulin-administration>



The epilepsy example is within the EHRC guidance 'Health and safety requirements' section. There is a focus on the need for schools to undertake risk assessments and reference to the Headteacher seeking advice from the LA and another school.

Aside from the NHS ICB commissioning responsibilities, both NHS providers and registered health professionals have obligations with respect to standards of care and risks. NHS providers should comply with the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 and this includes Regulation 12 – Safe care and treatment. The Care Quality Commission (CQC) issues guidance to assist providers in meeting these duties and the guidance for Regulation 12 stresses the importance of the identification and management of risk.¹¹ In addition, a registered nurse has a professional obligation when delegating care to identify any risks.¹² And yet, in this EHRC example, there are no references to NHS services or health professionals in relation to risk.

The training aspect of this example is concerning for several reasons. In terms of the '*Headteacher decides to provide training to all staff*', as per the asthma example, a registered health professional delegating this activity is responsible and accountable for ensuring the delegatee is trained. The example suggests that the school 'trains' everyone to assist in the event of a seizure but it is unclear what is meant by 'assist'. All staff receive training and then after the training, volunteers are sought to administer the medication. There is a distinction between training for general awareness and providing a direct intervention such as administering medication for a specific child, in line with a care plan i.e. delegation. This is not acknowledged in the example. It would not be considered good practice to delegate the administration of medication to an excessive number of individuals due to the need to maintain acceptable competency levels. It should also be noted that according to the DfE and the Health and Safety Executive (HSE), generally first aid does not extend to administering medicine.^{13,14}

This EHRC example states the '*Headteacher puts in place an individual healthcare plan*'. Assuming the headteacher is not a registered health professional, a Headteacher should not be putting in place an individual care plan for a pupil with epilepsy which includes instructions on how to administer seizure medication. This is misleading and inappropriate. This is a registered health professional task and the relevant local NHS service/health professional should lead in the development of this healthcare plan. As noted, the DfE's Supporting pupils with medical conditions guidance model process allows for a registered health professional to take the lead in developing a healthcare plan for an individual child or young person.

The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, Regulation 9 - Person-centred care places obligations on NHS providers that are relevant to care planning. The CQC guidance states that providers should take into account relevant national guidance when planning care. National-level standards and guidance are in place for children and young people with epilepsy and this includes local NHS services' responsibilities for developing

¹¹ CQC (Updated 2023) Regulations for service providers and managers – Regulation 12 Safe care and treatment <https://www.cqc.org.uk/guidance-providers/regulations/regulation-12-safe-care-treatment>

¹² NMC (2018) Accountability and Delegation pg. 4 <https://www.nmc.org.uk/globalassets/sitedocuments/nmc-publications/delegation-and-accountability-supplementary-information-to-the-nmc-code.pdf>

¹³ DfE (2022). First aid in Schools, Early Years and Further Education. See section Medicines administration in schools '*First aid at work does not include giving tablets or medicines*'. <https://www.gov.uk/government/publications/first-aid-in-schools>

¹⁴ HSE (Reissued 2018). The Health and Safety (First-Aid) Regulations 1981 pg. 17 <https://www.hse.gov.uk/pubns/priced/l74.pdf>



comprehensive written care plans for children and young people that cover home and school (and includes consideration of risk).^{15,16}

3) Education, Health and Care Plans

Although none of the EHRC examples refer to the pupils having an Education, Health and Care (EHC) Plan, it is worth noting that under the CFA 2014 s. 21, healthcare provision may be deemed special educational provision if it educates or trains. However, case law has shown that even if medical/nursing support is essential for a child or young person to access their education, this does not make it special educational provision.¹⁷ The nursing interventions described in these examples do not educate or train the child. Viewed in the context of NHS obligations under the NHS Act 2006 and the CFA 2014, if a child or young person has an EHC plan and a long-term medical condition, the nursing care needed should be specified in Section G of the plan and arranged by the relevant NHS commissioner. This is regardless of whether the nursing activity can be delegated to an unregistered support worker or not; delegation is not part of the criteria for determining whether health provision is deemed special educational provision.

Finally, the Equality Act 2010 aims to tackle disability disadvantage and discrimination and the reasonable adjustment duty sits alongside other statutory duties on public bodies. Arguably, presenting what should be NHS-commissioned nursing services as school 'adjustments' is not only legally questionable but inadvertently serves to undermine a disabled child or young person's entitlement to NHS 'quality' healthcare services.¹⁸ In the interests of children and young people with disabilities, it is imperative that the EHRC guidance accurately positions the reasonable adjustment duty within the wider statutory framework. Therefore, I look forward to the EHRC's clarification on the reasonable adjustment duty on schools in relation to long-term conditions and the NHS statutory duties.

Yours sincerely,

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¹⁵ NICE (2013) Quality Standards [QS 27] Epilepsy in children and young people – Quality Statement 4
<https://www.nice.org.uk/guidance/qs27/chapter/Quality-statement-4-Epilepsy-care-plan>

¹⁶ NHS England (2023) National bundle of care for children and young people with epilepsy
<https://www.england.nhs.uk/publication/national-bundle-of-care-for-children-and-young-people-with-epilepsy/>

¹⁷ East Sussex v KS (SEN) AACR3 [2018] para. 89 https://assets.publishing.service.gov.uk/2018/AACR_3_ws.pdf

¹⁸ **Note:** 'Quality' as defined in statute – effectiveness, safety and service user experience. NHS Act 2006 Part 2 Health Service Bodies e.g. NHS ICBs s.14Z34