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NHS England, SEND Lead

By email

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Tuesday 29th July 2025

Re: NHS England Slide Pack – Duties for health commissioners when supporting children and young people in education with medical conditions, October 2024

Dear [REDACTED]

I am writing to you regarding the NHS England slide pack sent to Integrated Care Boards (ICBs) in October 2024, which outlines the duties of health commissioners in supporting children and young people with medical conditions in education.¹

It is encouraging that NHS England commissioned legal advice to provide greater clarity on the statutory responsibilities of health bodies. I was pleased to see that the resulting guidance strongly emphasised the importance of complying with relevant legislation and regulatory requirements, particularly the Nursing and Midwifery Council (NMC) Code. This position is both welcome and helpful. However, I would like to raise several observations and questions. These are set out under four sections:

- 1. Children and Families Act 2014 - Statutory Guidance**
- 2. Commissioning - Principles**
- 3. Delegation**
- 4. Accountability**

1. Children and Families Act 2014 - Statutory Guidance

As part of the focus on compliance, the slides highlight the need to follow statutory guidance, specifically the Children and Families Act (CFA) 2014 *SEND Code of Practice* and the *Supporting Pupils with Medical Conditions* guidance. This emphasis is entirely logical. However, while these documents do refer to legislation in this area, they are also fundamentally flawed as **neither guidance document acknowledges the concept or legal implications of healthcare delegation**. As you know, this is an issue I first raised over five years ago, and fortunately, it is now becoming more widely recognised and understood.²

The CFA 2014 guidance documents describe the delivery of health services and support in terms of school staff *training* and NHS professionals *advising* education providers on managing medical conditions. This framing applies even when the care involved constitutes clinical nursing services under section 3 of the NHS Act 2006. For example, the SEND Code of Practice, para. 3.62 states:

*Health professionals advise education services on managing health conditions such as epilepsy and diabetes, and health technologies such as tube feeding, tracheostomy care and ventilation in schools.*³

¹ NHS England (2024) Duties for health commissioners when supporting children and young people in education with medical conditions <https://saphna.co/wp-content/uploads/2024/11/24.10.24-Duties-for-supporting-CYP-in-education-with-medical-needs.pdf>

² Roberts, J. (2025) DfE won't end 'effective' SEND provision, says minister tes magazine Helen Hayes has expressed concern that guidance fails to address delegating medical support to school staff. <https://www.tes.com/magazine/news/specialist-sector/dfе-will-not-end-effective-send-provision-mckinnell-ehcps>

³ DoH/DfE (2015) SEND Code of Practice pg. 54
https://assets.publishing.service.gov.uk/media/5a7dcb85ed915d2ac884d995/SEND_Code_of_Practice_January_2015.pdf



This implies that health professionals merely provide advice, while schools are responsible for managing the nursing care needs. However, case law and policy have established that even when a clinical healthcare task is considered suitable for delegation, this does not remove an ICB's commissioning responsibility for that activity. Furthermore, NHS Act 2006 healthcare tasks may be considered clinically suitable for delegation to unregistered staff, but this has no bearing on a school's ability to accept responsibility for these healthcare activities. For schools, whose statutory function is to provide education, the authority to assume responsibility for NHS Act 2006 healthcare activities is defined in statute.

Given the framework of statutory duties and powers, it could be argued that aspects of the CFA 2014 statutory guidance reflect an overreach in terms of schools' duties and powers and also undermine the NHS commissioning duties set out in the NHS Act 2006 and the CFA 2014.⁴ Therefore, if these aspects of the guidance are followed, children and young people are unlikely to receive the quality NHS healthcare they may need and are entitled to, which carries associated risks and implications for all involved.

As a consequence, NHS England's recommendation to comply with both legislation and statutory guidance may lead to conflicting interpretations. While legislation takes precedence over guidance, the slide pack neither identifies nor addresses the inconsistencies. **As a result, NHS England's aim of providing greater clarity may not be achieved, and local confusion is likely to persist.**

Question 1: Although the government appears intent on issuing non-statutory guidance on medical conditions later this year, the existing CFA 2014 statutory guidance will remain in place. The timeline for updating this statutory guidance is less certain, but when it does move forward, the process is likely to be lengthy.

In the interim, what is NHS England's position and advice to health commissioners and providers on aspects of the statutory guidance that are out of step with the legislation?

2. Commissioning - Principles

Slide 5 of the NHS England pack outlines key commissioning principles, covering individual needs of each child, duties under the Equality Act 2010, and statutory responsibilities to co-operate and/or make arrangements to support children with medical conditions. I also note that the principles reference the Children Act 1989 and 2004 and the Care Act 2014.

While the principles outlined are all important, **a critical principle is missing: that is, the statutory powers of non-health bodies in relation to NHS Act 2006 healthcare.** This goes beyond statutory duties and acts as an inbuilt safeguard to ensure that healthcare activity is delivered by an appropriate provider, within the appropriate governance framework. The sector distinctions and boundaries in relation to NHS Act 2006 healthcare activity matter.^{5,6,7}

⁴ **Note:** These specific points were first raised in Smith (2020) Clinical nursing services in special schools: Why we need to revisit statutory duties. pg. 15/16 <https://escmanagementservices.co.uk/wp-content/uploads/2022/09/Nursing-Services-in-Special-Schools-Statutory-Duties-February-2020.pdf>

⁵ KS East Sussex County Council v KS (SEN) [2017] UKUT 273 [2018] AACR3. See para. 65 https://assets.publishing.service.gov.uk/media/5bb61b1ce5274a4f75596b3b/2018_AACR_3_ws.pdf

⁶ R (T, D and B) v Haringey LBC. [2005] EWHC 2235 (Admin); (2006) 9 CCLR 58) See para. 61 and 68.

⁷ R (JP) v NHS Croydon CCG and the London Borough of Croydon [2020] EWHC1470. See para. 48 <https://www.bailii.org/ew/cases/EWHC/Admin/2020/1470.html>



As an example, section 100 of the CFA 2014 places a duty on schools to support pupils with medical conditions. However, this does not give schools powers or obligations in relation to NHS Act 2006 healthcare activity, including nursing care. Other duties, such as those under the Equality Act 2010, first aid, or duty of care/in loco parentis, also do not extend schools' powers to cover NHS Act 2006 healthcare activities. Therefore, if section 100 is appropriately discharged, schools' statutory powers define clear limits on what '*make arrangements*' means for school-led and NHS-led provision.

Additionally, many duties in this area depend on what is considered '*reasonable*' - a highly subjective standard. Ask 10 people across the health and education sectors what reasonable healthcare activities are for school staff, and the answers are likely to be strikingly divergent.

ICBs must arrange certain health services, including nursing, that they deem necessary to meet *reasonable* needs. However, when ICBs make decisions in isolation, against the backdrop of NHS resource constraints, and do not consider the limits and impact on local education partners, those decisions on what is *reasonable* invariably lead to inadequate and insufficient ICB-commissioned services. This leaves education partners in the difficult position of having to commission or deliver what amounts to clinical NHS healthcare activity beyond their legal remit. Such ultra vires activity not only breaches legal boundaries but also results in healthcare for children and young people being delivered outside appropriate governance frameworks.

As you are well aware, in England, a well-established, comprehensive care quality framework underpins the delivery of safe and effective health and social care services.⁸ Its fundamental purpose is to ensure access to high-quality care. As a result of sector functions and distinctions, it is understandable that there is no equivalent framework covering the education sector for healthcare quality standards. Therefore, any commissioning decision that diverts clinical services serving a health function, such as nursing care, away from the care quality framework should raise a 'red flag'.

ICB commissioning decisions need to take into account the statutory powers of their local non-health partners, as this provides objectivity in determining what is considered 'reasonable' and helps prevent inappropriate, unsafe and inconsistent decisions, as well as non-compliant system arrangements. It would go a long way toward resolving the current confusion about whether responsibility for healthcare activities should lie with health or education.

Question 2: Given the limited statutory powers of local authorities (exercising their education function) and schools in relation to NHS Act 2006 healthcare activities, and the importance of recognising these limits when determining appropriate and compliant ICB commissioning;

- a) What is NHS England's position on how these powers are reflected and taken into account in ICB commissioning decisions?
- b) Would NHS England consider adding recognising the statutory powers of local partners as a principle that should be given due regard by health commissioners?

⁸ **Note:** National Quality Board, NHS Outcomes, NHS Oversight, NHS provider licensing, System Quality Groups, Learn from Patient Safety Events service, NICE guidelines and standards etc.



3. Delegation

Slide 6 covers delegation and starts by referencing the NMC Code and supplementary information. This suggests that the slide is referring to the delegation of nursing interventions, rather than therapeutic interventions involving Health and Care Profession Council-registered professionals.

The NMC has identified ‘Nursing procedures’ that a nurse must be able to demonstrate they can perform safely at the point of registration.⁹ These include enteral feeding, administering oxygen, stoma care and inserting and removing catheters. When a child or young person requires an NMC-identified nursing procedure and this is specified in a personalised health-led care plan, and associated with registered nurse delegation, then it would be **reasonable to conclude that this intervention constitutes a nursing service under section 3 of the NHS Act 2006**. In addition, the NMC Code 20.4 requires nurses to ensure that the delegation of a task is legal.

The NHS England slide 6 includes the bullet point:

- *If it is deemed appropriate to delegate a healthcare task to educational staff, they should be provided with training so that they can perform the task competently and safely. This training should be funded by the Integrated Care Board through existing commissioning arrangements (provided it does not fall into the categories of a public health or school nursing function – set out in slide 5)*

This point is concerning and confusing. When delegation involves registered health professionals and support workers employed by different organisations, due to vicarious liability, the respective employers are liable for their employees’ actions. Consequently, there is an organisation-level dimension to the delegation - a dual dynamic exists of individual and organisational elements. **Critically, when this involves education staff, the school needs to have a legal basis to accept responsibility and liability for the NHS Act 2006 healthcare activity.**

Under the education statutory scheme, the route for a school to have the power to accept responsibility for NHS Act 2006 health services is explicitly set out in statute. This is triggered by section 21(5) of the CFA 2014 when health care provision is deemed special educational provision and specified in a child or young person’s Education, Health and Care (EHC) plan in Section F.¹⁰ Therefore, this requires a compliant local authority-led, child/young person-specific EHC process **and the health provision must function to ‘educate or train’**. **As a result, the 21(5) CFA 2014 provision and the powers it confers are narrow in scope.**

As a starting point, this would exclude approximately 95% of pupils in schools who do not have an EHC plan.¹¹ Furthermore, given the nature of nursing care, it is difficult to see how a nursing intervention would, in itself, function to educate or train. Drawing on the NMC-identified nursing procedures above, yes, they may be essential for a child or young person to access their education, but their purpose is to maintain health, not to educate or train.^{12,13} As such, in a compliant decision-making process, they would be specified in Section G as health provision.

⁹ NMC (2018) Standards of proficiency for registered nurses. Annexe B Nursing procedures pg. 36 – 44.

<https://www.nmc.org.uk/globalassets/sitedocuments/standards/2024/standards-of-proficiency-for-nurses.pdf>

¹⁰ **Note:** Statutory provision around deemed special educational provision. See section 21(5) of the CFA 2014 alongside section 66 of the CFA 2014 and section 337 of the Education Act 1996 which confer the necessary statutory powers for education providers.

¹¹ DfE (2025) Academic Year 2024/25 Special Educational Needs in England. Percentage of pupils in England with an EHC plan reported 5.3%. <https://explore-education-statistics.service.gov.uk/find-statistics/special-educational-needs-in-england/2024-25>

¹² East Sussex County Council v KS (SEN) [2017] UKUT 273 [2018] AACR3. See para. 89

https://assets.publishing.service.gov.uk/media/5bb61b1ce5274a4f75596b3b/2018_AACR_3_ws.pdf

¹³ NICE (2023) [NG213] Disabled children and young people up to 25 with severe complex needs: integrated service delivery and organisation across health, social care and education. para. 1.4.9 pg. 31 [NICE Guideline \[213\]](#)



This stands in stark contrast to the broader provisions within the adult social care statutory scheme, which allow local authorities to assume responsibility for NHS Act 2006 healthcare when it is *'merely incidental or ancillary'* to social care services. These broad powers set out in section 22 of the Care Act 2014 apply to the exercise of local authorities' adult social care function and do not extend to their education functions. If they did, this would: a) undermine section 21(5) of the CFA 2014 and b) lead to education providers routinely providing extensive clinical healthcare outside the appropriate care quality framework ('red flag', pg. 3).

As noted, the legal basis for NHS Act 2006 healthcare activities to be delegated to education staff only exists if the intervention has been deemed special educational provision through a compliant process. Assuming a compliant process is in place, under section 21(5) of the CFA 2014, the **key consideration is the function of the provision, not who delivers it. The act of delegation and the delegated activity are inextricably linked - one cannot exist without the other.** Because of this, if healthcare provision functions to educate or train, the entire provision, covering the registered and unregistered worker activities, should be specified in Section F of the EHC plan. Therefore, the local authority would be required to secure and fund the provision, including training associated with health professional delegation.

Conversely, if an ICB was responsible for funding training related to delegated interventions delivered in education settings, then the ICB would also be responsible for commissioning the delegated activity itself. In the context of the education sector, the idea that registered health professional activity and unregistered activity delivered by education staff can be separated does not align with the legislation. For this reason, the suggestion that ICBs should fund training for the delegation of NHS Act 2006 healthcare interventions, while those interventions are delivered by education staff, is inconsistent with the statutory framework.

Question 3: Could NHS England provide examples of circumstances and types of NHS Act 2006 healthcare activities, specifically nursing procedures, that may be deemed appropriate to delegate to educational staff?

Question 4: If the examples do not rely on section 21(5) of the CFA 2014, what is the proposed legal basis for a school to accept responsibility (and liability) for this NHS Act 2006 healthcare activity?

Question 5: From a legal standpoint, in what circumstances would an ICB be responsible for commissioning and funding the delegation of NHS Act 2006 healthcare, if the delegated healthcare activity falls under the remit of education (e.g. the local authority and school)?

4. Accountability

Within the slide pack, slide 7 sets out that accountability for delegating a healthcare task remains with the registered nurse. The slide also refers to the nurse's responsibility for ensuring safe and appropriate delegation, and that training should be provided along with competency sign-off, oversight and monitoring.

Whilst registered health professional accountability is important, when delegation involves employees from different organisations and sectors, the organisation-level aspect is equally important. As noted, there are organisation-level responsibilities, accountabilities and liabilities on



the respective employers in the delegation arrangement. This organisational aspect is captured in other health sector resources/guidance that would apply to delegation in non-health settings.^{14,15,16}

Given that the target audience of this slide pack is health commissioners and providers, it is surprising that the health employer aspect of accountability (and liability) has been omitted. In the context of the health and social care sectors, and arrangements for delegation and joint working, NHS England guidance is clear: *'The ultimate accountability, including any potential liability for unlawful delegation for the function, remains with the delegating organisation.'*¹⁷

While the statutory mechanism permitting delegation in the education sector differs from that in adult social care, there is an indisputable organisational element. It follows that health providers as employers of registered health professionals would bear some accountability if their staff were involved in delegation arrangements that did not comply with the legal framework.

Question 6: What is NHS England's advice/guidance to health providers in terms of their accountabilities and liabilities in relation to the delegation of healthcare activities to school staff, including potentially liability for unlawful delegation?

To conclude, local arrangements are often out of step with the legal and regulatory framework, and non-compliant practices remain widespread. I recognise the funding and workforce challenges NHS organisations face in implementing compliant models, as well as the valuable progress made by NHS England's SEND Team, including yourself, in recent years. However, these challenges must be addressed to ensure that children and young people receive the NHS healthcare they need and are entitled to. The education sector faces similar pressures, and it is neither appropriate nor sustainable for it to continue compensating for NHS shortfalls.

I would be grateful if you could consider these observations and queries, which I hope will help to inform future discussions.

Yours sincerely,

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¹⁴ DHSC/Skills for Care (2024) Delegated healthcare activities. Guiding principles for health and social care in England. For example, see pg. 19-21 <https://www.skillsforcare.org.uk/resources/documents/Support-for-leaders-and-managers/Managing-a-service/Delegated-healthcare-activities/Delegated-healthcare-activities-guiding-principles-November-2024.pdf>

¹⁵ RCN (2023) Accountability and delegation. See "Accountability – You and the law" <https://www.rcn.org.uk/Professional-Development/Accountability-and-delegation/Guide#accountability>

¹⁶ Diabetes UK (2022) Resources developed by Diabetes UK, the NHS and other Stakeholders. See Organisational checklist for delegation of administrations of insulin <https://www.diabetes.org.uk/for-professionals/improving-care/good-practice/pharmacy-and-medicines/delegation-of-insulin-administration>

¹⁷ NHS England (2024) Arrangements for the delegation and joint exercise of statutory functions. para. 74 <https://www.england.nhs.uk/long-read/arrangements-for-delegation-and-joint-exercise-of-statutory-functions/>