

The Context of Commissioning for SEND

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Overview of the session

1. 'Setting the scene' – how does Special Educational Needs and Disability (SEND) fit into wider commissioning principles?
2. Extended appeals and private reports
3. Commissioning streams.
4. Commissioning around transition to adult services.

Within each section is included time for us to have some reflection, participation, and questions.



Setting the scene - how does SEND fit into wider commissioning principles?



What is commissioning ?

Who pays?

What is joint commissioning ?

Children and commissioning

Children with complex needs

Why does this relate to SEND?

Wider commissioning and funding streams

Impact of the Children and Families Act 2014

- Brought in to encourage an integrated approach to commissioning of services for children and young people with SEND.
- The 2014 Act looked to ensure that health care and social care services were better integrated and jointly commissioned with regard to EHC Plans.
- **The diversity of commissioning funding streams and legislative frameworks for children however remained separate.**
- Commissioning principles still stand true but how has ICB restructures impacted upon SEND and joint commissioning?
- For health ICB duties to provide commissioning on an equitable and fair basis across the population it serves.
- Not permissible to have a two tier system – provision should always be based on need.
- Court understands that public services do not have bottomless pot of funds or resources..

Section 21 of the 2014 Act

- “**Special educational provision**”, ... means education or training provision that is additional to, or different from, that made generally for others of the same age.
- “**Health care provision**” means the provision of health care services as part of the comprehensive health service in England under s 1(1) of the National Health Service Act 2006.
- “**Social care provision**” means the provision made by a local authority in the exercise of its social services functions.
- Health care provision or social care provision which educates or trains a child or young person is to be treated as **special educational provision** (instead of health care provision or social care provision).

Deemed special educational provision

- As noted on previous slide, there is a category of provision which is 'deemed' special educational provision.

Health care provision or social care provision which educates or trains a child or young person is to be treated as special educational provision (instead of health care provision or social care provision).

- Practical effect: health care provision which educates or trains, and which therefore becomes deemed special educational provision, is included in Section F of an EHC Plan.
- There is no clear dividing line between education and health provision; each provision is assessed on its own facts.
 - Speech and Language Therapy, Occupational Therapy, and Cognitive Behavioural Therapy are common examples of deemed SEP – but not the only examples.

Need for a joint approach

- Children with complex needs may often have special educational needs and require support from social care / health services.
- **Continuing Care** should be part of a wider package of care which is agreed and delivered by collaboration between health, education and social care. What is care and what is health- contention there.
- Multi-agency approach is key.
- *R v North and East Devon HA ex P Coughlan [2001] QB 213, CA*
- *R (T and others) v Haringey LBC and another [2005] EWHC 2235 (Admin)*
 - Helpful summary of findings at Annex C to the CC guidance

R (T and others) v Haringey LBC and another [2005] *EWHC 2235 (Admin)*

- The Haringey decision considered the dividing line between NHS services and children's social care services.
- The court found that adults' services principles, as set out in *Coughlan*, should apply to children too, **even outside of institutional settings**.
- When planning a joint package for a child, the ICB needs to be mindful of the need to identify any services which **cannot** lawfully be provided by the LA (and which therefore cannot be commissioned or paid for by the LA).
 - Services that need to be delivered by a registered nurse;
 - Services which fall within s.22 Care Act 2014.
 - Although s.22 does not directly apply to children's services, it identifies services which are sufficiently medical to lie beyond the proper authority (vires) of a local authority.



EXTENDED APPEALS

LA's now face increased level of extended appeals

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This draws health and social care/ education into more deliberation as to which organisation is responsible for what element of provision

Wider Commissioning disputes can arise alongside a parental/child appeal for SEND

There can also be a parallel Judicial Review where the parents/child both health and health not meeting statutory commissioning duties for provision

Legal challenge often involves private reports and LA's/health may not have had the opportunity to assess the child

LA cannot respond to such a challenge alone- what is the bigger picture?

Private care

- Section 1(4) of the NHS Act 2006 (as amended) (the **NHS Act**) provides that all NHS treatment should be provided free of charge unless regulations have been made to permit charging
 - Mirrored in principle 2 of the NHS Constitution.

‘Access to NHS services is based on clinical need, not an individual’s ability to pay’

- The NHS Act 2006 also imposes various duties on ICBs to commission certain health services: *‘to the extent as it considers necessary to meet the reasonable requirements of the people for whom it has responsibility’* (section 3 NHS Act 2006).
- Power to **commission** certain health services as considered appropriate for the purposes of the health service that relate to securing improvement in the physical and mental health of the people for whom it has responsibility or in the prevention, diagnosis and treatment of illness in those people (section 3A NHS Act 2006).
- There are limits on the ability to mix private and NHS care – see “Guidance on NHS patients who wish to pay for additional private care”.

Private reports

- Little consistency, nationally, of approach towards consideration of private reports relating to needs.
- Some commissioners will, after consideration of a private report, move the child up a waiting list whether they are a child being seen by a service or not.
- In other cases the ICB/LA will challenge the private reports and not choose to move a child up a waiting list.
- Caution with excessive provision as is sometimes recommended by private reports.
- What is the big picture re provision ? Exceptional funding/CHC/complex care joint commissioning

Private reports and their use in EHC Plan appeals

- In extended appeals – ICB under a duty to provide any evidence that First-tier Tribunal (FTT) directs.
- In most appeals, the FTT will not make an order directly against the ICB for information or to answer questions.
- The FTT will rely on the local authority to liaise and seek input on health provision from the ICB; likely the ICB will need to consider any private report and provide their comments in relation to this assessment.
- The ICB may or may not be asked to provide a witness to address the health provision at the tribunal hearing itself.
- Remember some of the health care provisions that the ICB is being asked to comment on be 'deemed special educational provision'.



Questions and discussion



Funding and commissioning Streams

Children's and Young People's Continuing Care (CYPCC)

- National Framework for Children and Young People's Continuing Care 2016 (**CC guidance**).
- A continuing care package will be required when a child or young person (< 18 years old) 'requires care services'.
 - CYP will require care services where needs arising from disability, accident or illness that cannot be met by universal or specialist services alone.
- Framework covers children and young people up until 18 – thereafter the National Framework for NHS Continuing Healthcare should be used if the person is eligible for NHS Continuing Healthcare.
- Best practice as outlined in the National Framework is that Transition planning should commence at 14 years of age.
- There are significant differences between the continuing care framework and NHS Continuing Healthcare (CHC) for adults and eligibility to CYPCC does not automatically guarantee eligibility into NHS CHC.

Three stage process

I) Assessment

- Preference of the child or young person and their family.
- Holistic assessment of needs of the child or young people and their family.
- Reports and risk assessments from MDT's and/or evidence collated during the EHCP assessment
 - It is important that a CYPCC assessment should not be delayed to fit into timescales for a EHC plan assessment.
- Decision support tool for children and young people.

II) Decision-making

- Multi-agency forum or panel which considers the evidence and recommendation made by the assessor in order to reach a decision as to whether or not the child or young person has a continuing care need.

III) Development of a package of care

The process should aim to give the CYP and family a decision around eligibility within 6 weeks when the family should be involved in the arrangement of provision.

Stage I – Assessment

I) **Assessment**

- The assessment process is led by the responsible ICB.
- Preference of the child or young person and their family.
- **Holistic assessment of needs** of the child or young people and their family – where **relevant should also include a carer's assessment**.
- Assessment should consider all relevant reports and risk assessments from MDTs or evidence collated during the EHC Needs Assessment (health, education, and social care).
- Decision support tool for children and young people.
 - Based on the decision support tool widely used for adults.
 - Brings together needs from across ten domains.
 - Framework emphasises importance of exercising evidence-based professional judgement in all cases; decision support tool is not prescriptive.

Stage II – Decision-making

II) Decision-making

- Multi-agency forum or panel which considers the evidence and recommendation made by the assessor in order to reach a decision as to whether or not the child or young person has a continuing care need. (Para 10 of the CC Guidance).
 - Significant discretion as to how local panel/committee arrangements are made.
 - But likely to be unlawful to not have any joint decision-making processes
 - Panel / decision-making forum should be independent from assessment, and include key ICB and local authority professionals and at least one clinician
- Framework requires health bodies to have a local complaints procedure in place.
- Any disagreements voiced by the child or their family can be pursued through a complaint.

Stage III – Development of package of care

III) Development of a package of care

- CYPCC guidance provides extensive (but non-exhaustive) guidance on the areas covered as part of any commissioning process at paragraph 100.

[National Framework for Children and Young People's Continuing Care](#)

- Framework makes clear that a review should take place three months after the initial assessment.
- Frequent reviews thereafter – typically on an annual basis but may be held more frequently depending on the specific facts of the case.
- Public bodies should have regard to the limits on the local authority's ability to commission health services (see, the ex P Coughlan case).

R(A) v North Central London Integrated Care Board [2024]
EWHC 2682 (Admin)

Three grounds of claim:

1. **Ongoing breach of the Defendant's duty to ensure that the Claimant has a lawful health care plan contrary to s.42(3) Children and Families Act 2014.**
2. Within the context of the requirements of the National Framework, the Defendant's decision to terminate the care provider's contract and replace them with a new provider was irrational.
3. The Claimant's *parents* are entitled to restitution on the grounds of unjust enrichment. The Claimant asserts that the Defendant has been enriched by not paying for the healthcare package since on or around 10 July 2024.

R(A) v North Central London Integrated Care Board [2024]
EWHC 2682 (Admin)

Decision:

- The claim succeeded in respect of Ground 1: NCL ICB was in breach of its duty to secure health care provision specified in the EHC Plan (Section G).
- Permission granted in respect of Ground 2, but the Court was not satisfied that Ground 2 was made out (the decision to terminate the care provider's contractor/replace with a new provider).
- Ground 3 (permission to claim the remedy of restitution on the grounds of unjust enrichment refused).

R(A) v North Central London Integrated Care Board [2024] *EWHC 2682 (Admin)*

- The court concluded that section 42(3) Children and Families Act 2014 imposes an absolute and non-delegable duty on the NHS body to arrange the specified healthcare provision (para. 50).
- This was not a 'best endeavours' obligation and in the circumstances that relevant health body had not fulfilled this duty.
- Whist lawful for delegation of health care plan, did not excuse ICB from ensuring such a plan was in place, was properly maintained and was adequate.
- It had not made sufficient efforts to secure an updated health care plan from the registered provider.

Section 117 aftercare

- Joint duty between the ICB (health) and Local Authority (social care) - this does not however mean that the costs of these services will be shared equally.
- Only applies to certain qualifying provisions of the MHA 1983.
 - s3 – admission for treatment
 - s37 – hospital order
 - s45A – hospital direction
 - s47 – removal to hospital of persons serving sentences of imprisonment
 - 48 – removal to hospital of other prisoners

Freestanding duty – not a gateway provision.

Applies to children and young people.

Section 117 aftercare

(6) ... “after-care services”, in relation to a person, means services which have both of the following purposes:

- (a) meeting a need arising from or related to the person’s mental disorder; and
- (b) reducing the risk of a deterioration of the person’s mental condition

After-care services are broad in nature, examples include:

- Healthcare.
- Social care.
- Employment services.
- Supported accommodation.
- Services to meet the person’s social, cultural and spiritual needs.
- Services to regain or enhance the individual’s skills.



Questions and discussion



Interface of
children services
and adult
services –
commissioning
around
transition

Transition to adult health services

- This can represent a time of real anxiety for families and contention.
- Is a real pinch point for commissioning as the adult service provision often does not match children provision and SEND provision to age 25 so a meeting of two differing frameworks and provision structures.
- Produces a great deal of legal challenge and dispute inter agency.
- If a child has needs but does not have an EHC Plan, transition happens in a straightforward fashion.
- If a child has an EHC Plan regard has to be had to transition process under the SEND regulations as well as the usual transition arrangements for transitioning over to adult services.

The Care Act 2014

- Local authorities **and their partners** must co-operate in the provision of adult care and support in promoting the individual's wellbeing.
- The transition from children's to adult services needs to be well managed.
- Important to consider ways of supporting carers.

Principles for Transition

Transition is not a single event but a gradual process of supporting a young person and their family through their adolescence into adulthood. How does commissioning change?

Key principles for effective transition: coordinate a multi-agency approach.

- Establish good communication across all relevant agencies involved.
- Supporting parents and carers to understand the changes in rights as the young person reaches the legal age of adulthood regardless of mental capacity – facilitation of a Mental Capacity Assessment as required.
- Share information with all relevant agencies working with the child or young person.
- Contact all relevant services as early as possible to identify and plan for needs e.g. specialist equipment, therapy needs, physical adaptations to the environment, mobility and care needs, communication needs and curriculum needs.
- Offer support to parents for joint conversations regarding any emerging concerns such as wider determinants including social care, welfare benefits, housing, and employment.

Transition to adult services

- Young people with SEND turning 18, or their carers, may become eligible for adult care services regardless of whether they have an EHC Plan or whether they have been receiving care services under s.17 Children Act 1989.
- The Act sets out the requirements on local authorities when young people are approaching or turn 18 and are likely to require an assessment for adult care and support.
- For those already receiving support from children's services, the Act makes it very clear that local authorities must continue to provide children's services until adult provision has started.
- CC guidance suggests planning should begin where child reaches 14.
 - At 14 y.o. YP should be brought to attention of ICB as likely to need assessment for CHC.
 - 16-17 y.o. screening for CHC should be undertaken using adult screening tools.
 - 18 y.o. full transition to adult CHC or to universal and specialist health services.

Transition for young people with an EHC Plan

- The local authority should ensure that the transition to adult care and support is:
 - well planned;
 - is integrated with the annual reviews of the EHC plans; and
 - reflects existing special educational and health provision that is in place to help the young person prepare for adulthood.
- As with EHC Plan development in general, transition assessments for adult care and support must involve the young person and anyone else they want to involve in the assessment.
- Transition assessments must also account for the outcomes, views and wishes that matter to the young person – much of which will already be set out in their EHC Plan.

Transition for young people with an EHC Plan

- Assessments for adult care or support must consider:
 - current needs for care and support
 - whether the young person is likely to have needs for care and support after they turn 18, and
 - if so, what those needs are likely to be and which are likely to be eligible needs
- Local authorities can meet their statutory duties around transition assessment through an annual review of a young person's EHCP that includes the above elements.

Continuity of provision

- Under no circumstances should young people find themselves suddenly without support and care as they make the transition to adult services.
- For the most part, transition to adult services for those with EHC plans should begin at an appropriate annual review and in many cases should be a staged process over several months or years.
- Under the Care Act 2014 local authorities must continue to provide a young person with children's services until they reach a conclusion about their situation as an adult, so that there is no gap in provision.
- The local authority can also decide to continue to provide care and support from children's services after the young person has turned 18. This can continue until the EHC plan is no longer maintained but when the EHC plan ceases or a decision is made that children's services are no longer appropriate, the local authority must continue the children's services until they have reached a conclusion about their need for support from adult services.

A few other things to consider ...

- Rare Diseases Framework
 - ICBs will be expected to consider the Rare Diseases Framework.
 - [The UK Rare Diseases Framework](#)
- Interface with safeguarding
 - December 2023: DfE updated to the national framework for Children's Social Care.
 - [Children's social care national framework](#)



Questions and discussion

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