Department of Health

NHS Continuing Healthcare

Refunds Guidance

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NHS Continuing Healthcare Refunds Guidance

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Description	This guidance sets out the approaches to be taken by PCTs and local Authorities when a decision is awaited on eligibility for NHS continuing healthcare or there is a dispute following a decision. It explains responsibilities for providing services during these periods and for refunding the costs of services provided.
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For Recipient's Use	

Guidance on responsibilities when a decision on NHS Continuing Healthcare eligibility is awaited or is disputed.

1. This guidance should be read in conjunction with the revised National Framework for Continuing Healthcare and NHS Funded Nursing Care ('the Framework'), dated July 2009[1]. The Framework indicated that further guidance on responsibilities whilst awaiting the outcome of the NHS CHC eligibility decision and whilst awaiting the outcome of an Independent Review Panel (IRP) would follow later in the year. Accordingly, this guidance sets out the approach recommended to be taken by Primary Care Trusts (PCTs) and local authorities (LAs) in three situations:

a) where there is a need for health or community care services to be provided to an individual during the period in which a decision on eligibility for NHS continuing healthcare (NHS CHC) is awaited, in a case that does not involve hospital discharge[2];

b) where a PCT has unjustifiably taken longer than 28 days to reach a decision on eligibility for NHS CHC; or

c) where, as a result of an individual disputing an NHS CHC eligibility decision, a PCT has revised its decision.

<u>a) Where care needs to be provided whilst a decision on NHS CHC is awaited, in a case that does not involve hospital discharge</u>

2. A person only becomes eligible for NHS CHC once a decision on eligibility has been made by a PCT, informed by a completed Decision Support Tool or Fast Track Pathway Tool. Prior to that decision being made, any existing arrangements for the provision and funding of care should continue, unless there is an urgent need for adjustment.

3. If, at the time of referral for an NHS CHC assessment, the individual is already receiving an ongoing care package funded by a PCT or an LA or both, those arrangements should continue until the PCT makes its decision on eligibility for NHS CHC, subject to any urgent adjustments needed to meet the changed needs of the individual. In considering such adjustments, LAs and PCTs should have regard to the limitations of their statutory powers.

4. Some health needs fall within the powers of both PCTs and LAs to meet. However where:

i) an LA is providing services during the period in which an NHC CHC eligibility decision is awaited;

ii) it is identified that the individual has some health needs that are **not** within the power of an LA to meet (regardless of the eventual outcome of the NHS CHC eligibility decision); and

iii) those health needs need to be met before the decision on eligibility is made,

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[1] The Framework can be found at http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_103162

[2] The position for hospital discharges, including any interim services, is set out in paragraphs 56, 57 and 64 of the Framework.

the PCT should consider its responsibilities under section 3 of the 2006 Act[3] to provide such health services to such extent as it considers necessary to meet all reasonable requirements. The PCT should therefore consider whether the individual's health needs are such that it would be appropriate to make services available to help meet them in advance of the NHS CHC eligibility decision.

5. Where an individual is not already in receipt of an ongoing care package from the LA or PCT (or both), they may have urgent health or social care needs which need to be met during the period in which the NHS CHC eligibility decision is awaited, for example because previous private arrangements are no longer sustainable or there were not previously any care needs requiring support. Where the individual appears to be in need of community care services, the LA should assess the individual's eligibility for these under section 47 of the NHS and Community Care Act 1990 ('the 1990 Act'), including consideration of whether there is a need to provide services urgently in advance of such assessment, using their powers under section 47(5) of the 1990 Act.

6. If, in carrying out an assessment, the LA identifies that there may be a need for health services under the 2006 Act, the LA should invite the PCT to participate in the assessment[4]. The PCT should consider and meet its responsibilities under section 3 of the 2006 Act pending the NHS CHC eligibility decision, as explained above. The LA and PCT should jointly agree actions to be taken in the light of their statutory responsibilities until the outcome of the NHS CHC decision-making process is known. No individual should be left without appropriate support because statutory bodies are unable to agree on respective responsibilities.

b) Where a PCT has unjustifiably taken longer than 28 days to reach a decision on eligibility for NHS CHC

7. The Framework states that decision-making on eligibility for NHS CHC should, in most cases, take no longer than 28 days from receipt of a completed Checklist (or, where no Checklist is used, other notification of potential eligibility for NHS CHC)[5].

8. When
- i) a PCT makes a decision that a person is eligible for NHS CHC; and
- ii) it has taken more than 28 days to reach this decision; and
- iii) an LA or the individual has funded services whilst awaiting the decision;

the PCT should, where appropriate having regard to the approaches set out in paragraphs 11 to 13 below, refund to the individual or the LA, the costs of the services from day 29 of the period that starts on the date of receipt of a completed Checklist (or where no Checklist is used, other notification of potential eligibility for NHS CHC), and ends on the date that the decision was made. This period is referred to below as the "period of unreasonable delay". The refund should be made unless the PCT can demonstrate that the delay is reasonable as it is due to circumstances beyond the PCT's control, which could include:

[3] As delegated to it in the National Health Service (Functions of Strategic Health Authorities and Primary Care Trusts and Administration Arrangements) Regulations 2002 (S.I. 2002/2375).
[4] See section 47(3) of the 1990 Act.
[5] See paragraph 84 of the Framework.

i) evidence (such as assessments or care records) essential for reaching a decision on eligibility have been requested from a third party and there has been delay in receiving these records from them;
ii) the individual or their representatives have been asked for specific information or evidence or for participation in the process and there has been a delay in receiving a response from them;
iii) there has been a delay in convening a multidisciplinary team due to the lack of availability of a non-PCT practitioner whose attendance is key to determining eligibility and it is not practicable for them to give their input by alternative means such as written communication or by telephone.

9. In all of the above and other circumstances PCTs should make all reasonable efforts to ensure the required information or participation is made available within 28 days. This should include developing protocols with services likely to be regularly involved in NHS CHC eligibility processes that reflect the need for information or participation within 28 days. Where the PCT commissions the service from which information or participation is regularly required, it may be appropriate to consider placing such expectations within the specification for the relevant service.

10. PCTs and LAs should be aware of the requirements of the NHS Continuing Healthcare (Responsibilities) Directions 2009 ('the Responsibilities Directions') for a PCT to consult the relevant LA, wherever reasonably practicable, before making a decision on NHS CHC eligibility and for the LA, wherever reasonably practicable, to provide advice and assistance to the relevant PCT.

11. Where unreasonable delay has occurred and it is an LA that has funded services during the interim period, the PCT should consider refunding the LA the costs of the care package that it has incurred during the period of unreasonable delay. The PCT could use its powers under section 256 of the 2006 Act to make such payments. The amount to be refunded to the LA should be based on the gross cost of the services provided. Where an individual has been required to make financial contributions to the LA as a result of an assessment of their resources under the 1990 Act , the above approach should be adopted rather than the PCT refunding such contributions directly to the individual as the refund of contributions is a matter between the LA and the individual. Where a PCT makes a gross cost refund, the LA should refund any financial contributions made to it by the individual in the light of the fact that it has been refunded on a gross basis.

12. Where a PCT has unreasonably delayed reaching its decision on eligibility for NHS CHC, and the individual has arranged and paid for services directly during the interim period, the PCT should consider making an ex-gratia payment in respect of the period of unreasonable delay. The PCT would use its powers under section 2(1)(b) and paragraph 15(1) of Schedule 3 to the 2006 Act to make such payments.

13. Such payments would need to be made in accordance with the guidance for ex-gratia payments set out in Managing Public Money[6]. This sets out (in paragraph 4.12.4) that, where public services organisations have caused injustice or hardship, they should consider providing remedies that, as far as reasonably possible, restore the wronged party to the position that they would have been in had matters been carried out correctly. This guidance (in Annex 4.14)

[6] http://www.hm-treasury.gov.uk/d/mpm_whole.pdf

sets out other issues to be considered and PCTs should take these into account in reaching their decision.

c) Where, as a result of an individual disputing an NHS CHC eligibility decision, a PCT has revised its decision

14. When a PCT has made a decision on NHS CHC eligibility, that decision remains in effect until the PCT revises the decision. The Framework sets out that IRPs make recommendations but that these recommendations should be accepted by a PCT in all but exceptional circumstances. Where a PCT accepts an IRP recommendation on NHS CHC eligibility, it is in effect revising its previous decision in the light of that recommendation.

15. Where:

i) an LA has provided community care services to an individual in circumstances where a PCT has decided that the individual is not eligible for NHS CHC, and

ii) the individual disputes the decision that they are not eligible for NHS CHC and the PCT's decision is later revised (including where the revised decision is as a result of an IRP recommendation),

the PCT should consider refunding the LA the costs of the care package. This should be based on the gross care package costs that the LA has incurred from the date of the decision that the individual was not eligible for NHS CHC (or earlier, if that decision was unreasonably delayed – see the previous section) until the date that the revised decision comes into effect. The PCT could use its powers under section 256 of the 2006 Act to make such payments.

16. Where a PCT makes such a refund, the LA should refund any financial contributions made to it by the individual in the light of the fact that it has been refunded on a gross basis.

17. Where:

i) no LA has provided community care services to an individual in circumstances where a PCT has decided that the individual is not eligible for NHS CHC,

ii) the individual has arranged and paid for such services him or herself; and

iii) the individual disputes the decision that they are not eligible for NHS CHC and the PCT's decision is later revised (including where the revised decision is as a result of an IRP recommendation),

the PCT should consider making an ex-gratia payment to the individual. When a PCT has revised its decision, whether as a result of an IRP process or not, this is a recognition that the original decision, or the process leading up to the decision, was incorrect. An ex-gratia payment would be to remedy any injustice or hardship suffered by the individual as a result of the incorrect decision, and would be made using the PCT's powers under section 2(1)(b) and paragraph 15(1) of Schedule 3 to the 2006 Act. The PCT should take into account the Managing Public Money guidance as explained above.

Disputes

18. It is important that PCTs and LAs have clear jointly agreed local processes for resolving any disputes that arise between them on the issues covered in this guidance. The Responsibilities Directions require PCTs and LAs to have an agreed local process for resolving disputes between them on issues relating to eligibility for NHS CHC and for the NHS elements of joint packages. PCTs and LAs could consider extending the remit of their local disputes process to include disputes over refunds. Whatever disputes process is selected, it is important that it should not simply be a forum for further discussion but includes an identified mechanism for final resolution, such as referring the case to another PCT and LA and agreeing to accept their recommendation.

19. Where an individual disputes a PCT decision on whether to provide redress to them or disputes the amount of redress payable this should be considered by the PCT through the NHS complaints process.