FRIMLEY INTEGRATED CARE BOARD

CHC Verification & Dispute Resolution Policy

Agreed by
NHS Frimley Integrated Care Board (ICB),
Bracknell Forest Council,
Royal Borough of Windsor & Maidenhead,
Slough Borough Council

For implementation from September 2020
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Approved by	Fiona Slevin-Brown, Executive Place Managing Director, Bracknell Forest
Document Author	Head of EBCHC & Placement Governance, Frimley CCG LA CHC Leads; Bracknell, RBWM, Slough EBCHC Operational Manager, Frimley CCG EBCHC Business Manager, Frimley CCG
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Version control sheet

Version	Date	Author	Status	Comments
v1	8th Aug 2019	Vernon Nosal (RBWM) Assistant Director, Statutory Services, Caldecott Guardian Hannah Doherty (BFC) Head of LD Nick Chattaway (BFC)		Action following CHC Meeting; Initial Thoughts Captured from those present.
v2	22nd Aug 2019	Lorraine Charlton (FrimleyCCG) Head of CHC and Placement Governance		Head of CHC Initial Draft for wider consultation
v3	27th Aug 2019	Slough Borough Council: Andrew Grimm (Interim CHC Lead), Dianne Martin RBWM (Not present) Bracknell Forest Council; Nick Chattaway Frimley CCG Wendy Phillips (Clinical Manager) Lorraine Charlton (Head of CHC and Placement Governance)		Heads of Service Meeting:
v4	3rd Oct 2019	Slough Borough Council: Andrew Grimm (Interim CHC Lead), RBWM Liam Doherty (Continuing Healthcare Specialist) Bracknell Forest Council; Nick Chattaway Frimley CCG Wendy Phillips (Clinical Manager) Lorraine Charlton (Head of CHC and Placement Governance)		Heads of Service Meeting:
v5	8th October 2019	Slough Borough Council: Andrew Grimm (Interim CHC Lead), RBWM Liam Doherty (Continuing Healthcare Specialist) Bracknell Forest Council; Nick Chattaway Frimley CCG Lorraine Charlton (Head of CHC and Placement Governance)		Heads of Service Meeting:

v6	15th October 2019	Slough Borough Council: Not present RBWM Liam Doherty (Continuing Healthcare Specialist) Bracknell Forest Council; Nick Chattaway Frimley CCG Lorraine Charlton (Head of CHC and Placement Governance)		Heads of Service Meeting: Removes comment 2 as Verification Tool (Appendix 2) has been reviewed and approved by HoS.
v7	24th October 2019	Slough Borough Council: Not present RBWM Liam Doherty (Continuing Healthcare Specialist) Bracknell Forest Council; Nick Chattaway Frimley CCG Lorraine Charlton (Head of CHC and Placement Governance) Sandra Edwards (CHC Business Manager Frimley CCG) Jessica Holt-Wells (CHC Operational Manager) Wendy Phillips (Interim CHC Ops. Manager)		Heads of Service Meeting – Agreed Formal Dispute Resolution Stage 2. Addition of Appendix 4; dispute notification template
v8	24th October 2019	Lorraine Charlton HO CHC Frimley CCG		Removal of comments, highlighted content. Additional Appendices, content to be added as agreed by HoS. Minor correction of identified typing errors and readability of Stage 2 dispute section as agreed in HOS Meet.
V9	25th Oct 2019	RBWM Liam Doherty (Continuing Healthcare Specialist)		Additions to Principles and Verification Insertion of Dispute Avoidance Adjustments to Stage 2 Expansion of Stage 3 Minor correction of typos
v10	10th January 2020	Slough Borough Council: Andrew Grimm (Interim CHC Lead), RBWM Liam Doherty (Continuing Healthcare Specialist)		Correction of typos Clarification of timescales

v11	17th January 2020	RBWM Liam Doherty (Continuing Healthcare Specialist)		Changed order of sections and contents table Slough & BFC email addresses added Inserted section on responsibilities during dispute Inserted dispute process templates Removed training and flowchart Appendices
Final	28th June 2021	Sandra Edwards (CHC Business Manager Frimley CCG)	Final	Updated the CCG Logo Updated reference to Frimley CCG and changing it to Frimley Added; Policy page, version control sheet, equality statement as per CCG policy of policies.

Equality Statement

Frimley ICB aims to design and implement services, policies and measures that meet the diverse needs of our service, population and workforce, ensuring that none are placed at a disadvantage over others.

Throughout the development of the policies and processes cited in this document, we have:

- Given due regard to the need to eliminate discrimination, harassment and victimisation, to advance equality of opportunity, and to foster good relations between people who have shared a relevant protected characteristic (as cited under the Equality Act 2010) and those who do not share it;

- Given regard to the need to reduce inequalities between patients in access to, and outcomes from, healthcare services and in securing that services are provided in an integrated way where this might reduce health inequalities.

Members of staff, volunteers or members of the public may request assistance with this policy if they have particular needs. If the member of staff has language difficulties and difficulty in understanding this policy, the use of an interpreter will be considered.

We embrace the four staff pledges in the NHS Constitution. This policy is consistent with these pledges.

Contents

Practitioner Principles

- Professionals will follow the spirit of the Framework and give due consideration to the requirements outlined in the National Framework [1] and the contained practice guidance which is summarised in Appendices 1 & 2.
- Frimley CHC Service, Bracknell Forest Council, Slough Borough Council and the Royal Borough of Windsor and Maidenhead have agreed to work together in a way that minimises the need to invoke formal inter-agency dispute resolution procedures.
- Practitioners will have completed appropriate training to facilitate the robust completion of the Decision Support Tool. This will include adequate descriptions to explain the level of need selected by the MDT and full consideration of the primary health needs test; nature, intensity, complexity and unpredictably. MDTs will also identify whether there are any needs above the legal limit of the local authority to provide. These should be clearly articulated as part of the DST, this is especially important where an individual is not recommended as eligible for CHC. The MDT may also need to capture within the DST any actions arising from the assessment.
- Recommendations will be accepted in all but exceptional circumstances in accordance with the National Framework (sections outlined in Appendix 1).
- Verifiers will use the agreed Quality Assurance Tool (Appendix 2) and will not:
    a. financially gate keep
    b. complete or alter DSTs
    c. overturn recommendations, (where the verifier has concerns they will refer back to an MDT for further work in certain circumstances).
- The National Framework deems that exceptional circumstances where the ICB may not accept a recommendation.
    a. Where the DST is not completed fully (including where there is no recommendation)
    b. where there are significant gaps in evidence to support the recommendation
    c. where there is an obvious mismatch between evidence provided and the recommendation made
    d. where the recommendation would result in either authority acting unlawfully.
- The ICB should not refer a case back, or decide not to accept a recommendation, simply because the multidisciplinary team has made a recommendation that differs from the one that those who are involved in making the final decision would have made, based on the same evidence.
- Where a recommendation is not accepted, the matter will be sent back to the MDT with a full explanation of the relevant matters to be addressed using the agreed form (Appendix 2). Where there is an urgent need for care/support to be provided, the ICB (and Local Authority where relevant) should make appropriate interim arrangements:

[1] Department of Health, “National Framework for Continuing Healthcare and NHS-funded nursing Care (2018)

Verification

Process

1. Assessment sent by Nurse Assessor in CHC to generic Duty Nurse inbox for the attention of the Duty Manager frimleyicb.bechcdutynurse@nhs.net

2. Local Authority CHC Leads will be phoned by CHC to advise if there are any verifications due that day.

3. Assessment allocated to Clinical Verifier. Full assessment is read alongside all evidence provided, signatures checked. Levels of need are reviewed and finally the recommendation is considered. The Quality Assurance form in Appendix 2 will be completed. If on review:
    a. no quality issues are identified; the assessment is verified using the Quality Assurance form and forwarded to CHC Admin frimleyicb.bechc@nhs.net to prepare the letter for signature and sending. This should take place within 5 working days.
    b. there are quality issues identified the Nurse Assessor is advised and asked to ensure any outstanding actions are completed before resubmission. They may also be asked to reconvene the MDT to consider the matters raised and review the levels of need or recommendation. This should take place within 5 working days. Letter sent from ICB to advise patient/representative of delay.

4. Once the MDT has reviewed the verification feedback, they will reconvene. This may be virtually. The MDT update the assessment for re-submission (steps 1-3 as above). On review at least 2 staff will reconsider the evidence provided and the completed DST.
    a. Once the MDT have completed all the required actions, and reviewed their recommendation for submission for verification; the recommendation of the MDT should be paramount. It is anticipated that once the MDT have provided the requested further evidence or explanation, and if the MDT continue to recommend that the individual is eligible for CHC, the ICB will accept this recommendation.
    b. If on review there is no quality issues identified, the assessment is verified and decision letter sent.
    c. If there are obvious quality issues identified; if both Verifiers consider there is an obvious mismatch between the recommendation and evidence provided or there are quality issues identified they will “re-write” the 4 key indicators on the verification form. They will then make the decision on behalf of the ICB. The outcome is then sent.

5. If the Local Authority disagrees with the decision made, they can revert to the formal Dispute Resolution process outlined in this policy.

Disputes – Disagreements between Organisations

This section outlines the process to be followed by all organisations when there is a disagreement about the decision made by the ICB in regards to an individual's eligibility for NHS funded continuing healthcare.

There are 3 parts to the dispute resolution process; Informal, Formal and Arbitration.

In order to undertake a review of the decision, the ICB will require details of why the Local Authority does not agree with the decision made. Disputes will be reviewed for learning points and these will be shared with professionals involved in CHC assessment.

Separate procedures exist for individuals and/or their representatives to challenge East Berkshire NHS Continuing Healthcare Service decisions regarding CHC. These are referred to as appeals and the relevant processes can be found in the NHS Continuing Healthcare Operational Policy.

Dispute Avoidance

The ICB and Local Authorities will adhere to the fundamental principle to work together in a way that minimises the need to invoke formal inter-agency dispute resolution procedures.

Checklist stage

- The Checklist threshold is intentionally low, requiring a brief description of the need, and no requirement to provide detailed evidence. It is expected that the CHC service will not reject Checklists.
- The local authorities will have assurance mechanisms to ensure Checklists are of a suitable quality before they are submitted to the CHC Service.
- The CHC service will not impose disproportionate quality assurance mechanisms for Checklists which result in a barrier to, or delay in, individuals being referred for CHC assessment.

Decision Support Tool and eligibility decision

- The ICB will be flexible about the date of MDT meetings in order to facilitate social workers attending.
- All parties agree there may be valid and unavoidable reasons for the determination of eligibility taking longer than 28 calendar days, such as where additional work is required to ensure that the DST and supporting evidence accurately reflect an individual's needs (NF 164). The ICB may defer making an eligibility decision in these circumstances.

Eligibility Reviews

- The CHC service will only review a person's eligibility for CHC where there is clear evidence of a change in need:
    - for standard CHC this will be evidenced through reducing the level of care to reflect reduced need
    - for Fast Track CHC this will be through a revised prognosis that the person is not near the end of their life.

Responsibilities Whilst Awaiting the Outcome of Dispute

Where a ICB or LA are already providing care and support

A person only becomes eligible for CHC once a decision on eligibility has been made by East Berkshire NHS Continuing Healthcare Service, informed by a completed DST and MDT recommendation 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.

Neither the NHS nor an LA should unilaterally withdraw from an existing funding arrangement without a joint assessment and/or reassessment of the individual, and without first consulting one another. It is essential that alternative funding arrangements are agreed and put into effect before any withdrawal of existing funding, in order to ensure continuity of care.

If agreement between NHS and the LA cannot be reached on the proposed change, and the local disputes procedure is invoked, current funding and care management responsibilities should remain in place until the dispute has been resolved.

No individual should be left without appropriate support because statutory bodies are unable to agree on respective responsibilities.

Any interim funding arrangements will be made on a 'without prejudice' basis pending the outcome of the dispute resolution process.

Where East Berkshire NHS Continuing Healthcare Service has funded through the dispute process and East Berkshire NHS Continuing Healthcare Service's eligibility decision has been upheld and the individual has been found not eligible, the relevant LA will reimburse Berkshire NHS Continuing Healthcare Service backdated to the 29th day after the Checklist was submitted.

Where the LA has funded through the dispute process and the outcome of the process is that East Berkshire NHS Continuing Healthcare Service's decision is not upheld and the individual has been found eligible, East Berkshire NHS Continuing Healthcare Service will reimburse the relevant LA backdated to the 29th day after the Checklist was submitted.

Individuals Assessed following Hospital Discharge

All parties agree to follow local hospital discharge processes

Individuals not already in receipt of care and support from a ICB or LA, assessed at home or in a nursing and/or residential placement

Where an individual is not already in receipt of an on-going care package from the LA or East Berkshire NHS Continuing Healthcare Service (or both), they may have urgent health or social care needs which need to be met during the period in which the 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 there are urgent healthcare needs to be met, these should be assessed by the relevant healthcare professional. This is not automatically the CHC service and could be District Nursing, GP or other NHS service.

Where the individual appears to be in need of care and support, the local authority should assess the individual's eligibility for these under section 9 of the Care Act 2014.

It may be that the person has needs that will be met, during the duration of the dispute, by health and social care e.g. by way of a nursing home placement with a Funded Nursing Care contribution from health or with input from District Nursing and / or other health funded services if the person is in the community.

The Assistant Director for CHC and/or nominated Deputy and the Senior Manager for the relevant LA will agree the on-going funding arrangement at the point the dispute is notified to East Berkshire NHS Continuing Healthcare Service. No individual should be left without appropriate support because statutory bodies are unable to agree on respective responsibilities. Once the dispute is settled and there is a final eligibility decision, reimbursements will be made as set out above.

Stage 1 - Informal Dispute Resolution

During the early stages of implementing this policy, there may be historic cases which sit outside this policy due to the dispute being raised out of time etc. These disputes will be dealt with on a case by case basis in line with this policy accepting timeframes and other sections may not apply for assessments which took place previously.

Notification of Dispute

Where the Local Authority wishes to dispute, they will notify the CHC Team within 28 calendar days of receiving the outcome letter using the agreed template in Appendix 4. The ICB will respond confirming receipt within 5 working days. The ICB will also inform the individual or their representative that a dispute has been raised.

Set up

This is a face to face or telephone conversation between professionals to discuss concerns from both sides. This would usually be the Social Worker and Nurse Assessor from the original MDT and a supporting manager from the ICB or Local Authority who will facilitate the conversation. These managers will have relevant authority to agree recommendations on behalf of their organisation. Attendees will complete the Stage 1 Informal Dispute Resolution Meeting form (see template in Appendix 4)

Professionals' Roles

The role of the Social Worker – Is to detail their professional opinion and during the course of the conversation the reasons why they disagree with the 'not eligible' decision and why they consider the person has a primary health need.

The role of the CHC Assessor - in this forum is to objectively and critically review the process and recommendation previously made. To address the Local Authority's concerns, reviewing and explaining their rationale and offer an opportunity for questions to be answered.

Process

During the meeting the focus will be on what the patient needs, identifying any care needs which are above the Local Authority legal limit and consideration of alternative care delivery models.

At the end of the meeting a discussion will take place about any deviations from process or concerns about the experience. Matters raised will be presented to the Heads of Service Meeting for an agreed action plan. The ICB will keep a record of learning opportunities identified and action plans.

It is expected that in 90% of cases, the decision is resolved at this stage and a formal decision will be made by the MDT. The MDT will be expected to also submit to the Business Manager the completed Stage 1 Informal Dispute Resolution Meeting template (Appendix 4) within 5 working days of the meeting taking place. This will capture the main topics that were discussed, the outcome and any actions to be taken. Documents should be sent to the CHC Business Manager. An outcome letter will be sent to the local authority and families within 5 working days.

If, following this informal dispute process, the professionals are unable to agree an outcome; the informal part of the process is concluded. Submitted copies of the Dispute Template will be forwarded to:

Slough: AdultSocialCare@slough.gov.uk
Bracknell Forest Council: CHC@bracknell-forest.gov.uk
Royal Borough of Windsor Ascot and Maidenhead: Access.Services@RBWM.gov.uk

Cooling Off Period and Progression to Stage 2

The Local Authority will have a period of 10 working days in which to consider whether they still believe the decision to be wrong. During this time individuals involved in the dispute will:

(a) reflect on their experience;
(b) seek appropriate advice from the CHC Lead/ CHC practitioner in their organisation
(c) carefully and objectively reflect on the individual's case with regards to the decision.

The Local Authority will submit a position statement no later than 10 working days after the informal stage outcome was communicated. Local Authority This position statement may be the completed Stage 1 meeting form, with any additional evidence or rationale.

The ICB will review the content, gather any additional evidence that may assist in the decision making process and convene a Formal Dispute Panel within 10 working days from receipt of the Local Authority position statement. In order to facilitate the decision making process, the ICB will provide a copy of patient records including care needs assessments and records from third parties which were used as part of the assessment process, the disputed Decision Support Tool, and the completed Stage 1 meeting form (Appendix 4) relevant to the assessment electronically to the Panel Members. The disputing Local Authority will provide any additional evidence it considers is relevant to assist in the decision making process.

Stage 2 - Formal Dispute Resolution

Before a decision is made about considering a formal dispute resolution, a cooling off period of 10 working days will take place.

Set Up

A Formal dispute meeting takes place and is run in a similar way to an Independent Review Panel to review the disagreement and the Panel will make a decision regarding eligibility; in all but exceptional circumstances this decision will be accepted by the ICB and the Local Authority.

The Panel for the Formal Dispute Resolution Meeting will be co-chaired by:

- East Berkshire NHS Continuing Healthcare Service Manager
- Social work Manager from a different East Berkshire Local Authority with experience in CHC

Attendees:

- Nurse Assessor who attended the MDT and completed the DST, or nominated Deputy in exceptional circumstances.
- Social Worker who attended the MDT and completed the DST, or nominated Deputy in exceptional circumstances.
- Management representative from the disputing Local Authority with experience in CHC
- Specialist advisor if required
- Administrator from either the CHC Service or disputing Local Authority, to minute the meeting.

Process

The remit of the Panel is to:

- Offer an opportunity for the Nurse Assessor and Social Worker to present the individual's needs as they saw them.
- Consider each of the domains and the individual's needs, review the levels selected by the MDT and comment on whether they were appropriately allocated.

Once this is done, the Social Worker and Nurse Assessor will leave the meeting. This will enable the Panel to make their independent consideration.

The ICB Chair and Local Authority Co-Chair will answer all the questions contained within the National Framework in relation to Nature, Intensity, Complexity and Unpredictability (Appendix 5). The Panel will complete their own 4 key indicators.

They will make a decision regarding eligibility and whether there are any needs that are above the legal limit of the Local Authority. It is the responsibility of the Panel to capture health needs in order to support the Local Authorities request for Joint Funding. If the Panel are unable to agree the outcome, the ICB will take a Chair's decision.

The Panel will also identify any learning opportunities; this might include training needs or action plan to prevent divergence from process. These learning opportunities must be submitted by the Panel at the next Heads of Service Meeting for consideration.
Notes of the meeting and outcome will be communicated to the CHC Business Manager within 10 working days. The CHC Service will communicate the outcome to the disputing Local Authority and the individual within 5 working days.

If the disputing Local Authority is not satisfied with the outcome of the Formal Dispute Panel, the process moves into Independent Arbitration.

Cooling Off Period and Progression to Stage 3

Before a decision is made about Independent Arbitration, a cooling off period of 10 working days will take place, during this time individuals involved in the dispute will:

(a) reflect on their experience;
(b) seek appropriate advise from the CHC Lead/ CHC practitioner in their organisation
(c) carefully and objectively reflect on the individual's case with regards to the decision.
(d)

If the Local Authority wishes to progress to Arbitration, the Local Authority will provide notice in writing to the ICB no later than 10 working days after the formal stage outcome was communicated.

Stage 3 - Independent Arbitration

This section is only for exceptional circumstances where the formal dispute resolution process fails to reach agreement decision made by the ICB.

It is intended that this arbitration process intentionally avoids escalation within organisational management. This is because arbitration will be delivered most effectively by skilled and knowledgeable professionals with a Health or Social Care background or specific expertise within the Continuing Healthcare operational arena.

This process will be run in a similar way to some Serious Case Reviews. An independent Arbitrator will be jointly appointed and jointly funded. The Arbitrator will be expected to have extensive experience in Continuing Healthcare, possess well-developed analytical skills and have sound judgement in complex and sensitive cases. Arbitrators may include those individuals who have been appointed by NHS England as Chairs for Independent Review Panels. East Berkshire CHC Service will maintain a register of potential Arbitrators who can be approached for specific disputes.

Process

The ICB and Local Authority will be jointly responsible for identifying and recruiting the Arbitrator within 4 weeks. The Arbitrator will be expected to complete their report within 6 weeks.

The Arbitrator's fee will be negotiated depending on the complexities of the case. Reasonable travel expenses will be reimbursed. The cost of the Arbitrator will be shared equally between the ICB and the disputing organisation.

The Arbitrator will be provided with records of all information relevant to the CHC assessment and the dispute: Checklist, all evidence gathered, Decision Support Tool, Quality Assurance forms, MDT minutes, Stage 1 Position Statements and Stage 1 meeting minutes, Stage 2 resolution meeting minutes, Pre-arbitration position statements, and any additional correspondence.

Their role will be to chair an investigation considering the thought processes of the ICB and Local Authority in relation to the decision made, interview individuals involved, consider the casefile and gather any other information if required.
The Arbitrator may choose to convene a meeting with CHC and social services representatives for presentation of reasons for the eligibility decision and the dispute.

The Arbitrator will ultimately make their own recommendation about an individual's eligibility and consider whether there are any actions for partner organisations in relation to supporting the assessed individual.

Arbitration Report and Decision

The chair will provide a report which includes:

- Findings
- Outcome/decision on the person's eligibility
- Decision on assessed levels of need under the DST
- Consideration of the four key characteristics and Primary Health Needs test
- Consideration of any procedural issues
- Recommendations for organisational learning

The Arbitrator's recommended decision to the ICB which will be accepted by all parties; save for joint concerns about the professionalism with which the investigation was conducted.

This report and decision is sent to the CHC Business Manager for communication to the ICB, disputing Local Authority and the individual within 5 working days. This decision is final.

Appendix 1 – Verification; National Framework excerpts

The following section captures the National Framework (including Practice Guidance) content in relation to the Verification process.

Decision-making on eligibility for NHS Continuing Healthcare by the ICB

Section 153 - ICBs are responsible for decision making regarding NHS Continuing Healthcare eligibility, based on the recommendation made by the multidisciplinary team in accordance with the process set out in this National Framework. Only in exceptional circumstances, and for clearly articulated reasons, should the multidisciplinary team's recommendation not be followed.

Section 154 - ICBs should ensure consistency and quality of decision making. The ICB may ask a multidisciplinary team to carry out further work on a Decision Support Tool (DST) if it is not completed fully or if there is a significant lack of consistency between the evidence recorded in the DST and the recommendation made. However, the ICB should not refer a case back, or decide not to accept a recommendation, simply because the multidisciplinary team has made a recommendation that differs from the one that those who are involved in making the final decision would have made, based on the same evidence.

Section 155 - ICBs should not make decisions in the absence of recommendations on eligibility from the multidisciplinary team, except where exceptional circumstances require an urgent decision to be made (refer to Practice Guidance note 39)

Section 156 - Section ICBs may choose to verify the multidisciplinary team's recommendation in a number of different ways. It is expected that whether the verification is done by an individual or by a panel, this process should not be used as a gate-keeping function or for financial control. A decision not to accept the multidisciplinary team's recommendation should never be made by one person acting unilaterally. The final eligibility decision should be independent of budgetary constraints, and finance officers should not be part of a decision-making process.

PG 37 What is the role of the ICB in the decision-making process?

- **37.1** ICBs are responsible for making the eligibility decision for NHS Continuing Healthcare, based on the recommendation made by the MDT in accordance with the processes set out in this National Framework.

- **PG 37.2** The role of the ICB decision-making processes, whether by use of a panel or other processes should include:
    - verifying and confirming recommendations on eligibility made by the MDT, having regard to the issues in PG41 below;
    - agreeing required actions where issues or concerns arise.
- **PG 37.3** ICB decision-making processes should not have the function of:
    - financial gatekeeping
    - completing/altering DSTs
    - overturning recommendations (although they can refer cases back to an MDT for further work in certain circumstances – refer to Practice Guidance note 39 below).

PG 38 If he ICB uses a panel as part of the overall decision-making process what should its function be and how should it operate?

- **PG 38.1** Once an MDT has made a recommendation regarding eligibility it is for the ICB to make the final eligibility decision. There is no requirement for ICBs to use a

panel as part of their decision-making processes. Where a ICB does use a panel this should not replace the function of the MDT, whose role it is to assess the individual, complete the DST and make a recommendation regarding eligibility. Close working with local authorities is a central part of this National Framework, for example in terms of membership of MDTs and in having local joint processes for resolving disputes. It would be consistent with this overall approach for ICBs to have mechanisms for seeking the views of LA colleagues before making final decisions on NHS Continuing Healthcare eligibility and this could be by the use of a panel. However the formal decision-making responsibility rests with the ICB. Annex F (Local NHS Continuing Healthcare Protocols) contains details of the recommended content of local protocols, including decision-making processes.

- **PG 38.2** Panels may be used in a selective way to support consistent decision-making. For example this could include panels considering:
    - cases which are not recommended as eligible for NHS Continuing Healthcare (for audit purposes or for consideration of possible joint funding)
    - cases where there is a disagreement between the ICB and the LA over the recommendation this could form part of the formal disputes process
    - cases where the individual or his/her representative is appealing against the eligibility decision a sample of cases where eligibility has been recommended for auditing and learning purposes to improve practice (refer to paragraph 69 of the National Framework and Practice Guidance note 1).

- **PG 38.3** If a ICB chooses to use a panel arrangement as part of the decision-making process this should not be allowed to delay decision-making. Where relevant expertise is considered essential to the panel the ICB should ensure that staff with such expertise are made available in a timely manner.

PG 39 What are the 'exceptional circumstances' under which a ICB or panel might not accept an MDT recommendation regarding eligibility for NHS continuing healthcare?

- **39.1** Eligibility recommendations must be led by the practitioners who have met and assessed the individual. Exceptional circumstances where these recommendations may not be accepted by a ICB include: where the DST is not completed fully (including where there is no recommendation)
    - where there are significant gaps in evidence to support the recommendation
    - where there is an obvious mismatch between evidence provided and the recommendation made
    - where the recommendation would result in either authority acting unlawfully.
- **39.2** In such cases the matter should be sent back to the MDT with a full explanation of the relevant matters to be addressed. Where there is an urgent need for care/support to be provided, the ICB (and LA where relevant) should make appropriate interim arrangements.

PG 40 How should ICBs fulfil their duty to make final eligibility decisions for NHS Continuing Healthcare?

- **40.1** The National Framework and Standing Rules1 make it clear that ICBs cannot delegate their final decision-making function in relation to eligibility for NHS Continuing Healthcare. ICBs remain legally responsible for all such decisions even where they have authorised another body (such as a Commissioning Support Unit, social enterprise or local authority) to carry out assessment functions on their behalf. ICBs have a number of options as to how to fulfil this responsibility. For example, they might choose to use one, or a combination of, the following:

    - appoint (or jointly appoint) an employee (or employees) to work within the organisation carrying out the assessment functions such that this member of staff has authority to make eligibility decisions as an employee of the ICB with clear lines of authority and accountability within the ICB for undertaking this role
    - identify an employee (or employees), or Governing Body Member(s), within the ICB to make eligibility decisions regarding NHS Continuing Healthcare having received the completed assessments and recommendations from the organisation carrying out the NHS Continuing Healthcare assessment function on behalf of the ICB bearing in mind the guidance in Practice Guidance,
    - use a verification committee or 'panel' as a formal sub-committee of the ICB with delegated responsibility for decision making in relation to NHS Continuing Healthcare eligibility
- **40.2** Whatever arrangements the ICB chooses it must be remembered that the National Framework places a strong emphasis on the MDT recommendation regarding eligibility for NHS Continuing Healthcare and states that 'Only in exceptional circumstances, and for clearly articulated reasons, should the multidisciplinary team's recommendation not be followed. A decision not to accept the recommendation should never be made by one person acting unilaterally (refer to paragraph 156 of the National Framework). Any model for final ratification must respect this requirement and also the requirement that 'the final eligibility decision should be independent of budgetary constraints' (refer to paragraph 156 of the National Framework). It is vital that all arrangements for verifying recommendations and for making the final eligibility decisions are timely and efficient and do not result in delays, particularly where the individual concerned is awaiting transfer of care from an acute hospital setting.

PG 41 Can 'commissioners' sit on panels which scrutinise and ratify eligibility recommendations for NHS Continuing Healthcare?

- **41.1** The National Framework (paragraph 156) makes it clear that the final decision regarding eligibility for NHS Continuing Healthcare should be independent of budgetary constraints and that 'finance officers' should not be part of a decision making panel. The purpose of excluding finance officers is to avoid any perception that eligibility has been influenced by funding considerations.
- **41.2** ICBs do not have to use a panel arrangement as part of their process for ratifying eligibility recommendations, but if they do the panel should not be used for financial gatekeeping (refer to Practice Guidance note 40).
- **41.3** Being a budget holder does not automatically mean that a person is a finance officer. Almost everyone working in the NHS or in social care has some responsibility for the proper use of public money. This does not make them 'finance officers'. The term 'finance officer' refers to individuals whose primary role is financial management rather than managing, commissioning or providing services. In a ICB, for example, the Director of Finance is a finance officer and it is probable that most staff who report directly to that Director are also 'finance officers'.
- **41.4** The National Framework does not state that 'commissioners' should not be panel members and it is recognised that in many cases it will be commissioning staff (whether from health or social care) who will bring relevant expertise to the decision-making process. However, where panel members, or any officers involved in the ratification process, also have budgetary responsibilities it is very important to be clear that decision-making is based on whether the individual has a 'primary health need', not on financial considerations.

- **41.5** As a matter of best practice, and in order to ensure objectivity, where a professional has been involved in making an eligibility recommendation they should not also be involved in ratifying that recommendation.

Appendix 2 – Quality Assurance Form (MDT recommendation verification)

This template has been developed by the Heads of Service for trial by practitioners and review.

Ratification Out of Panel Decision Approv

Appendix 3 – Dispute Resolution National Framework excerpts

The revised 2018 National Framework attempted to clarify and provided clearer guidance on interagency disputes. Section 59 (208-212) and Annex E are dedicated to this:

S151 - If an MDT is unable to reach agreement on the recommendation this should be clearly recorded. Please refer to Practice Guidance note 21 and 28 for further information on the process to be followed by the MDT and Practice Guidance note 33 on what to do if MDT members disagree on domain levels. Please also see paragraphs 208-215 on interagency disagreements and disputes.

S190 - It is a core principle that neither a ICB nor a local authority should unilaterally withdraw from an existing funding arrangement without a joint reassessment of the individual, and without first consulting one another and the individual about the proposed change of arrangement. Therefore, if there is a change in eligibility, it is essential that alternative funding arrangements are agreed and put into effect before any withdrawal of existing funding, in order to ensure continuity of care. Any proposed change should be put in writing to the individual by the organisation that is proposing to make such a change. If agreement between the local authority and the NHS cannot be reached on the proposed change, the local disputes procedure should be invoked, and current funding and care management responsibilities should remain in place until the dispute has been resolved. There is a separate disputes procedure for when the individual disagrees with the decision (refer to paragraphs 192-207).

S208 - A fundamental principle is for ICBs and local authorities to minimise the need to invoke formal inter-agency dispute resolution procedures by, for example:

a) all parties following the guidance set out in this National Framework;

b) agreeing and following local protocols and/or processes which make clear how the ICB discharges its duty to consult with the local authority (refer to paragraph 21) and how the local authority discharges its duty to co-operate with the ICB (refer to paragraphs 25-30);

c) developing a culture of genuine partnership working in all aspects of NHS Continuing Healthcare;

d) ensuring that eligibility decisions are based on thorough, accurate and evidence-based assessments of the individuals' needs;

e) always keeping the individual at the heart of the process and ensuring a person-centred approach to decision-making;

f) always attempting to resolve inter-agency disagreements at an early and preferably informal stage;

g) dealing with genuine disagreements between practitioners in a professional manner without drawing the individual concerned into the debate in order to gain support for one professional's position or the other;

h) ensuring practitioners in health and social care receive high-quality joint training (i.e. health and social care) which gives consistent messages about the correct application of the National Framework.

Individuals must never be left without appropriate support while disputes between statutory bodies about funding responsibilities are resolved.

S209 – ICBs and local authorities in each local area must agree a local disputes resolution process to resolve cases where there is a dispute between them about:

- a decision as to eligibility for NHS Continuing Healthcare, or
- where an individual is not eligible for NHS Continuing Healthcare, the contribution of a ICB or local authority to a joint package of care for that person, or
- the operation of refunds guidance (see Annex E).

S210 - When developing and agreeing local inter-agency disagreement and dispute resolution protocols, ICBs and local authorities should ensure that they encompass the following elements:

• A brief summary of principles including a commitment to work in partnership and in a person-centred way.

• The ICB duty to consult with the local authority (refer to paragraph 21) and the local authority duty to co-operate with the ICB (refer to paragraphs 25-30). This should include arrangements for situations where the local authority has not been involved in the MDT and in formulating the recommendation.

• An 'informal' stage at operational level whereby disagreements regarding the correct eligibility recommendation can be resolved – this might, for example, involve consultation with relevant managers immediately following the MDT meeting to see whether agreement can be reached. This stage might include seeking further information/clarification on the facts of the case or on the correct interpretation of the National Framework.

• A formal stage of resolving disagreements regarding eligibility recommendations involving managers and/or practitioners who have delegated authority to attempt resolution of the disagreement and can make eligibility decisions. This stage could involve referral to an inter-agency NHS Continuing Healthcare panel.

• If the dispute remains unresolved, the dispute resolution agreement may provide further stages of escalation to more senior managers within the respective organisations.

• A final stage involving independent arbitration. This stage should only be invoked as a last resort and should rarely, if ever, be required. It can only be triggered by senior managers within the respective organisations who must agree how the independent arbitration is to be sourced, organised and funded.

• Clear timelines for each stage.

• Agreement as to how the placement and/or package for the individual is to be funded pending the outcome of dispute resolution and arrangements for reimbursement to the agencies involved once the dispute is resolved. Individuals must never be left without appropriate support whilst disputes between statutory bodies about funding responsibility are resolved.

• Arrangements to keep the individual and/or their representative informed throughout the dispute resolution process.

• Arrangements in the event of an individual requesting a review of the eligibility decision made by the ICB.

S211 – It should be remembered that decisions regarding eligibility for NHS Continuing Healthcare are the responsibility of the ICB, who may choose to make their decision before an inter-agency disagreement has been resolved. In such cases it is possible that the formal dispute resolution process will have to be concluded after the individual has been given a decision by the ICB.

S212 – Where disputes relate to local authorities and ICBs in different geographical areas, the dispute resolution process of the responsible ICB should normally be used in order to ensure resolution in a robust and timely manner.

Annex E: Guidance on responsibilities when a decision on NHS Continuing Healthcare eligibility is awaited or is disputed

1. This guidance sets out the approach to be taken by ICBs and local authorities (LAs) in three situations:

a) where there is a need for health or care and support to be provided to an individual during the period in which a decision on eligibility for NHS Continuing Healthcare is awaited, in a

case that does not involve hospital discharge (refer to paragraphs 109-115 of the National Framework).
b) where a ICB has unjustifiably taken longer than 28 calendar days to reach a decision on eligibility for NHS Continuing Healthcare; or
c) where, as a result of an individual disputing an NHS Continuing Healthcare eligibility decision, the ICB has revised its decision.
a) Where care needs to be provided whilst a decision on NHS continuing healthcare is awaited, in a case that does not involve hospital discharge
2. A person only becomes eligible for NHS continuing healthcare once a decision on eligibility has been made by a ICB, 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 Continuing Healthcare assessment, the individual is already receiving ongoing care and support funded by a ICB, or a local authority, or both, those arrangements should continue until the ICB makes its decision on eligibility for NHS Continuing Healthcare, subject to any urgent adjustments needed to meet the changed needs of the individual. In considering such adjustments, local authorities and ICBs should have regard to the limitations of their statutory powers.
4. Some health needs fall within the powers of both ICBs and local authorities to meet. However where:
i) a local authority is providing services during the period in which an NHC Continuing Healthcare eligibility decision is awaited; and
ii) it is identified that the individual has some health needs that are not within the power of a local authority to meet (regardless of the eventual outcome of the NHS Continuing Healthcare eligibility decision); and
iii) those health needs have to be met before the decision on eligibility is made; the ICB should consider its responsibilities under the NHS Act to provide such health services to such extent as it considers necessary to meet all reasonable requirements. NHS England or the ICB 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 Continuing Healthcare eligibility decision.
5. Where an individual is not already in receipt of ongoing care and support from the local authority or ICB (or both), they may have urgent health or care and support needs which need to be met during the period in which the NHS Continuing Healthcare 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 there are urgent healthcare needs to be met, these should be assessed by the relevant healthcare professional.
6. Where the individual appears to be in need of care and support, the local authority should assess the individual's eligibility for these under section 9 of the Care Act 2014.
7. If, in carrying out a needs assessment (under the Care Act 2014), it appears to the local authority that the individual may be eligible for NHS Continuing Healthcare the local authority must refer the individual to the ICB. The ICB must then take steps to ensure that an assessment of eligibility for NHS Continuing Healthcare is carried out. The local authority and ICB should jointly agree actions to be taken in the light of their statutory responsibilities until the outcome of the NHS Continuing Healthcare eligibility 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 the ICB has unjustifiably taken longer than 28 calendar days to reach a decision on eligibility for NHS continuing healthcare
8. Decision-making on eligibility for NHS Continuing Healthcare should, in most cases, take no longer than 28 calendar days from the ICB (or organisation acting on behalf of the ICB)

being notified of the need for assessment of eligibility for NHS Continuing Healthcare e.g. an appropriately completed positive Checklist, or other notification that an assessment of eligibility is required.

9. When

i) the ICB makes a decision that a person is eligible for NHS continuing healthcare; and

ii) it has taken more than 28 calendar days to reach this decision; and

iii) a local authority or the individual has funded services whilst awaiting the decision;

the ICB should, having regard to the approaches set out in paragraphs 11 to 13 below, refund directly to the individual or the local authority, 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 Continuing Healthcare), 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 ICB can demonstrate that the delay is reasonable as it is due to circumstances beyond the ICB's control, which could include:

i) evidence (such as assessments or care records) essential for reaching a decision on eligibility has 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 essential 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-ICB 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.

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

11. ICBs and LAs should be aware of the requirements of the Standing Rules1 and Directions to local authorities5 for the ICB to consult the relevant local authority, wherever reasonably practicable, before making a decision on NHS continuing healthcare eligibility and for the local authority, wherever reasonably practicable, to provide advice and assistance to the relevant ICB.

12. Where unreasonable delay has occurred and it is an LA that has funded services during the interim period, the ICB should refund the local authority the costs of the care package that it has incurred during the period of unreasonable delay. The ICB can use its powers under section 256 of the NHS Act to make such payments. The amount to be refunded to the local authority should be based on the gross cost of the services provided. Where an individual has been required to make financial contributions to the local authority as a result of an assessment of their resources under the Care Act 2014, the above approach should be adopted rather than the ICB refunding such contributions directly to the individual as the refund of contributions is a matter between the local authority and the individual. Where a ICB makes a gross cost refund, the local authority 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, including interest.

13. Where a ICB has unreasonably delayed reaching its decision on eligibility for NHS Continuing Healthcare, and the individual has arranged and paid for services directly during

the interim period, the ICB should make an ex-gratia payment in respect of the period of unreasonable delay.

14. Such payments would need to be made in accordance with the guidance for ex-gratia payments set out in Managing Public Money1. This sets out that, where public services organisations have caused injustice or hardship, they should provide 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 sets out other issues to be considered and ICBs should take these into account in reaching their decision.

c) Where, as a result of an individual disputing an NHS continuing healthcare eligibility decision, a ICB has revised its decision

15. When a ICB has made a decision on NHS Continuing Healthcare eligibility, then that decision remains in effect until the ICB revises the decision. This National Framework sets out that IRPs make recommendations but that these recommendations should be accepted by NHS England and the ICB in all but exceptional circumstances. Where a ICB accepts an IRP recommendation on NHS Continuing Healthcare eligibility, it is in effect revising its previous decision in the light of that recommendation.

16. Where:

i) a local authority has provided care and support to an individual in circumstances where a ICB has decided that the individual is not eligible for NHS continuing healthcare, and

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

the ICB should refund the local authority the costs of the care package. This should be based on the gross care package costs that the local authority has incurred from the date of the decision that the individual was not eligible for NHS Continuing Healthcare (or earlier, if that decision was unreasonably delayed – see the previous section) until the date that the revised decision comes into effect. The ICB can use its powers under section 256 of the NHS Act to make such payments. Where the local authority has collected an assessed charge from the individual, the refund from the ICB should include interest on that amount so that this can be reimbursed to the individual (see paragraph 17 below)

17. Where a ICB makes such a refund, the local authority should refund any financial contributions made to it by the individual (with interest) in the light of the fact that it has been refunded on this basis.

18. Where:

i) no local authority has provided care and support to an individual in circumstances where a ICB has decided that the individual is not eligible for NHS Continuing Healthcare, and

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 Continuing Healthcare and a ICB's decision is later revised (including where the revised decision is as a result of an IRP recommendation),

the ICB should make an ex-gratia payment directly to the individual. When the ICB 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. The ICB should take into account the Managing Public Money guidance as explained above.

Disputes

19. It is important that ICB s and LAs have clear jointly agreed local processes for resolving any disputes that arise between them on the issues covered in this guidance. The Standing Rules and Directions to local authorities require ICBs and LAs to have an agreed local process for resolving disputes between them on issues relating to eligibility for NHS continuing healthcare and for the NHS elements of joint packages. ICBs and LAs could

extend 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 ICB and LA and agreeing to accept their recommendation.

20. Where an individual disputes a ICB's decision on whether to provide redress to them, or disputes the amount of redress payable, this should be considered through the NHS complaints process.

Appendix 4 – Dispute Process Templates

Stage 1 dispute notice form Jan 202(

Stage 1 dispute resolution meeting t

Stage 2 dispute resolution meeting t

Stage 3 Arbitration report template Jan

Appendix 5 – Nature, Intensity, Complexity and Unpredictability Questions

This appendix captures the questions the Formal Dispute Panel should ask in every case when considering primary health need.

Nature

This is about the characteristics of both the individual's needs and the interventions required to meet those needs. Questions that may help to consider this include:

• How does the individual or the practitioner describe the needs (rather than the medical condition leading to them)? What adjectives do they use?
• What is the impact of the need on overall health and well-being?
• What types of interventions are required to meet the need?
• Is there particular knowledge/skill/training required to anticipate and address the need? Could anyone do it without specific training?
• Is the individual's condition deteriorating/improving?
• What would happen if these needs were not met in a timely way?

Intensity

This about the quantity, severity and continuity of needs. Questions that may help to consider this include:

• How severe is this need?
• How often is each intervention required?
• For how long is each intervention required?
• How many carers/care workers are required at any one time to meet the needs?
• Does the care relate to needs over several domains?

Complexity

This about the level of skill/knowledge required to address an individual need or the range of needs and the interface between two or more needs. Questions that may help to consider this include:

• How difficult is it to manage the need(s)?
• How problematic is it to alleviate the needs and symptoms?
• Are the needs interrelated?
• Do they impact on each other to make the needs even more difficult to address?
• How much knowledge is required to address the need(s)?
• How much skill is required to address the need(s)?
• How does the individual's response to their condition make it more difficult to provide appropriate support?

Unpredictability

This about the degree to which needs fluctuate and thereby create challenges in managing them. It should be noted that the identification of unpredictable needs does not, of itself, make the needs 'predictable' (i.e. 'predictably unpredictable') and they should therefore be considered as part of this key indicator. Questions that may help to consider this include:

• Is the individual or those who support him/her able to anticipate when the need(s) might arise?
• Does the level of need often change? Does the level of support often have to change at short notice?
• Is the condition unstable?

• What happens if the need isn't addressed when it arises? How significant are the consequences?
• To what extent is professional knowledge/skill required to respond spontaneously and appropriately?
• What level of monitoring/review is required?