NHS Continuing Healthcare: Funding responsibility when an individual's eligibility is withdrawn and they challenge the decision.

Proposal

When an individual:

- Has been found eligible for Full NHS Continuing Healthcare (NHS CHC) funding;
- has their eligibility withdrawn following a reassessment of NHS CHC eligibility, and;
- the individual challenges the decision that they are no longer eligible for NHS CHC

The CCG should remain responsible for funding the individual's existing package of care until the Local Resolution Process has been completed.

Background

The first National Framework for NHS Continuing Healthcare and NHS Funded Nursing Care (the National Framework) was issued in 2007. It made Local Health Authorities (Primary CareTrusts (PCTs)) responsible for funding the individual's care package when they challenged a decision of ineligibility for NHS CHC until the dispute resolution process (including the Independent Review Panel) was completed:

> Annex E Paragraph 8:
> *"While this review procedure is being conducted, the PCT should continue to fund appropriate care. Any existing care package, whether hospital care or community health services, should not be withdrawn under any circumstances until the outcome of the review is known."*

Primary Care Trusts were therefore responsible for funding NHS CHC care packages when individuals challenged either the initial NHS CHC eligibility assessment or the outcome of an NHS CHC eligibility reassessment until a decision was reached.

In 2009 the National Framework was updated and the requirement for Local Health Authorities to continue funding appropriate care during the dispute resolution process was withdrawn. The justification for this change was that the existing system was encouraging "vexatious" challenges to decisions of ineligibility for NHS CHC. However it should be noted that no evidence was ever presented to back up this claim and there was no public consultation on the change.

In 2012 the Department of Health issued timescales guidance that when an individual challenges a decision of ineligibility for NHS CHC the Local Health Authority should complete their local resolution process within three months.

In 2012 when the current NHS Architecture was implemented there was an effective fracturing of responsibility for delivering NHS CHC. Not only did the number of Local Health Authorities increase significantly when PCTs were split into Clinical Commissioning Groups (CCGs) but the emergence of Commissioning Support Units (CSUs) who worked both within and across CCGs added substantial complexity to the system.

Current Situation

1. Unintended Consequences

Removing responsibility from CCGs to fund care provision through the resolution process removed all incentives for the CCG to:

- Conduct thorough reassessment of NHS CHC eligibility and only consider withdrawing eligibility where there is clear evidence of a reduction in the individuals Healthcare need;
- expedite the local resolution process in a timely manner.

In fact the change actually provided CCGs with an *incentive* to withdraw NHS CHC eligibility "lightly" and prolong the local resolution process.

Despite guidance in the current National Framework that funding should never be unilaterally withdrawn this routinely does happen. This is particularly prevalent when the individual concerned is means tested out of local authority provision and becomes a perforce self funder. At best they are typically given 28 days notice of the cessation of funding.

By dragging out the local resolution process (there are examples of the process taking in excess of three years) we believe that substantial numbers of individuals simply give up before the process is completed. In this instance the CCG may completely avoid its lawful responsibilities to provide or fund the individuals package of care.

In those cases where the individual chooses to persist with the resolution process, often at great personal cost; the consequences for a CCG are negligible. In the event that an Independent Review Panel overturns a decision to withdraw NHS CHC eligibility a CCG should re-commence payment of the individual's care package. Whilst the CCG may be required to reimburse the individual for the cost of their care during the resolution process there is no requirement for them to compensate the individual for the stress, anxiety and sheer amount of time and work that has to be invested in the process to achieve a successful outcome. Moreover, the CCG is not compelled to oblige the decision of the IRP, and we have examples of CCGs which resolutely refused to implement IRP recommendations.

There is experiential evidence that since 2012:

- The quality of reassessments of NHS CHC eligibility has fallen. While there are pockets of good practice there are many more examples of reassessments being conducted by an inappropriately constituted multi-disciplinary team (MDT), incomplete Decision Support Tool (DST) and reassessment documentation, ignorance of the 'well-managed need' principle and poor communication with the individual;
- the quality of local resolution processes has become substantially more variable across the country. There are pockets of good practice but these are in the minority and majority of local resolution processes resemble little more than rubberstamping exercises for the original decision to withdraw eligibility;
- the time taken to expedite local resolution processes has substantially increased. It is now exceptional for the process to take less than 12 months. When the 2012 Department of Health guidance is pointed out to CCGs they routinely respond that the statutory guidance is 'aspirational' and therefore not binding. This is reinforced by the fact that, as far as we are aware, there are no instances where a CCG has been sanctioned for breaching the three-month statutory timescales guidance.

2. Imbalance of Consequence

The relative imbalance of consequence for the CCG and the individual of the withdrawal of care funding during the resolution process cannot be overstated.

The CCG:

The only consequence for the CCG of withdrawal of care funding is an administrative and relatively small resource cost should the individual challenge that decision.

The Individual:

While most CCGs consider the 2012 Department of Health timescales guidance for resolution processes as being 'aspirational' for themselves they consider it to be 'absolute' for individuals. In other words if an individual goes even a single day beyond the deadline imposed by the timescales guidance their challenge is rejected. So while there is no sanction on the CCG for breaching the timescales guidance there is absolute sanction on the individual.

When the individual's NHS CHC funding is stopped there are two scenarios:

1. Their care funding becomes the responsibility of the local authority. When this happens, they are often subjected to a reduced package of care (on the grounds that social care is less expensive than healthcare) and required to 'top up' the funding from their own resources to maintain their existing package of care.
2. They become perforce self-funders. This is most often because they have assets (as opposed to savings) that take them outside of the local authority means testing threshold. Consequently, they must dispose of their assets in order to maintain their care provision through the resolution process. Even if they are eventually successful and reimbursed for the cost of their care at the end of the resolution process they are unlikely to be able to recover the assets that they have been forced to dispose of. In other words they are placed in an irrecoverable position.

Once the individual has lodged their challenge against the withdrawal of their NHS CHC eligibility and funding they have absolutely no control over the resolution process – and in particular the timescales. This control lies entirely with the CCG who, without any responsibility to provide or fund the individual's care, have no real incentive to expedite the resolution process speedily.

Whilst the CCG has experience of the resolution process (indeed they have typically designed it themselves) the individual has none. Consequently the amount of research, time and effort required on the part of the individual to navigate the process is substantially greater than the CCG.

3. The Fairness Principle

The scale of imbalance outlined above must raise the question of fairness. Can it be fair that an under resourced individual with absolutely no control over the resolution process should be responsible for both challenging the decision to withdraw their NHS CHC eligibility *and* continue funding their own care; Meanwhile a comparatively well-resourced CCG with complete control over the resolution process carries no responsibility in this area??

The issue of unfairness is particularly acute where an individual has worked hard to achieve a comprehensive package of care that properly manages their healthcare. If NHS CHC eligibility is subsequently withdrawn on the basis of an absence of evidence of health complications (in contravention of the so-called 'well-managed need' principle) the individual's success in managing their health care needs is harshly and unjustifiably penalised.

The Benefits of Our Proposal

1. Quality of Reviews

If CCGs know that they will be responsible for funding the individual's package of care in the event of them challenging the decision to withdraw NHS CHC eligibility it will drive up the quality of reassessments. In order to avoid challenges CCGs will both conduct better quality reassessments and improve their communication with the individual to explain their justification.

2. Length of Local Resolution Processes

If the reassessment that results in a decision to withdraw NHS CHC eligibility and the CCG's communication with the individual is of a higher quality there will be less preparatory work required for hearing and concluding the local resolution process. This will also be the case if the challenge is pursued to Independent Review Panel.

In addition, if there is a financial cost to the CCG of a prolonged local resolution process there will be a material incentive for the CCG to expedite the local resolution process.

3. Greater Equality of Consequence

There is greater equality of consequence as the CCG and the individual are only subjected to consequences in respect of the aspects of the reassessment and resolution process that they have some control over. This is in contrast to the current situation where the individual essentially bears all of the consequence whilst retaining virtually no control.

The Risks of Our Proposal

1. CCG Financial Exposure

While our proposal will mean that CCGs will have a financial exposure in respect of funding the individual's package of care through the local resolution process this should, if Department of Health guidance is followed, only be for a maximum of three months. In relative terms, this level of financial exposure is inconsequential for CCGs.

2. Vexatious Challenges

If our proposal does drive up the quality of reassessments for NHS CHC eligibility and the CCG's communication with the individual that individual will be more likely to accept the CCGs decision.

Because our proposal limits CCGs to funding the individual's package of care when they withdraw eligibility (i.e. Not when eligibility is refused at the initial assessment) there will be no risk of them having to fund individuals who have no realistic prospect of achieving NHS CHC eligibility.

Conclusion

We recognise that CCGs are likely to resist the implementation of our proposal. However, we would strongly encourage the Department of Health and NHS England to stand firm in defence of some of the most vulnerable individuals in our society. The current position that these people are put in when their eligibility for NHS CHC is withdrawn is untenable and must not be allowed to continue.

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