Landmark CHAMBERS

Commissioning Policies and Individual Funding

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Introduction

- Topics to be considered:
  - Policies which decision-makers must have in place
  - Issues relating to individual funding
  - Personal health budgets and direct payments

Policies and Public Law

- Policies must not fetter the discretion of the decision-maker (***British Oxygen Co Ltd***)
- There is no general common law requirement to have a policy, although failure to do so may be irrational (***R v North West Lancashire Health Authority, ex p A***)
- Statute may require a decision-maker to have a policy
- Correct interpretation of policy is a matter for the court (***Tesco Stores***)

Policies and Public Law (2)

- An applicable policy is a relevant consideration
- Departure from applicable policy may require a good reason
- A public body may not have a secret policy different to its published policy (***Lumba***)

Annual Commissioning Plans

- Required by National Health Service Act 2006, s.14Z11
- Annual Commissioning Plan for each financial year
- Due to ss.14Q and 223H, these are likely to be a matter of a decision concerning the comparative cost-effectiveness of a treatment
- Quality Adjusted Life Year scheme to assess relative merits of proposals
- Annual Commissioning Plan to be informed by the joint strategic health needs assessment

CCG Commissioning Policies

- Commissioning policies set out care pathways and define the clinical criteria for funding; they are more detailed than the Annual Commissioning plan
- These policies will be the starting-point for consideration
- Written statements of reasons for a general policy should be published on the CCG's website: Reg 35(1) of the Responsibilities and Standing Rules Regulations 2012
- Reg 35(2) provides that reasons must be given where a decision is taken not to fund treatment, in line with the policy

Exception Policies

- CCGs frequently develop policies for how to deal with claims that an individual's case is exceptional.
- There are two main examples:
  - Where an NHS patient has been provided with a service or treatment when living in the area of one commissioner, and then moves to a different area where that service or treatment is not generally funded;
  - Where a patient has taken part in an NHS-sponsored clinical trial, and there is a prior agreement that the treatment would be funded after the end of the trial.

Individual Funding Decisions

- Reg 34(2)(b) of the Responsibilities and Standing Rules Regulations requires a commissioner to have arrangements to deal with a request for funding where there is no relevant NICE recommendation, and the commissioner's policy is not to fund.
- If treatment has a NICE TAG, this removes the CCG's discretion (Reg 7(6) of the NICE Regs).

When May an Individual Funding Request Arise?

- Three main situations:

1. The CCG has made decision not to routinely fund the intervention in question.
2. The CCGs does fund the intervention in question, but there are specified clinical criteria as a gateway to the CCG's decision to fund it, and the individual cannot meet those criteria.
3. The CCG has no policy governing whether an individual should benefit from the intervention or not.

Exceptionality

- Generally classes 1. and 2. will depend on a patient being able to demonstrate exceptionality. This is not unlawful: ***Condliff***.
- In ***Condliff***, a policy excluding social factors from the exceptionality test was not contrary to Article 8 ECHR.
- Helpful guidance regarding IFRs (including exceptionality) in NHS Federation Paper.
- In class 3, there should be no exceptionality test, as there is simply no policy covering the situation.

Guidelines for IFR Policies

- May take into account:
  - That patient can show that the application is supported by an NHS referring clinician. If the patient does not have a clinician who is prepared to provide the treatment for the patient then the CCG should not entertain the application because the NHS does not generally fund medical treatment which is not recommended by clinicians;
  - The patient is able to demonstrate exceptional clinical circumstances;
  - The patient, supported by his or her clinician, can show that the requested treatment is likely to be clinically effective;

Guidelines for IFR Policies (2)

- The patient, supported by his or her clinician, can show that the requested treatment is likely to be cost effective;
- The circumstances are such that there are not likely to be other patients in a clinically similar situation. If there are other patients then the CCG should respond to the request by devising a policy and/or considering the request as an "in year service development" but should not process the request as an IFR case.

In Year Service Developments

- Starting-point is Annual Commissioning Plan
- May be developments within the year
- Will need to be striking to get funding (due to likely budgetary constraints)
- CCG should have a policy to deal with requests for funding of in-year service development.

Personal Health Budgets

- Related to the question of individual funding
- “Personal health budget” means an amount of money—

(a) which is identified by a relevant body as appropriate for the purpose of securing the provision to a person of all or part of a relevant health service; and

(b) The application of which is planned and agreed between the relevant body and the eligible person or their representative

(Regulation 32A)

What is a “Relevant Health Service”?

“Relevant health service” means—

(a) Continuing Care for Children; or
(b) NHS Continuing Healthcare

Regulation 32A

How is Continuing Care for Children Defined?

"that part of a package of care which is arranged and funded by a relevant body for a person aged 17 or under to meet needs which have arisen as a result of disability, accident or illness"

How is NHS Continuing Healthcare defined?

“A package of care arranged and funded solely by the health service in England for a person aged 18 or over to meet physical or mental health needs which have arisen as a result of disability, accident or illness”

What does NHS England's Guidance say?

- Money in a PHB is not new money
- Rather, it is money which would have been spent, being spent more flexibly
- It gives choice, control and flexibility to the patient

What are the rights of patients?

Regulation 32B(4), in force from 1 October 2014:

“Where a request is made by or on behalf of an eligible person for a personal health budget, a relevant body must grant that request, save to the extent that it is not appropriate to secure provision of all or any part of the relevant health service by that means in the circumstances of the eligible person’s case.”

What are the rights of patients (2)

- If request made, must be granted
- Save to extent that not appropriate
- (May be appropriate to have personal health budget for part of patient's care)
- However, Guidance states that CCGs should strive to include as much of the budget as possible into person's PHB (5.1)

Discretion where Right to Have inapplicable

- Even if the ‘right to have’ a PHB does not apply, the commissioner may retain a discretion.
- This can be useful, such as in cases where a patient has a fluctuating condition.
- Such patients may not always be eligible for NHS Continuing Care / Continuing Care for Children
- While not eligible, no right to PHB
- Health body can offer PHB on voluntary basis

Other Duties for Commissioners

- Duty to publicise and promote availability of PHBs to eligible persons and their representatives
- Provide information, advice and support those deciding whether to request PHB

The Right to Have – a major change

- Right to have a PHB is major development
- In ***R (Harrison) v SSH*** [2009] EWHC 574 (Admin), held that PCTs had no power to make direct payments to patients
- Now not only the power for commissioners to give direct payments, but the right to have payments (albeit this right is not absolute).

When does the Right to Have not apply?

- Guidance: may be impracticable or inappropriate
- Type of care required
- Not value for money (to the NHS)
- These are exceptional circumstances
- Pilot cases: PHBs will generally be able to be provided

(Guidance 7.1)

What if the Right to Have does not apply?

- Health body must give reasons for the refusal for the PHB
- Eligible person / representative may require a review of the decision; can provide evidence or information
- Health body must provide decision in writing, with reasons
- No obligation to review more than once in 6-month period
- NHS England's Guidance gives good practice timeline for reconsideration

Different types of PHB

- Direct Payments
- ‘Notional budgets’
- Payments to appointed person

Direct Payments have particular regulations: National Health Service (Direct Payments) Regulations 2013

To whom can a direct payment be made?

- Can be made to anyone for whose benefit anything may or must be provided or arranged by a health body—

(i) Under the 2006 Act, or

(ii) In the case of CCG or the Board, under any other enactment,

Who consents to the making of a direct payment

Children and Adults Lacking Capacity

- Representatives can consent to the making of PHBs
- Must:
  - Agree to act on patient's behalf in relation to direct payment
  - Act in best interests of patient when securing provision of services in respect of which the direct payment is made
  - Be responsible as principal on contracts
  - Use direct payment in accordance with care plan
  - Comply with the Direct Payment Regulations

  (Regulations 4 and 5)

Decision to make direct payment

- Health body may consult various persons, including:
  - Anyone identified by patient
  - Carer
  - Health care professional
  - Social care team
  - Patient (if patient doesn't have capacity / not adult – otherwise patient would have to consent)

(Regulation 7)

Payment to Nominee

- Health body must be satisfied nominee capable of managing payment
- Enhanced criminal record certificate (unless living in same household as patient)

(Regulation 7(7))

Refusal to make direct payment

- If Health body refuses to make direct payment, must inform patient and any representative
- Reasons must be given
- Right to request consideration (providing evidence/information)
- Decision on reconsideration must be in writing
- No requirement for more than one reconsideration in 6-month period

Provision of assistance by commissioner

- Regulation 9(1): commissioner must make arrangement for information, advice or other support.
- May include provision for payroll, training, sickness cover or other employment-related services
- Some charities provide assistance and support
- Must be a care co-ordinator, who is the point of contact at the commissioner

Direct Payments and Residential Care

- NHSE Guidance suggests caution
- No prohibition in legislation
- No explicit limit to those living in own homes

Direct Payments: Care Plan

- Commissioner must prepare care plan
- Give advice to patient, representative or nominee regarding the risks of direct payments
- Agree the procedure for managing significant potential risks
- Commissioner must be satisfied that the health needs in the care plan can be met by the services in the care plan, and the direct payments will be sufficient for the full cost of each of the services in the care plan

Care Plans: the Risks

- Patient's health
- Medical or surgical risk from procurement of particular services
- Employment relationships
- Lack of / insufficient complaints procedures
- Lack of / insufficient insurance cover
- Monies may go missing, be misused or subject to fraud

Care plans: Content

- Health needs to be met by services secured by direct payments
- Services that the commissioner considers necessary to meet health needs of patient
- Amount / frequency of payment
- Name of care co-ordinator
- Who monitors each health condition
- Anticipated date of first review of direct payments
- Period of notice to apply if health body to reduce / stop direct payments

Direct Payments: Excluded services

- Primary medical services
- Prescriptions etc
- Planned surgical procedures
- Vaccination, immunisation or screening
- National Child Measurement Programme
- NHS Health Check
- Alcohol or tobacco
- Gambling services or facilities
- Repay a debt other than in respect of a service specified in a care plan

(Regulation 8(5)

Direct Payments: Conditions on Use

- Must be used only to procure services in care plan
- Be used to secure the provision of the whole of the services in the care plan
- Patient / representative / nominee may need to make enquiries of proposed provider, but can require health body to do that
- If reasonable to do so, inform health body of change to condition of patient
- Health body may prevent using money to get services from particular person

Review of Direct Payments

- Health body must monitor making of direct payments, and health conditions of the patient
- At least one review within first 3 months
- Then at intervals not more than 12 months
- Consider if review appropriate if state of health of patient has changed significantly
- May lead to e.g. change in care plan

(Regulation 14)

Repayment of Direct Payments

- Commissioner may seek to recover direct payments
- Enforceable as civil debt
- If care plan / circumstances changed substantially
- Substantial proportion of payments have not been used to secure services in care plan and have accumulated
- Direct payments used other than as in care plan
- Theft / fraud / other offence in connection with care plan
- Death of patient

(Regulation 15)

There are requirements of notice, and possibility of a review

Stopping Direct Payments

- Withdrawal of consent
- Person for whom payment made no longer patient
- Representative / nominee deemed unsuitable
- Nominee does not agree to receive payments
- Nomination withdrawn
- Direct payments used otherwise than for service in care plan
- Theft / fraud / other offence may have occurred in connection with payments
- Commissioner considers that health needs cannot be / are not being met by services secured by direct payments
- Patient has died
- Again, notice requirement and possibility of reconsideration

Persons Excluded from Direct Payments

- In Schedule to the Direct Payments Regulations
- Include a person subject to drug rehabilitation requirement, or alcohol treatment requirement
- A person released on licence from prison

Potential issues with PHBs

- Ensuring clinical governance with a non-professional ‘commissioner’ of services
- Paperwork
- Not an increase in money: provision of services still subject to resources

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