

# **NHS Continuing Healthcare – Appeals and Remedies**

**David Lock QC**

## Who can dispute a CHC decision?

- Patient
- Relatives
- Care provider
- Local Authority

## Challenges by patient or relatives

- Stage 1: Internal review by CCG
  - Para 194 of NF
  - Duty to have a CHC local resolution process
  - Processes can vary between CCGs
  - Unclear what grounds the CCG can rely upon to change the decision
  - Rarely (if ever) leads to a different decision
- Reg 23 of 2012 Regs provides for “review” by NHS England
- Guidance at 196 to 207 of NF

## NHS England Appeals

- Two grounds:
  - Reg 23(3)(a) – procedural flaws by the CCG
  - Reg 23(3)(b) – merits appeal
- Members of panel under reg 23(4)
  - Chair
  - Someone from another CCG
  - Social Services Authority member
- Procedure for the review is for the Chair
- Overriding public law duty to run a fair process

## Detailed guidance at Annex D to NF

Para 3 provides Panel should proceed if:

*“An IRP should not proceed if it is discovered that the individual has not previously received a comprehensive assessment of needs and a determination of their eligibility for NHS Continuing Healthcare, including use of the Decision Support Tool or the Fast Track Pathway Tool, as appropriate”*

- Clear duty to send the case back if either no comprehensive assessment or properly completed DST.
- Raises the timing question – new DST now or retrospective.

## Duty to act fairly

Para 16 of Annex D:

“The IRP should also have access to the views of key parties involved in the case, including the individual, his or her family and any carer, health and social services staff, and any other relevant bodies or individuals. It will be open to key parties to put their views in writing or to attend. If parties attend, they should be given the opportunity to hear the submissions of other parties and to ask them questions”

- Hence right for patients or representatives to attend the decision meeting

## The outcome

Para 21 of Annex D: All options open to IRP

Para 22 : Duty to give reasons (and hence the decision can be challenged for inadequate reasons)

- Reg 23(8) and (9) – CCG must, unless it determines in accordance with paragraph (9) that there are exceptional reasons not to do so, implement the decision of the review panel as soon as reasonably practicable.

Also note 23(9) In determining whether under paragraph (8) there are exceptional reasons, a relevant body must have regard to the National Framework”

## Local authority challenge to decisions

- Court will not adjudicate on merits: *R (St Helen's Borough Council) v Manchester PCT* [2009] PTSR 105
- Hence LA can only dispute outcome through Dispute Resolution procedures or by JR
- Paras 208 to 215 and Annex F of NF indicates the contents of a Dispute Resolution policy and how it should operate
- CCG should use policy agreed with local LA with all other LAs



## The vires problem

- Illustrated by *R (Wolverhampton Council) v South Worcestershire CCG and Shropshire CCG* [2018] EWHC 1136 (Admin)
  - Facts
  - Vires problem
  - Outcome
  - Role of NHS England and vires problem
- The Dispute Resolution process can only be voluntary as it cannot lawfully abdicate CCG decision making to a third party

## The reimbursement problem

- If a CCG delays or makes an unlawful decision, it can be corrected by a JR:
  - Corrects matter going forward
  - But that will not result in any statutory right to back pay for care home fees paid whilst P was wrongly determined not to be eligible
  - Principles in *R (O'Rourke) v Camden LBC*
- So how does the financial injustice get remedied?
- Answer is the guidance in the National Framework and legal duty to follow guidance (save for good reason)

## What does the Guidance say?

- Annex E: Para 2:

“A person only becomes eligible for NHS continuing healthcare once a decision on eligibility has been made by a CCG, 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”

- Hence CHC decision takes effect when made, not backdated to application date

## Delay and reimbursement

- CCG has 28 days to complete process
- If delays beyond that, should generally compensate LA: see para 12 of Annex E
- Para 13 provides: “Where a CCG 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 CCG should make an ex-gratia payment in respect of the period of unreasonable delay”
- Refers to “Managing Public Money”

## Judicial Review

- The timing problem
  - Challenge the CCG decision
  - Wait until outcome of NHS England Review
  - Then be out of time
  - Answer in *R (Mazz Rafique-Aldawery) v St. George's, University of London and Office of the Independent Adjudicator* [2018] EWCA Civ 2520 namely put the CCG on notice of potential JR and then it should not be able to take a time point
  - Grounds: The usual areas of public law challenges