

Title: NHS continuing health care joint dispute resolution procedure

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1 Purpose of this policy

This is a joint protocol based upon the National Framework for NHS Continuing Healthcare and NHS funded Nursing Care (“the Framework”).¹

This protocol is agreed further to the relevant Directions² (for Cornwall Council) and Regulations³ (for NHS Kernow). The purpose of this protocol and associated procedure is to ensure that NHS Kernow Clinical Commissioning Group (NHS Kernow) and Cornwall Council have a clear route to follow in the event of a dispute regarding the decision outcome and/or the decision-making process determining a person’s eligibility for Continuing Health Care (“CHC”). The protocol relates to new assessments and to reviews of CHC eligibility.

2 Responsibility

All NHS Kernow and Cornwall Council staff.

3 Definitions

Policy.

4 Training Implications

None identified

5 This Policy/Guidance/Strategy/Protocol is cross referenced to:

NHS Kernow Choice policy
NHS Kernow Continuing Healthcare policy
National Framework for Continuing Healthcare

6 Equality and Diversity Impact Assessment taken place: Yes

Assurance Framework reference	1. Improving Services: delivering high quality safe care. 2d Risk that governance arrangements are not robust or effective. 5. Promoting confidence in NHS Kernow and developing partnerships
Assurances: Positive	Positive assurance that the Organisation has an effective policy for resolution of disputed cases

¹ National Framework for NHS Healthcare and NHS-funded Nursing Care (November 2012)

² The NHS Continuing Healthcare (Responsibilities of Social Services Authorities) Directions 2013 paragraph 2(4)

³ National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012 Regulation 22(2)

	with the local authority.
Assurances: Negative	None but it is essential that all staff are made aware of this Policy and their responsibilities.
Assurances: Gaps	All staff should be made aware of the policy once ratified.
Legal and financial issues:	These arrangements are fundamental to ensuring the Organisation complies with their statutory legal requirements and avoids litigation
Equality and Diversity impact:	In implementing this paper, positive action will be taken where necessary to include all staff groups
Environmental impact:	Compliance that this policy gives assurance of employees working in a safe and suitable environment.
Workforce issues:	This policy will play a part in ensuring that members of NHS Kernow and the local authority are support in reaching decisions on disputed cases
Health and Safety issues:	This paper discusses development of policies, procedures, safe systems, practices and risk arrangements. Appropriate reporting arrangements are in place to identify and manage adverse accidents, incidents and near misses.

This document

Can

Cannot

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1. Introduction

- 1.1 All parties concerned recognise it is in the best interests of service users/carers for disputes to be resolved between the organisations arranging services speedily and at the earliest point. The prime consideration is to ensure that the interests of service users are protected and that care is provided first, with discussion regarding funding only taking place later through the dispute process.

A key element in this is to ensure that eligibility decisions are made promptly and in accordance with the Framework.⁴ Formal disputes should be a last resort; it is expected that most disputes can be resolved locally through discussion and negotiation.

- 1.2 Resources should be directed towards resolution at an early stage rather than being directed into managing disputes. It is recognised CHC is a complex and high risk area for all parties and there may well be disagreement and professional differences between partners. Strategic managers will take steps to strengthen joint activity and understanding in order to prevent conflict and help prevent unnecessary escalation to formal dispute:

- Nominated individuals from Cornwall Council will be nominated to sit on the NHS Kernow CHC decision making Panel.

- 1.3 NHS Kernow and Cornwall Council are committed to avoiding disputes wherever possible. Eligibility determinations are above all evidence based judgements and requesting additional evidence to support assessments can often resolve differences. Building on current best practice and positive partnership working⁵ will ensure that disputes will be kept to a minimum. Where they do occur they will be resolved promptly, professionally and in a person-centred way.⁶

- 1.4 This process only relates to disputes between the local authority and the Clinical Commissioning Group. Separate procedures exist for service users and their representatives to resolve concerns regarding NHS CHC.

- 1.5 The success and integrity of this process is wholly dependent on both organisations working in partnership and in a committed person-centred way. Nominated managers at the CHC decision-making panel and at stage one and two of the process will need to approach the issues in each dispute objectively, with a preparedness to look at the facts of the case and if

⁴ The Framework indicates that funding decisions should be made within 28 days of the Checklist being received by the CCG (paragraph 95)

⁵ Measures to improve partnership working are addressed at paragraph 74 of the Practice Guidance to The Framework (97/8)

⁶ The Framework (at Appendix F) includes Guidance on responsibilities when a decision on NHS Continuing Healthcare eligibility is awaited or disputed

appropriate reach a different conclusion to those reached by colleagues at an earlier stage.

- 1.6 The parties recognise that each have different statutory responsibilities and a duty of care to carry out their own assessments according to criteria relevant to that organisation and the decision to be made. In assessing whether a client is eligible to NHS funded CHC, the decision on eligibility will be determined against the Primary Health Need criteria⁷. During this process, individuals will continue to receive the care they need from the responsible Commissioners as appropriate (see table at 5.1.2)
- 1.7 An individual's eligibility for social care support is a decision for the Council and (up to 31 March 2015 will be determined in accordance with section 47(1) NHS and Community Care Act 1990. Decisions regarding social care support will be made in accordance with the relevant guidance.⁸ If an assessment under Section 47(1) has not taken place or begun at the point where a dispute is referred to stage one of this procedure, the Council will arrange such an assessment to be completed within 28 days of referral to stage one⁹.
- 1.8 Accordingly this Dispute Resolution Procedure has been established to facilitate the resolution of disputes around:
 - Funding responsibility for services provided to any individual who is the responsibility of either or both of the parties under the Responsible Commissioner Guidance, the NHS Continuing Healthcare Framework, the Funded Nursing Care Guidance and "ordinary residence" rules or equivalent rules on funding responsibility as they apply to the NHS or the Local Authority;

or

 - The outcome of an assessment of needs or eligibility for services to be provided by the CCG or the local authority.

2. Types of disputes

- 2.1 For Cornwall Council a dispute will be when:
 - a decision is not made promptly and in accordance with the timescales as set out in the Framework; or

⁷ The Framework (paragraphs 33-41)

⁸ Prioritising Need - Guidance on Eligibility Criteria for Adult Social Care (February 2010); after 1 April 2015 the existing framework will be replaced by the arrangements under sections 9-13 Care Act, the Care and Support (Assessment) Regulations, The Care and Support (Eligibility Criteria) Regulations and the Care Act Guidance (Chapter 6)

⁹ The Care Act 2014

- the process for assessment and determining eligibility in the Framework¹⁰ has not been followed; or
 - a decision is made by the CCG not to grant eligibility for NHS Continuing Healthcare, when the Council has evidence of a primary health need and this cannot be resolved through panel arrangements¹¹, or
 - the individual requires an amount of general nursing care that is more than incidental or ancillary to the accommodation and is not of a nature that a local authority can be expected to provide¹².
- 2.2 For NHS Kernow it will be when a patient is waiting for hospital discharge¹³ or in receipt of NHS Continuing Healthcare and the CCG has evidence that there is not (or no longer) a primary health need¹⁴ and this cannot be resolved through panel arrangements or

The individual has needs for shared health and social care, or a social care package that requires funding from Cornwall Council, yet Cornwall Council does not accept responsibility for the arrangement.

3. Where are disputes likely to arise?

Disputes may arise at different stages of the process for assessing eligibility for CHC funding:

3.1 At checklist stage

3.1.1 Although there is no requirement in the Regulations or the National Framework for the CCG and the council to have a policy to deal with disputes relating to the completion of the checklist we acknowledge that there are instances when a dispute can occur and we have therefore included this area in our joint procedure to support best practice.

3.1.2 Checklists should always be completed by staff members who have completed the Continuing Care training, which can be accessed at <https://www.england.nhs.uk/resources/resources-for-ccgs/nhs-continuing-healthcare-e-learning-tool/> . Occasions may arise when the checklist has been completed and a decision not to progress to completion of a Decision Support Tool has been made. Disputes may arise at the checklist stage where a social care professional or multi-disciplinary team has completed a checklist but has not provided enough evidence that demonstrates a need for a full CHC assessment. This will be where an individual client/patient is living in the community or in their own home.

¹⁰ The Framework (paragraphs 60-95)

¹¹ Panel arrangements are those referred at paragraphs 39-41 of the Practice Guidance to The Framework (81-3)

¹² This issue is addressed at paragraphs 30-2 of the Framework and paragraph 1 of the Practice Guidance to The Framework (50)

¹³ This issue is addressed at paragraphs 62-7 of the Framework

¹⁴ This issue is addressed at paragraphs 139-44 of the Framework

- 3.1.3 A checklist is not required to discharge patients from hospital if there is clearly no requirement for Continuing Healthcare Checklist assessment. It is agreed Local authority and community contracted health services can support patients on discharge who do not require Continuing Healthcare funding.
- 3.1.4 If there is disagreement between NHS Kernow and Cornwall Council as to the contents of a checklist completed by Cornwall Council staff the Council Team Manager must raise this with the individual(s) who have completed the checklist and reach a satisfactory outcome. If resolution cannot be achieved at this stage, then a Senior CHC Nurse assessor from NHS Kernow must be contacted to assist in resolving the issue. If the review indicates that significant levels of need have been missed and that evidence determines that consideration for eligibility is warranted then NHS Kernow may instruct the multidisciplinary team to complete their assessments for MDT recommendation. This stage should take no more than 48 hours to reach resolution.
- 3.1.5 Where the individual client/patient is in hospital and there is disagreement between hospital discharge and a Cornwall Council member of staff as to the contents of a checklist completed by hospital staff, this must be resolved between Cornwall Council and the hospital trust. It may be necessary to seek advice from a senior nurse in NHS Kernow's CHC team to prevent a delay in hospital discharge for the individual client/patient. In either case it will be for the Senior CHC Nurse to determine it is not necessary to undertake a full assessment – although the decision will have regard to the fact that the checklist has a low threshold and for passage through to a full eligibility assessment.¹⁵

3.2 At the MDT recommendation stage using the decision support tool

- 3.2.1 The DST should be completed by a Multidisciplinary Team ("MDT"):
- (i) two professionals who are from different healthcare professions, or
 - (ii) one professional who is from a healthcare profession and one person who is responsible for assessing individuals for community care services under Section 47 of the National Health and Community Care Act 1990.¹⁶
- 3.2.2 The Framework makes it clear that the MDT should include both health and social care professionals who are knowledgeable about the individual's health and social care needs. Where this is not available both health and social care professionals must ensure they know the individual health and social background.

¹⁵ The checklist threshold is addressed at paragraph 72 of the Framework and paragraph 69.2 of the Practice Guidance to The Framework (95)

¹⁶ Up to 31 March 2015 (see earlier footnote 5)

- 3.2.3 The MDT should collate information from a range of professionals and must consult professionals involved in the individuals care. It is possible that agreement cannot be reached regarding the recommendation of the MDT about eligibility for CHC. Where there is disagreement, or the MDT is not able to agree a level of need in a particular domain the disagreement should be recorded on the DST along with the reasons for choosing each level and by which practitioner. This information should be summarised within the recommendations so that the Panel can note this when verifying recommendations. In accordance with the Framework guidance, where practitioners are unable to reach agreement, the higher level of need should be recorded and a note outlining the position included within the recommendation on eligibility. It is necessary that this is evidence based, and this evidence is recorded.
- 3.2.4 NHS Kernow will monitor this area on an ongoing basis and work in collaboration with the council to identify trends and potential training needs for MDT staff.

3.3 At the Continuing Healthcare decision making panel

- 3.3.1 In accordance with the Framework¹⁷ it is acknowledged that only in **exceptional circumstances** should the recommendation of an MDT not be accepted as the formal decision by the Panel. To further reduce this likelihood, a member of staff from Cornwall Council will be nominated to sit on this Panel. Where there is a disagreement concerning eligibility for NHS Continuing Healthcare, which cannot be resolved at the Panel, it will formally be recorded that both parties are in dispute and will be referred to stage one of the Dispute Resolution process.
- 3.3.2 All relevant information must be available before the Panel can refer to stage one. If the nominated managers believe that there is missing information and/or assessments that would be essential to the final decision they can request that the Case Coordinator collates the information within **five working days**. In these circumstances the process starts again with the case represented to the next scheduled Panel. This will not be recorded as a dispute.
- 3.3.3 A stage one dispute can therefore only be recorded as such when all necessary information has been received and both organisations are satisfied with the assessments and that the Panel could still not agree a joint decision on eligibility or joint funding.

4. Dispute resolution procedure (see flowchart at Appendix 1)

¹⁷ The Framework (paragraphs 91/2)

4.1 Preparation for stage one

4.1.1 Before referring to stage one, the Panel must confirm and formally record:

- a) The Panel Decision Summary Record has been completed at Panel. It must be recorded that NHS Kernow and Cornwall Council are in dispute and the reasons why.
- b) Which body will be responsible for any interim care and funding arrangements, pending resolution of the dispute (see table at 3.3)

NB. In light of the individual's needs profile and without prejudice to the parties' perspectives on the applicable legal status of the individual's needs, consideration must be given to a package of interim care funding in every disputed case.

The framework is clear that existing funding arrangements cannot be withdrawn without the agreement of the other party.

4.1.2 Once this is recorded, and assuming that the reasons for non-agreement are clearly focused and are not related to inadequacy of the documentation, the non-agreement will be referred to stage one. The referral to stage one must be made within **two working days** of the Panel.

4.2 Stage one

4.2.1 [Locality Manager], Cornwall Council (or a nominated officer) and [Senior Operations Manager], NHS Kernow will meet to review the combined evidence (eg. checklist, referral forms, health and social care assessments, DST and outputs from the MDT and Panel). This meeting will focus on the Primary Health Need Test with a view to resolving the dispute and agreeing eligibility.

4.2.2 Both stage one managers are required to meet and agree a decision (including referral to stage two, where necessary) within **10 working days**. A record will be made of this decision. If there remains a dispute, then this progresses to stage two. The referral to stage two must be made within **two working days** of the stage one meeting.

4.3 Stage two

4.3.1 Where the procedures set out in stage one do not result in a consensus decision being reached, the matter will be referred to senior managers from NHS Kernow and Cornwall Council. Stage two of this Dispute Resolution process will require a meeting to be held within **15 working days** of being notified of the disagreement at stage one.

4.3.2 This should be the final stage of the process, and there should be commitment from both parties to come to a final agreement in all but the most exceptional circumstances: Where either party believes that it would be outside of their lawful powers or duties to fund a particular package of care/support, a reasonable period of time for receipt of legal advice should be agreed and a further date set to reconsider the case in light of the legal advice. In normal circumstances this should not extend the total dispute resolution period beyond **12 weeks from the date of the panel**. Interim funding arrangements agreed at the Panel will continue pending final resolution of the dispute.

4.3.4 During stage two, the dispute will be escalated to non-operational managers with knowledge of the Continuing Healthcare Framework who have not been involved in the case. The [General Manager CHC], NHS Kernow and the [Senior Manager CHC], Cornwall Council will meet to review the combined evidence (as above with the addition of information from stage one of the dispute resolution process). The stage two outcome form will be used to record this.

4.3.5 It is expected that the majority of disputes will be resolved at stages one and two and only in exceptional circumstances will it be necessary to proceed to stage three. The referral to stage three must be made within **two working days** of the stage two meeting.

4.4 Stage three

4.4.1 If no agreement is reached at stage two the case will be referred to an independent panel chaired by an independent chair. This panel will be funded equally between NHS Kernow and Cornwall Council. Terms of reference and membership to be agreed.

4.4.2 Where stage two managers request an independent panel decision this should be completed within an additional **15 working days**.

4.5 Ratification of final decision

4.5.1 It is the responsibility of NHS Kernow to commission Continuing HealthCare with the support and participation of local authority. The CHC commissioning decision cannot be retracted or changed by Senior Directors in either clinical commissioning groups or local authorities.

If at this stage a final decision is reached, NHS Kernow will return the matter to the CHC panel for ratification.

5. Funding arrangements

5.1 Individual cases during the disputes resolution process

5.1.1 Where existing funding arrangements are in place, whichever organisation is funding at the time of the dispute arising will continue to fund on a “without prejudice” basis until the dispute is resolved in accordance with this agreement. New arrangements e.g. following hospital discharge will be facilitated by the appropriate authority in line with the formal panel outcome. NHS Kernow and Cornwall Council agree that following resolution of the dispute, funding will be backdated in line with the reimbursement arrangements set out in the Annexe F of the National Framework for NHS Continuing Healthcare and NHS funded Nursing Care (November 2012)

5.1.2 Interim funding responsibility during a dispute will be agreed as follows:

Setting	Funding at time of dispute	Funding until dispute resolved
Own home, residential or nursing home	Cornwall Council	Cornwall Council
In NHS hospital, own home, residential or nursing home*	NHS Kernow	NHS Kernow
Own home, residential or nursing home	Shared Cornwall Council/ NHS Kernow	Shared Cornwall Council/ NHS Kernow

*In order to avoid raising unrealistic expectation of future care location or costs of care provision and to avoid committing the other party to inappropriate future liabilities where interim funding has been agreed, NHS Kernow and Cornwall Council agree to work collaboratively when considering interim funding based placements and care provision and, where possible, to agree interim care costs. This should happen in the majority of cases. Where there is no prior agreement because consultation has not been practicable or emergency arrangements are necessary, the interim funding authority undertakes to keep cost to the necessary minimum within the context of the duty owed by the body in question to the individual concerned. Any subsequent reimbursement will be based on the actual cost incurred.

6. Legal obligations, rights and duties

6.1 Nothing in this protocol shall limit or constrain the legal obligations, rights or duties of either of the parties to patients or service users or as between themselves.

6.2 In the event that any dispute between the parties cannot be resolved using the procedures set out in this protocol, the parties' legal rights shall not be affected nor shall the parties be prevented from asserting those rights in any court of law or other forum.

7. Concurrent appeal and dispute

- 7.1 In the event that both the service user/representative and the council disagree with the decision of the CCG, it shall seek to resolve the issue using the established local review process in the first instance.
- 7.2 The service user/representative has up to six months to make an appeal under DH guidance.
- 7.3 The council should in any case notify the CCG in writing of the dispute and the reasons for it within **28 days** of formal written notification of the disputed decision. If, during this 28 day period, the individual/representative makes an appeal to the CCG, then the council dispute will be put on 'hold' during the appeal process. If the service user/representative does not appeal within 28 then the dispute will continue in line with the dispute resolution procedure and timescales.
- 7.4 Once the local appeals process has been completed and depending on the outcome of the appeal, the LA may choose to re-instate the dispute. In this case, the dispute resolution procedure and timescales will be followed.

Appendix 1 – Dispute resolution flowchart

