



## Continuing Healthcare Disputes Agreement

NEE/CCG/2016/074

<b>Brief Description (max 50 words)</b>	This policy sets out the process for CHC disputes.
<b>Target Audience</b>	All staff
<b>Action Required</b>	For implementation.

### Document Information

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<b>Stakeholders engaged in development or review</b>	
<b>Equality Impact Assessment</b>	<b>EQUALITY IMPACT ASSESSMENT</b> This document has been assessed for equality impact on the protected groups, as set out in the Equality Act 2010. This Policy is applicable to the Board, every member of staff within the CCG irrespective of their age, disability, sex, gender reassignment, pregnancy, maternity, race (which includes colour, nationality and ethnic or national origins), sexual orientation, religion or belief, marriage or civil partnership, and those who work on behalf of the CCG
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## Amendment History

Version	Date	Reviewer Name(s)	Comments
1.0	July 2016	CHC/Quality	Policy developed

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### Background

There are three different kinds of dispute that may arise in relation to NHS continuing healthcare;

- a) challenges (including requests for reviews) by the individual or their representative in relation to the process or decisions made – this is not covered by this process and can be found in the Clinical Commissioning Groups (CCG) operating framework;
- b) disputes between two CCGs over which is the responsible commissioner for the patient;
- c) disputes between a CCG and a Local Authority (LA) regarding eligibility.

Points a) and b) are addressed in national guidance, and local arrangements are in place in each CCG, and fall outside the scope of this protocol. However Paragraph 6.83 of the Care and Support Statutory Guidance (DH 2014) makes it statutory requirement for LAs and CCGs to have a disputes resolution process in place that deals with disputes between CCGs and LA (point c), which must cover;

- eligibility for Continuing Healthcare , and/or,
- the apportionment of funding, and/or,
- operation of the refunds guidance.

**Annex A and B** of this paper sets out a draft memorandum of understanding and a protocol that is under development and is designed to discharge this duty.

### Discussion

1. At present there are no robust arrangements in place for dealing with the disputes between Essex County Council ([Southend on Sea Unitary Authority and Thurrock Unitary may wish to sign up to agreement in the near future](#)) and the CCGs relating to Continuing Healthcare and Funded Nursing Care. This situation means that presently we, and our partners, are not complying with the requirements of the Care and Support Guidance or with Continuing Healthcare National Framework.
2. From an operational perspective the absence of an agreed process across the LAs is resulting in a lack of clarity over the handling of disputes, and potentially in unnecessary expenditure in care and support costs for the LAs and CCGs.

## Approach

3. A draft Memorandum of Understanding is being developed and is attached at **Annex A** to support a county wide approach to the handling of CHC and funded nursing care while the draft Protocol at **Annex B** sets out a defined process for dealing with disputes that;
  - complies with our duties under the Care and Support Guidance 2014;
  - covers funded nursing care;
  - addresses the issue of who will fund care and on what basis while the matter is under dispute;
  - provides for reimbursement of the party who has been funding care if it is determined by the Panel that they are not responsible for paying for care.

## Continuing Healthcare Disputes Panel

4. At the core of the approach is a proposal to establish a Continuing Healthcare Disputes Panel (CHPD). The Panel would be chaired by an independent person who has a background in Continuing Healthcare and had no previous involvement in the case under dispute.
5. The membership of the Panel would always be made up of an odd number of people to ensure that the chair has a casting vote. The Panel's proposed structure and remit is set out at **Annex C** of this paper.
6. Referral arrangements are set out in the protocol, which proposes the use of deadlock letters, to ensure that the matter under dispute and the evidence relating to it are clearly stated between the parties ahead of the Panel date, thus providing a further opportunity for informal resolution between the parties.

## Process for selecting and funding the Chair

7. It would be preferable for the independent chair to be sourced from the current pool of CCG independent panel chairs and who has had no previous involvement in the case under dispute.
8. If it is not possible to select from the current pool - the Chair can be selected through a formal recruitment process and is paid on a sessional basis. Recent advertisements for similar roles suggest a reasonable rate for the role would be in the region of £500 a day. It is suggested that the cost is split in equal parts between the parties using the Panel.
9. A draft job advertisement, based on similar roles offered by NHS England last year, a) which sets out the role, and, b) puts it into context is attached at **Annex D** to support discussion of this aspect.
10. The selection process for the chair is not included in the body of the protocol on the basis that arrangements may change from time to time and it seems helpful for this to be able to happen without the need to formally review the whole structure.

## Conclusion

11. The proposed approach is limited to disputes between Essex County Council ([Southend on Sea Unitary Authority and Thurrock Unitary Authority may wish to sign up at a later date](#)) and the CCGs and as such satisfies the requirement of Care and Support Guidance 2014. Processes are already in place to deal with individual disputes; these are set out in the relevant national guidance. It is also for CCGs to have arrangements in place dealing with disputes between them over CHC.

12. It is not envisaged that the formal process be used that frequently as it should only come into play when all other avenues to resolve the dispute have been exhausted. It is hoped that sharing the cost of the chair between the parties each time the CHDP is used will encourage appropriate use of the arrangements.

## Annex A

### Memorandum of Understanding on the provision of Continuing Health Care and Funded Nursing Care

between

**Essex County Council**  
(Southend on Sea Unitary Authority and Thurrock Unitary Authority may wish to sign up at a later date).

and

**Basildon and Brentwood Clinical Commissioning Group (CCG)**  
**Castle Point and Rochford CCG**  
**Mid Essex CCG**  
**North East Essex CCG**  
**Southend CCG**  
**Thurrock CCG**  
**West Essex CCG.**

This memorandum of understanding (MoU) establishes a framework for co-operation between Local Authorities (LAs) listed above and the Clinical Commissioning Groups (CCG) listed above. It sets out the role of each body, and explains how they work together to discharge their responsibilities under the Care Act 2014, the Care and Support Guidance 2016, the NHS Framework for Continuing Healthcare 2012, and the Continuing Healthcare Operating Framework (DH 2015). The MoU is based on the following principles;

- clear **accountability**. Each authority must be accountable for its actions and the discharge of its statutory responsibilities as set out in the relevant guidance;
- **transparency**. Elected members, citizens of Essex, and, regulators must know who is responsible for what;
- **avoidance of duplication**. Each authority must have a clearly defined role, to avoid second guessing, inefficiency, and, the unnecessary duplication of effort. This will help ensure proper accountability;
- **regular information exchange**. This helps each authority to discharge its responsibilities as efficiently and effectively as possible.

#### Provision of care

It is agreed by all parties that in the event of a dispute between them over the funding of care no arbitrary decision will be taken by any party that could lead to a delay in provision of, or the withdrawal of care that has been provided to meet an assessed need.

#### The responsibility of Essex County Council (Southend on Sea Unitary Authority, and Thurrock Unitary Authority may sign up at a later date)

- The relevant LA will ensure that it fully discharges its responsibilities as defined in the Care and Support Guidance (Department of Health 2016). In particular it will ensure;
- that it acts openly and in good faith in all dealings with its health partners;

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- it deals with any disputes that arise between it and any of its health partners relating to the provision of Continuing Healthcare and/or Funded Nursing Care in line with the local agreement governing disputes between the Council and the relevant health partner;
- in all cases where the LA is funding the adults care and support at the time the dispute arises it will continue such funding on a “without prejudice” basis until such a time as the dispute is resolved.

### **The responsibility of the Clinical Commissioning Groups**

The CCGs will ensure that they provide Continuing Healthcare and Funded Nursing Care in full compliance with the Care Act 2014, the Care and Support Statutory Guidance 2014, National Framework for NHS Continuing Healthcare and NHS funded nursing care (Department of Health 2012), CHC Operating Framework (Department of Health 2015). In particular each CCG will ensure;

- that it acts openly and in good faith in all dealings with the local authority partner(s);
- it deals with any disputes that arise between it and its local authority partner(s) relating to the provision of Continuing Healthcare and/or Funded Nursing Care in line with the local agreement governing disputes between it and its local authority partners;
- in all cases where the CCG is funding the adult’s care and support at the time the dispute arises it will continue such funding on a “without prejudice” basis until such a time as the dispute is resolved.

### **Review of this Memorandum of Understanding(MoU)**

This MoU will be kept under regular review to ensure it is fit for purpose. Formal reviews will take place at 12 month intervals. All parties will be invited to participate in the review process.

**Continuing Healthcare and Funded Nursing Care  
Disputes Protocol  
Agreed between**

**Basildon and Brentwood Clinical Commissioning Group (CCG)**

**Castle Point and Rochford CCG**

**North East Essex CCG**

**Mid Essex CCG**

**Southend CCG**

**Thurrock CCG**

**West Essex CCG**

**Essex County Council (ECC)**

**Thurrock Unitary Authority (option at later date)**

**Southend Unitary Authority (option at later date)**



## Context

1. This protocol deals with disputes between Essex County Council ([Southend on Sea Unitary Authority and Thurrock Unitary Authority may wish to sign up to agreement at later date](#)) and the Clinical Commissioning Groups listed above regarding the provision of Continuing Healthcare and Funded Nursing Care in the following areas:
  - eligibility for Continuing Healthcare and Funded Nursing Care;
  - apportionment of funding in cases where support is being provided through a jointly funded care and support plan.
2. This document fulfils the requirement for a disputes process set out at paragraph 6.83 of the Care and Support Guidance (Department of Health, 2014), and should be read in conjunction with both the Guidance, the NHS Framework for the provision of NHS funded Continuing Health Care and NHS Funded Nursing Care (Department of Health 2012) and the Continuing Healthcare Operating Model (Department of Health 2015).
3. This protocol should also be interpreted in the light of the wider duty to cooperate imposed on all parties by the Care Act 2014.
4. This protocol does not deal with the general assessment and decision making process as this is set out statutory guidance listed above.

## Approach to ensuring continuity of care provision

5. The basic principle of this protocol is that a dispute between the parties shall not delay, or, result in, a failure of the provision of care and support to an adult who has been assessed as requiring it.
6. While the dispute is being resolved the party who is presently meeting the adult's needs shall be responsible for funding the adult's care and support on a "without prejudice" basis in the interim period.
7. In the case of a jointly funded package funding will continue in the same ratio on a "without prejudice basis" in the interim period.

## Resolution of disputes

8. All disputes over eligibility and/or funding that cannot be resolved by negotiation shall be heard and adjudicated by the Continuing Healthcare Disputes Panel (the Panel).
9. The membership and responsibilities of the panel are set out at **Annex C**. The membership and responsibilities of the panel may be changed with the agreement of all parties without the need to revise this protocol.
10. Nothing may be done to the structure of the panel without a revision of this protocol. This is to protect the role of the independent Chair.

## Referrals to the Panel

11. Either party can refer a case to the Panel, if, following negotiation between them, a resolution to the dispute cannot be reached. Notification will be given by the referring party to the other parties by means of a formal exchange of deadlock letters which state the evidence base for the dispute.

**Timescale for holding the Panel**

12. The Panel shall be held within 28 calendar days of the receipt of the deadlock letters.

**Arranging the Panel**

13. It will be the responsibility of the party triggering the disputes process to arrange the panel and provide accommodation and support for it.

**Evidence**

14. All evidence to be considered by the Panel shall be contained in the deadlock letters.

**Decisions binding**

15. The parties accept that, subject to their legal rights, the decisions of the Panel will be binding upon them and undertake to implement them within 10 working days of a decision being formally notified to the parties.

**Reimbursement of funding**

16. Where without prejudice funding has been provided, and, the liability to fund is determined as falling on the other party, or in the case of jointly funded support a change in the ratio of the funding results, any financial adjustments shall be made between the parties within 28 working days of the decision being formally notified. The funding will be backdated to the date of the decision under review.

**Term and review of the Protocol**

17. The Protocol shall remain in force, subject to the parties giving 28 working days notice in writing of their intention to withdraw. The protocol will be formally reviewed at 6 months and at the end of its first year of operation and will then be reviewed every 12 months thereafter.

## **Annex C - The Continuing Healthcare Disputes Panel**

### **Membership**

The Continuing Healthcare Disputes Panel (CHDP) will consist of 2 members from each party to the agreement (members to be determined by the CCG and LA, and who must be independent of the case being heard). The meeting will be chaired by an independent Chair, who is also independent of the case being heard. The Chair and the members must evidence experience of senior level decision making relating to Continuing Healthcare.

### **Remit**

The CHDP will hear, and, adjudicate upon disputes over eligibility for, or funding, (including joint funding), of Continuing Healthcare, and/or Funded Nursing Care, where the dispute is between the parties to this agreement. It will not deal with matters relating to individuals who may be in dispute with any of the parties, or disputes between Clinical Commissioning Groups.

### **Powers**

The CHDP has the power;

- to decide disputes between the parties relating to eligibility and or funding of, Continuing Healthcare in line with the relevant statutory guidance, and,
- to direct reimbursement where it has been determined that the party who has been funding the adult is not liable to do so, or, in the case of jointly funded packages, not liable to do so at the rate they have been.

### **Decision making process**

Decisions will be taken by a simple majority vote of the members. In all cases the Chair will have the casting vote.

Decisions will be formally notified, in writing, to the parties within 5 working days of the date of decision. All decisions will be binding, subject to the legal rights of the parties.

## **Annex D – Draft advertisement for Chair – to support discussion.**

### **Independent Chair for Continuing Healthcare Disputes Panel**

We are seeking a person to chair the Continuing Healthcare Disputes Panel (CHDP) which deals with disputes between Local Authorities (LAs) and local Clinical Commissioning Groups (CCGs) about eligibility for Continuing Healthcare and/or Funded Nursing Care and financial apportionment.

The CHDP can be requested by local authorities or Clinical Commissioning Groups, who are parties to the local disputes protocol [insert link]. The CHDP comprises of the chair and representatives from the relevant clinical commissioning group and local authority.

The CHDP works within the [National Framework for NHS Continuing Healthcare and NHS funded nursing care](#).

We are seeking a chair that lives in, or close to, Essex. Applicants will be required to travel across the County and may also be required to travel to London for meetings where appropriate.

[The initial appointment will be for three years and will be reviewed annually.]

### **Skills, Experience and Knowledge**

Chairs must have a genuine interest in healthcare and social care, experience of decision making at a senior level relating to Continuing Healthcare and be able to demonstrate excellent communication, interpersonal and facilitation skills. They will be required to provide clear leadership to the CHDP, possess well-developed analytical skills and demonstrate sound judgement in complex and sensitive cases. They will be capable of securing the confidence of all parties during a review, using a collaborative style of working that is focused on achieving evidence-based outcomes in line with the National Framework for NHS Continuing Healthcare and NHS funded nursing care.

The chair will need an understanding of how health and social care services for older people, and other vulnerable care groups, have developed in recent years and in particular of the Care Act 2014 and the wider personalisation agenda. The chairs will also be involved in producing written reports following the CHDP taking place.

The chair's fees will be in the region of £500 a day and reasonable travel expenses will be reimbursed.

[This role is not open to a current chair, member (other than a member of an NHS Foundation Trust), director, governor or employee of an NHS or social care Body; a chair or a member of a clinical commissioning group; or an elected member or employee of a social services authority.]

However, those who have previously held any of these positions (outlined above) are eligible to apply.