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Meeting health needs as part of a local authority package of social care.

North Central London Councils – Section 22 Policy

Approved Version 1 - January 2024

Introduction

1. The aim of this policy is to provide guidance to staff working in Adult Social Care on the extent to which local authority social services departments are permitted to meet health needs as part of a charged-for package of care under the Care Act 2014 ("the Care Act").

2. The Care Act sets out the duties on local authorities to assess and support adults to meet needs that would have a significant impact on the individual's well-being if they remained unmet. These will be called *"social care needs"* for the purpose of the document.

3. Section 18 of the Care Act creates a duty on local authorities to meet eligible care and support needs for adults who are ordinarily resident in their area. Whether an individual's needs are eligible is determined by reference to national eligibility criteria. These are set out in regulations made under section 13 of the Care Act.

4. Local authorities must promote well-being in exercising their duties under section 1 of the Care Act. Local authorities must also consider the prevention, delay and reduction of the development of needs for care and support, under section 2 of the Care Act.

5. Local authorities are not permitted to meet "health needs" as part of a charged-for package of social care under the Care Act unless certain conditions apply. These are set out in section 22 of the Care Act. (See paragraphs 9 to 11 below).

Legal Background

6. The NHS Act 2007 ("the Health Act") works together with the Care Act to enable the reasonable health and social care needs of local residents to be met respectively by NHS Integrated Care Boards ("ICBs") and local authority social services departments. Section 1 of the NHS Act requires the promotion of a comprehensive health service to prevent, diagnose and treat illness and secure improvement in the physical and mental health of the people of England. Section 3 of the NHS Act places a duty on ICBs to arrange for the provision of health services locally in accordance with the overarching duty to promote a comprehensive health service.

7. Needs met under the Health Act are free at the point of delivery whereas needs met under the Care Act are means-tested and charged for.

8. The NHS Act is considered "dominant" in the sense that local authority provision is intended as provision of last resort when provision is not otherwise available. (This does not mean that ICBs can choose not to provide a service on the basis that the local authority will do so.)

9. The legal prohibition on local authorities meeting health needs is set out in section 22 of the Care Act, which provides:

"(1) A local authority may not meet needs under sections 18 to 20 by providing or arranging for the provision of a service or facility that is required to be provided under the National Health Service Act 2006 unless—

> *(a) doing so would be merely incidental or ancillary to doing something else to meet needs under those sections, and*
>
> *(b) the service or facility in question would be of a nature that the local authority could be expected to provide."*

10. In simple terms this means that local authorities are not permitted to meet health needs as part of a support package under the Care Act UNLESS meeting the identified health need is…

    A – "incidental/ancillary"

    I. connected with meeting an eligible social care need (and)
    II. a minor part of what is going on (and)

    B – "of a nature"

    III. the risks involved
        a) are appropriately delegated by NHS staff (and)
        b) can be safely met by the local authority (and)
    IV. it is appropriate to charge the individual for meeting the health need.

11. Both parts of section 22(1) must be satisfied, namely that the health need identified is incidental or ancillary to an identified eligible social care need AND that the nature of that health need is appropriate for the local authority to take on in terms of both managing the risk and charging the individual for doing so.

12. Local authorities must not "pick up" health needs by default or for expedience. Health tasks may only be delegated by the NHS when this is in the best interests of the patient.

13. Correct operation of section 22 requires staff to be able to recognise a health need during the care planning process (and differentiate it from a social care need) and secondly, actively consider whether the exceptions in section 22 apply, to permit the local authority to meet that health need.

14. Appendix 1 gives detailed guidance as to the identification of health needs when considering eligible social care needs. Appendix 2 sets out the pathway that must be followed whenever a health need is identified to evidence that section 22 has been properly considered.

15. Following the pathways set out in the appendices to this guidance should ensure that the local authority is not unlawfully meeting health needs that are the responsibility of the NHS.

When do these issues need to be considered?

16. There are various stages at which questions around the provision of health needs by the local authority may arise. These will include the following situations:
    a. During the initial assessment of needs;
    b. Care planning stage;
    c. Reviews;
    d. When a change in need is notified
    e. During assessment for NHS Continuing Healthcare

Identifying health needs within the local authority

17. In order to implement this policy staff must be able to identify whether a particular identified need reflects a health or social care need as section 22 considerations only apply when a health need is identified. The guidance from Skills for Care is a useful resource:

https://www.skillsforcare.org.uk/Support-for-leaders-and-managers/Managing-a-service/Delegated-healthcare-activities/Delegated-healthcare-activities.aspx

Definition of a Social Care Need

18. In this context, social care needs are determined by reference to the National Eligibility Criteria, which are set out as follows:

a) managing and maintaining nutrition;
b) maintaining personal hygiene;
c) managing toilet needs;
d) being appropriately clothed;
e) being able to make use of the home safely;

f) maintaining a habitable home environment;
g) developing and maintaining family or other personal relationships;
h) accessing and engaging in work, training, education or volunteering;
i) making use of necessary facilities or services in the local community, including public transport and recreational facilities or services; and
j) carrying out any caring responsibilities the adult has for a child.

19. Eligible needs exist when an inability to achieve 2 or more outcomes would have a significant impact on an individual's well-being. The well-being principle is set out in section 1 of the Care Act.

20. It should be noted that these criteria very deliberately do not include needs related to
    a. Managing medication or other treatments delegated or prescribed by a health care professional.
    b. Managing risks associated with a person's behaviour.

Definition of a Health Need

21. This issue is considered in the National Framework for NHS Continuing Healthcare and NHS-funded nursing Care July 2022 (Revised) ("the National Framework").

22. Paragraph 51 of the National Framework provides that *"Whilst there is not a legal definition of a health need in general terms it can be said that such a need is one related to the treatment, control, management or prevention of a disease, illness, injury or disability, and the care or aftercare of a person with these needs (whether or not the tasks involved have to be carried out by a health professional)."*

23. This definition derives from sections 1, 3 and 275 of the Health Act.

What happens if a health need is identified?

24. Where a health need is identified, the local authority must consider whether section 22 permits the meeting of this need by the local authority, as set out at paragraphs 9 & 10 above and appendix 2 below.

25. In many cases this will be a straightforward matter. For example, the administration of medication is always a clear health need. However, it will be often permissible for the local authority to support with the administration of medication where it is a small part of a visit (incidental) where an individual is being supported with social care needs like washing, dressing and eating. On the other hand, a "medication only" visit under the Care Act would never be

permitted: if there is no eligible social care need being met then meeting the health need could never be incidental or ancillary to doing so. Note that if a Local Authority were to provide medication only support, that would be likely to result in a person being unlawfully charged for health care.

26. If there is any doubt, then the pathway in Appendix 2 should be used.

27. Staff should also be aware that the identification of significant health needs which may lead to CHC eligibility could trigger the need for a CHC eligibility assessment. In such cases the checklist should be completed, and any positive checklist referred immediately to the ICB in the usual way.

Responsibility of Local Authorities when delegating health care tasks to a social care provider

28. When a Local Authority expects a social care provider to complete health care tasks it must:
    a. explicitly specify to the provider which tasks are health care
    b. identify to the provider which NHS professional has delegated the tasks to them
    c. ensure the delegating health care professional:
        i. offers appropriate initial and ongoing training and support to the provider manager and staff
        ii. agrees a review and monitoring process to oversee the safe and effective delegation of that health care to the provider
        iii. confirm that the provider has appropriate insurance or indemnity cover

Responsibility of Social Care Providers when accepting delegated health care tasks from a Local Authority

29. Any provider commissioned by a Local Authority to meet an 'incidental or ancillary' health need must ensure:
    d. it knows which NHS professional holds delegating responsibility
    e. it's managers and staff receive appropriate initial and ongoing training before allowing their staff to complete the delegated health care tasks that any delegated tasks is appropriately covered by it's current insurance and indemnity policies and confirm this to the Local Authority

What happens if the local authority is unable to meet the health need?

30. If consideration of the pathway in appendix 2 demonstrates that the health need is not incidental or ancillary to the meeting of eligible social care needs, or that the health need is not of a nature that a social services authority could be expected to provide a referral will need to be made to the ICB or relevant NHS provider organisation.

Capacity and Choice

31. If there are concerns around mental capacity and ability to make decisions the Mental Capacity Act 2005 must be followed.

32. Where a mentally capacitated individual is being informally cared for, they are entitled to choose how to meet their own needs (health or social care) regardless of whether others might consider it unwise.

33. If the local authority is responsible for the care & support, a duty of care applies and the local authority must consider this in discharging its responsibilities. This means that if the local authority decides to meet the health need, as part of a Care Act package of care, it becomes a party to the legal liability for the safe meeting of any health needs it decides to take on.

Escalation and Disputes

34. Any disputes that arise through the operation of this policy as to responsibility for provision of service should be resolved in accordance with the NCL CHC disputes resolution policy.

Overriding principles:

35. In discharging its duties under the Care Act including respecting the restrictions placed on local authority provision under the Care Act there are some important principles which must always be taken into account.

36. Local Authority Social Services Departments are not, and should not be considered / viewed as, a substitute NHS.

37. Any health tasks accepted as suitable for the local authority to meet under section 22 of the Care Act must be properly delegated by a health professional and reviewed by that health professional on an annual basis as a minimum. See the Skills For Care guidance on this at https://www.skillsforcare.org.uk/Support-for-leaders-and-managers/Managing-a-service/Delegated-healthcare-activities/Delegated-healthcare-activities.aspx

38. Where the local authority meets a health need as part of a Care Act Support package, that local authority is responsible for safe delivery of that health task (see para 37).

39. The fact that a health need is met as part of a local authority-funded package of care (pursuant to section 22), does not convert it into a social care need. It remains a health need; one that is met as part of a means-tested package of care. This is relevant in the context of CHC eligibility assessment should one be required as all health needs must be taken into account in determining eligibility, including health needs that are met by the local authority.

40. Local authorities should always be able to explain the legal basis for meeting any given health need as a charged-for service. Decisions together with rationales should be clearly recorded in the individual's case notes, assessments (including risk assessments) and care plans.

41. It should be clear from the documentation what Health needs are being met by the local authority under section 22 of the Care Act.

42. If meeting health needs as part of a social care package increases the cost of that social care package, then this would suggest that it would not pass the incidental or ancillary test.

43. Decisions need to be clearly communicated to individuals to ensure transparency.

44. It is important for local authority staff to remember that section 22 grants permissions to local authorities to meet certain health needs as part of a social services package of care when it is in the interests of the individual. The decision as to whether it may meet health needs in any given case is for the local authority to make, bearing in mind there is no duty on the local authority to meet health needs, even where section 22 permits this.

Appendix 1 – Identifying Health Needs

1. Some health needs may be directly associated with achieving daily living activities, whilst others are less obviously connected.

2. Section 1 of this appendix deals with recognising health needs that are closely connected with specific social care eligibility outcomes. Section 2 deals with health needs that may not be directly connected to the achievement of a specific outcome but could impact on some or all of them.

SECTION 1: ELIGIBILITY OUTCOMES

A. MANAGING AND MAINTAINING NUTRITION

This is about the daily activities of eating and drinking.
The activity of eating involves food being placed inside the mouth, chewed and swallowed and will constitute social care where no elevated risks are present.

Elevated risks giving rise to health needs include:

- Managing the risks of malnutrition and dehydration
- Managing risks relating to airways during eating and drinking where a person has difficulty swallowing
- Managing clinically assisted nutrition and hydration (CANH), such as a PEG, even when it is non-problematic
- Managing other clinical interventions
- Management of eating disorders
- Management of food allergies and intolerances

Health professionals

- SALT
- GP/district nurse
- Hospital
- Dietician
- Nutritionist

Risk assessment tools

- Malnutrition universal screening tool (MUST)

B. MAINTAINING PERSONAL HYGIENE

This is about the activity of washing and grooming, including laundry.

Elevated risks giving rise to health needs include:

- Preventative interventions due to an elevated risk of skin breakdown (Waterlow score of 10+) including

  - Repositioning (and equipment used for that purpose)
  - Monitoring skin that is at risk
  - Preventative application of creams
- Treatment, care and aftercare where breach of skin integrity has occurred, including
  - Monitoring and dressing any wound (graded 1 to 4) whether or not it is responding to treatment
- Management of skin conditions

Health professionals

- Tissue viability nurse
- GP/district nurse
- Hospital

Risk assessment tools

- Waterlow Tool (assessment/prevention/treatment)

C. MANAGING TOILET NEEDS

This is about the adult's ability to access and use the toilet (a receptacle for the hygienic disposal of human waste)

Elevated risks giving rise to health needs include:

- Management of clinical incontinence
- Clinical interventions
- Ongoing management of clinical disposal of waste following clinical intervention (for example, stoma, catheter)
- The management of associated elevated risks (e.g. to skin integrity)
- Use of medication
- Monitoring output, for example to manage the risks of constipation
- Management and prevention of UTIs
- Bladder washouts
- Irrigation
- Manual evacuation
- Management of constipation and other bowel problems

Health professionals

- Continence nurse
- GP/district nurse
- LD Nurse
- Hospital

Risk assessment tools

- Bristol stool chart

D. BEING APPROPRIATELY CLOTHED

This is about the adult's ability to dress themselves appropriately (eg. weather)

Elevated risks giving rise to health needs include:

- Support required to manage a person's behaviour if they do not want to be appropriately clothed
- Support required to manage risks related to damage or removal of clothing

E. BEING ABLE TO MAKE USE OF THE HOME SAFELY

This is about the adult's ability to move around the home safely.

Elevated risks giving rise to health needs include:

- Falls risk prevention (where support required to manage risk of injury)
- Risks on transfers
    - physical harm
    - loss of muscle tone
    - pain on movement
    - spasms or contractures

Health professionals

- Occupational Therapy
- Physiotherapy
- GP/district nurse
- Hospital

Risk assessment tools

- Falls Risk Assessment Tools (FRAT)

F. MAINTAINING A HABITABLE HOME ENVIRONMENT

This is about whether the home is clean and maintained with use of essential amenities

Elevated risks giving rise to health needs include:

- Risks of infection
- Where additional cleaning required due to illness
- Risks related to damage to the home caused by a person's behaviours of concern

Health professionals

- GP/district nurse
- Hospital
- Clinical Psychologist or other specialist clinician

G: DEVELOPING AND MAINTAINING FAMILY OR OTHER PERSONAL RELATIONSHIPS

This is about avoiding isolation and loneliness.

Elevated risks giving rise to health needs include:

- Management of risks related to a person's behaviours of concern.

H: ACCESSING AND ENGAGING IN WORK, TRAINING, EDUCATION OR VOLUNTEERING

This is about the adult's ability to contribute to society and apply themselves to the stated activity

Elevated risks giving rise to health needs include:

- Management of risks related to a person's behaviours of concern

I: MAKING USE OF NECESSARY FACILITIES OR SERVICES IN THE LOCAL COMMUNITY

This is about the adult's ability to get around in the community safely and use facilities such as public transport, shops or recreational facilities.

Elevated risks giving rise to health needs include:

- Management of risks related to a person's behaviours of concern

NB: Transport to health appointments should be arranged by health if the individual cannot use public or their own transport.

There may well be relevant health needs connected with difficulties achieving the above outcomes. These are likely to be reflected in the non-physical domains, such as psychological needs including prevention of deterioration of mental health.

SECTION 2 – OTHER HEALTH NEEDS THAT MIGHT NEED TO BE CONSIDERED

There are also a number of health needs that are not necessarily associated with any specific outcome. These include the following areas:

Prevention, treatment and symptom control (drugs, medication and pain management)

Prevention of illness, treatment and symptom control are the core business of the NHS, under sections 1 and 3 of the Health Act. They form no part of the eligibility criteria and do not reflect social care needs.

All of the following reflect health needs:

- Support (prompting/supervision) with routine medication that manages symptoms effectively with no side-effects
- Administration of medication required by
  - Registered nurse
  - Carer or care worker (whether specifically trained for the task or not)
- Problematic and non-problematic PRN regimes
  - Include standby time for administering medication if not already present to meet social care needs
- Individuals who are compliant or non-compliant with regime
- Pain management
- Symptom control and monitoring (eg blood testing, observation)

Any support in this category provided by the local authority under the Care Act, *must* be under the permissions given by section 22.

Consideration must always be given as to whether section 22 permits the local authority to meet these health needs as part of a charged-for Care Act package of care, and whether it is otherwise appropriate to do so:

Management of the airways/breathing difficulties

Managing and maintaining the airways will always reflect an elevated risk that is health in nature due to the immediacy and severity of the consequences of an obstruction.

Any preventative action, monitoring, management, control and treatment of any breathing problems will reflect a health need.

This will include physiotherapy delegated treatment, such as chest massage and the need to reposition a person so as to maintain airways and effective breathing.

Care Act support may be relevant in terms of achieving the identified eligibility outcomes.

Altered States of Consciousness

The risks presented in this category are outside the realm of social care due to the elevated risks flowing from loss of consciousness, including risks to the airways and injury.

<u>Managing the risk of injury</u> (for example, through Challenging Behaviour or Falls.)

This includes prevention of an imminent risk of injury as well as responding to any incidents where the risk is ongoing.

- Use of restraint, whether physical or chemical will always reflect a health need. Proportionate response required to an immediate risk of injury.
- Standby time. (This is relevant in considering whether meeting the health need is incidental or ancillary to social care.)

<u>Behaviour Domain</u>

The assessment of needs of an individual with serious behavioural issues should include specific consideration of the risk(s) to themselves, others or property with particular attention to aggression, self-harm and self-neglect and any other behaviour(s), irrespective of their living environment.

When approaching the behaviour domain, it is helpful to consider:

- An immediate risk of physical harm (injury) is a health need as it represents an elevated risk that does not come within social care outcomes
- An immediate risk of self-harm (injury) is a health need as it represents an elevated risk that does not come within social care outcomes
- The risk of self-neglect could be health or social care depending on the circumstances
- When assessing the severity and frequency/unpredictability level of risk, the National Framework approach to well-managed needs must be followed, namely that the level of risk created by the need must be considered as if the support provided were not available ie. the “unmanaged risk”
- Risk = risk to self, others or property
- If retreat and return is required, the person should not be described as “compliant with care”. A high will be the more appropriate weighting as they will generally be considered as having “variable compliance but usually responsive to planned interventions”. As to whether this is health or social care will depend on the nature of the interventions involved. If retreat and return is required, details must be provided. (How frequently, how many times, any other interventions?)

APPENDIX 2 – PATHWAY FOR CONSIDERING APPLICABILITY OF SECTION 22 WHEN HEALTH NEEDS HAVE BEEN IDENTIFIED

This pathway applies whenever a health need has been identified (using appendix 1) and therefore section 22 requires consideration as set out in paragraphs 9 to 11 above.

STEP 1 involves consideration of Section 22(1)(a) "incidental/ancillary"

STEP 2 involves consideration of Section 22(1)(b) "nature"

The key questions (in bold) in steps 1 and 2 must both be answered in the affirmative for the local authority to be legally permitted to meet this health need.

STEP 1: MERELY INCIDENTAL OR ANCILLARY

Key question: Would meeting the health need be merely incidental or ancillary to the meeting of a social care need or needs?

Paragraph 10 above i. and ii. are of relevance. This is primarily a quantitative analysis that focuses on the level of support that is required to meet the health need/s.

The **first** aspect of this question is:

- Would meeting this health need be *in connection with* meeting an eligible social care need? (ancillary)

If meeting the health need is not connected with any social care, then the local authority will not be permitted to meet this health need.

An example of when this may be permitted is helping someone clean themselves due to incontinence, at the same time as helping them have a wash.

The **second** aspect of this question is:

- Is meeting the health need *a minor part* of what is going on? (incidental)

This will be a question of fact and degree in many cases, but if the majority of what is required at any given visit reflects meeting health needs (either alone or in combination), then it will be unlawful for the local authority to meet these needs as part of a Care Act package.

An example of this might be giving simple medication from a pre-prepared dosette box, while supporting someone to eat or prepare a meal.

Other elements to consider:

- The more significant the health risks, the less likely they will be incidental or ancillary.

STEP 2: NATURE

Key Question: Would meeting a health need of this nature be something that a local authority could be expected to provide as part of a means-tested package of social care?

This is about whether it is appropriate [acceptable/expected/safe/proper] in principle for the local authority to meet a health need of this particular nature, bearing in mind the local authority is providing a charged-for package of social care.

Relevant questions include:

- What is the overall level of risk (before and after control measures and considering likelihood – including proximity and unpredictability)?
- Can the level of risk be sufficiently mitigated?

Mitigation of Risk

What risks are involved?

Use national or local risk assessment tools to identify any elevated risks.

The following questions should be asked:

Can this need only be met by a health professional?

If the answer is yes, it will not be lawful for the local authority to meet this health need as part of a Care Act package.

OR

Is it possible and practicable to train others to meet this need safely?

If the answer is yes, go on to consider the following:

- Is there anyone prepared to meet the need? (agency, PA, family member)
- What level of training is required to safely meet this need?
- Can this be provided?
- What level of health oversight and monitoring is appropriate taking into account the risks involved?

It is important to consider whether the need is currently being met legally, safely and appropriately. The following questions will assist in this:

- Who is currently meeting the need?
- Which health professionals are currently involved or have been involved?
- Any risk assessments? Are they up to date and comprehensive?

- Are carers adequately trained?
- Is there currently appropriate health oversight and monitoring?
- Is reporting/feedback required? If so, what level?
- Do carers know who to contact if needs change or something goes wrong?
- Are health professionals involved in regular reviews?

Is it in principle acceptable for the local authority to meet the health need taking into account the above matters?

If the answer is yes, the local authority may meet the health need as part of a Care Act package.

Record the reasons for the decision in the [care plan] and inform the individual that health needs will be met as part of the Care Act package.

If the answer is no, the local authority is not permitted to meet this health need and the matter must be referred to local health services as set out in Appendix 3.

APPENDIX 3 – HOSPITAL DISCHARGE RESPONSIBILITIES

Aftercare – Hospital Discharge

The Health Act 2006 section 3 (e & f) requires ICBs to provide reasonable aftercare for people who have suffered from illness. This includes people who have been admitted to hospital.

The legal responsibility for supporting an individual through recovery and rehabilitation following hospital discharge, lies primarily with the NHS. Local authorities have a role in supporting discharge, but unless the individual's health needs are optimised and scope of longer-term support is known, the responsibility for funding additional or new needs remains with the NHS until CHC eligibility can be ruled out through the assessment process.

The National Framework for NHS Continuing Healthcare and NHS-funded nursing care (July 2022) paragraphs 101 to 108 sets out the responsibilities of the NHS on discharge to ensure unnecessary stays on an acute ward are avoided. Paragraph 106 states, *"there should be consideration of whether the provision of further NHS-funded services is appropriate. This might include therapy and/or rehabilitation, if that could make a difference to the potential of the individual in the following few weeks or months. It might also include intermediate care or an interim package of support…In such situations, assessment of eligibility for NHS Continuing Healthcare, if still required, should be undertaken when an accurate assessment of ongoing needs can be made. The interim [NHS] services should continue until it has been decided whether or not the individual has a need for NHS Continuing Healthcare."*

The following guidance sets out additional responsibilities in relation to Hospital Discharge:

- Hospital Discharge and Community Support Guidance (July 2022)