Independent Patient Choice and Procurement Panel

Review of a proposed contract award

Online ADHD Assessment, Diagnostic and Management Services for North Cumbria

Case Reference: CR0001-24

15 May 2024

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1. Introduction

1. On 9 April 2024, The Owl Centre Limited ("TOC") asked the Independent Patient Choice and Procurement Panel ("the Panel") to advise on the selection of a provider for an Online ADHD Assessment, Diagnostic and Management Service ("the Online ADHD Service") by North East and North Cumbria Integrated Care Board ("NENC"). NENC had made this selection under the Health Care Services (Provider Selection Regime) Regulations 2023 ("the PSR Regulations").

2. TOC's request for a review of NENC's provider selection decision was accepted on 10 April 2024 in line with the Panel's case acceptance criteria. These criteria set out, first, the minimum eligibility requirements that must be met for case acceptance, and second, the prioritisation criteria that the Panel will apply when it is approaching full caseload capacity.[1] TOC's request met the Panel's minimum eligibility requirements, and as the Panel was not conducting any other reviews, there was no need to apply the Panel's prioritisation criteria.

3. This review has been carried out in accordance with the Panel's Standard Operating Procedures ("procedures").[2] At the time of accepting this case, the Panel's procedures were in draft form and had not been published. A copy of the draft procedures was supplied to each of TOC and NENC ("the Parties"). There are no significant differences between the draft procedures supplied to the Parties and the final published version.

4. The Panel has six members including its Chair, Andrew Taylor. The Chair appointed three members to a Case Panel for the purposes of reviewing this matter (in line with the Panel's procedures). The Case Panel consisted of:
   - Andrew Taylor, Case Panel Chair;
   - Carole Begent, Case Panel Member; and
   - Albert Sanchez-Graells, Case Panel Member.[3]

5. Having completed its review, this report sets out the Panel's assessment and advice to NENC.[4]

2. The Panel's role

6. The PSR Regulations, issued under the Health and Care Act 2022, have put into effect a new regime, known as the Provider Selection Regime, for commissioning health care services by the NHS and local authorities. The PSR Regulations, and accompanying statutory guidance, were published in draft

[1] The Panel's case acceptance criteria are available at https://www.england.nhs.uk/commissioning/how-commissioning-is-changing/nhs-provider-selection-regime/independent-patient-choice-and-procurement-panel/.
[2] The Panel's Standard Operating Procedures are available at https://www.england.nhs.uk/commissioning/how-commissioning-is-changing/nhs-provider-selection-regime/independent-patient-choice-and-procurement-panel/.
[3] Biographies of Panel members are available at https://www.england.nhs.uk/commissioning/how-commissioning-is-changing/nhs-provider-selection-regime/independent-patient-choice-and-procurement-panel/panel-members/.
[4] The Panel's advice is provided under para 23 of the PSR Regulations and takes account of the representations made to the Panel prior to forming its opinion. This is not an opinion on whether the relevant authority has followed the Regulations and statutory guidance in other areas.

form in October 2023, in final form in December 2023, and came into force on 1 January 2024.[5]

7. Previously, health care services were purchased under the Public Contracts Regulations 2015 and the National Health Service (Procurement, Patient Choice and Competition) (No.2) Regulations 2013. The Provider Selection Regime, however, provides commissioners with greater flexibility in selecting providers of health care services so as to help support the shift towards service integration.

8. The Panel's role is to act as an independent review body where a provider has concerns about a commissioner's provider selection decision. The Panel will, however, only review a commissioner's provider selection decision where a commissioner has already, at the request of the provider, carried out its own internal review.

9. After a Panel review, its assessment and advice is supplied to the parties and published on the Panel's webpages. It is then a matter for the commissioner to review its decision in light of the Panel's advice. A provider that is unhappy with the commissioner's final decision, following the Panel's advice, could choose to seek a judicial review of that decision.

10. The Panel recognises that, especially in the early days of the Provider Selection Regime, there may be some discomfort for providers in raising matters with the Panel and for commissioners in responding to the Panel's queries. Commissioners, in particular, face the prospect of having provider selection decisions reviewed by the Panel at a time when their staff are still coming to grips with the new regime.

11. As a result, the Panel is committed to ensuring that its processes are as efficient, fair and transparent as possible. To this end, the Panel will carry out a review of its procedures in the next 3-6 months to capture, and reflect in its procedures, any learning points from the initial cases reviewed by the Panel.[6]

12. In relation to this particular review, the Panel is grateful to TOC and NENC for their constructive and cooperative approach to what is the Panel's first case review. The Panel appreciates the feedback that has already been offered and will take this forward into its next cases.

3. Background to the Panel review

13. Psychiatry UK Limited (Psychiatry UK) is the incumbent supplier of an Online ADHD Service to NHS patients in North Cumbria. The service was originally commissioned by North Cumbria Clinical Commissioning Group (CCG), one of eight CCGs whose responsibilities were taken over by NENC on 1 July 2022.

[5] The PSR Regulations are available at https://www.legislation.gov.uk/uksi/2023/1348/contents/made and the accompanying statutory guidance is available at NHS England, *The Provider Selection Regime: statutory guidance*, https://www.england.nhs.uk/long-read/the-provider-selection-regime-statutory-guidance/.
[6] The precise timing will depend on the Panel having completed sufficient cases to inform its review.

14. The Online ADHD Service in North Cumbria is for adult patients (aged 16 years and over). It is led by consultant psychiatrists and is accessed via a referral from a patient's GP. GPs in North Cumbria referred 1,851 patients to the service in 2023/24, and the contract's value was approximately £1.1 million.

15. Other suppliers of ADHD services in the North East and North Cumbria Integrated Care System ("ICS") include Cumbria and Northumberland Tyne and Wear NHS Foundation Trust and Tees, Esk and Wear Valley NHS Foundation Trust, which both provide face-to-face, rather than online, services. In addition, the Panel understands from NENC that there are several other providers of ADHD services based outside the ICS which accept referrals from GPs in the ICS.[7]

16. Psychiatry UK's contract with NENC for its Online ADHD Service in North Cumbria was due to expire on 31 March 2024. As a result, NENC decided to award a new contract to Psychiatry UK using Direct Award Process C, one of five provider selection processes under the PSR Regulations.

17. The five provider selection processes in the PSR Regulations give commissioners considerable, albeit not complete, flexibility in deciding how to conduct a procurement. The five processes can be summarised as follows:
    - *Direct Award Process A*: where there is only one capable provider for a service;
    - *Direct Award Process B*: where patients have a legal right to choose their provider or where commissioners wish to offer such a choice of providers to patients;
    - *Direct Award Process C*: where a commissioner believes that a provider is satisfying its existing contract and is likely to deliver services to a sufficient standard under a new contract for the same services;
    - *Most Suitable Provider*: where a commissioner considers that it can identify the most suitable provider without a competitive process; and
    - *Competitive Tender*: where a commissioner wishes to evaluate competing offers to supply a service.[8]

18. Having decided to use Direct Process C, NENC carried out an evaluation consistent with this process, and published a notice of its intention to award a new 12 month contract to Psychiatry UK on 26 March 2024.

19. On 28 March 2024, prior to the expiry of the standstill period for the award of a new contract to Psychiatry UK, TOC made representations to NENC about its provider selection decision. In response, NENC carried out an internal review and wrote to TOC on 4 April 2024 confirming its intention to award a new contract to Psychiatry UK, and stating that it was "confident the appropriate

[7] Patients are able to access services from these providers by exercising their right to choose their provider – see paragraphs 32 to 34.
[8] A full and formal description of these provider selection processes and the circumstances in which they may be used is set out in the PSR Regulations.

decision has been made under the current circumstances and compliant with the Direct Award Process C".

20. Following receipt of NENC's letter, TOC requested that the Panel review NENC's provider selection decision. As set out above, the Panel accepted this case for review on 10 April 2024. NENC, on being made aware of the Panel's acceptance of TOC's request, confirmed that it would hold the standstill period open for the duration of the Panel's review.[9]

21. The Panel understands that Psychiatry UK continues to provide services on an interim basis during the standstill period and while the Panel review is taking place. The Panel notes that commissioners may have the option of putting in place temporary contractual arrangements during a standstill period under para 14(3) of the PSR Regulations.

4. Representations by the Parties

4.1 The Owl Centre Limited (TOC)

22. TOC's representations to the Panel regarding NENC's proposed contract award to Psychiatry UK made several points, including that:
    - the proposed contract award diminishes the scope for patient choice;
    - the approach taken "lacks competitiveness within the market, not only in terms of cost but also in ensuring optimal patient care and protection of the public purse";
    - the approach taken "carries a heightened risk of failure owing to the magnitude of the contract";
    - the ICB has failed to develop an understanding of the provider landscape or gather additional information from the market;
    - the ICB had attributed its decision to time constraints but effective planning would have allowed sufficient time to engage with the market and facilitate a more thorough procurement process; and
    - Direct Award Process B could have been a superior route to market.

23. TOC suggested that these points amounted to a breach of Regulation 4 of the PSR Regulations. Regulation 4 requires that commissioners, when procuring healthcare services, act with a view to (i) securing the needs of the people who use the services; (ii) improving the quality of the services; and (iii) improving efficiency in the provision of the services.

24. The Case Panel met with TOC during its review to ensure that it had a full understanding of TOC's representations. TOC also provided information in response to the Panel's questions by way of email correspondence.

[9] Services continue to be supplied by Psychiatry UK during the internal and Panel review processes notwithstanding the formal end of its contract on 31 March 2024.

4.2 North East and North Cumbria ICB (NENC)

25. During the review, NENC provided information about its provider selection decision through sharing internal records, answering questions via email, and discussing the issues at a meeting with the Case Panel. The following summarises the key points about NENC's decision-making process and its rationale for selecting Psychiatry UK under Direct Award Process C.

26. NENC told the Panel that it wished to award a new contract to Psychiatry UK to maintain continuity of its existing arrangements in North Cumbria while it reviewed its ADHD service specifications for the entire ICS. NENC's written response to TOC indicated that it was intending to proceed to new commissioning arrangements for ADHD services on an ICS-wide basis in 2025/26. It further stated that the recent introduction of the PSR Regulations gave it insufficient time to undertake a full evaluation of potential new providers for a contract commencement in April 2024.[10]

27. NENC told the Panel at the meeting on 3 May 2024 that its intention was to use Direct Award Process B in the future. However, revising the specification for ADHD services for the ICS was not straightforward because of the need to consider the varied populations across the ICS and inter-related service provision.

28. NENC told the Panel that it understood that patients referred to ADHD services by their GP had the right to choose their provider. NENC went on to say that, given this, it understood that it had the option of awarding contracts for ADHD services under Direct Award Process B or Direct Award Process C.[11] NENC said that it had awarded Psychiatry UK a contract under Direct Award Process C for 2024/25 because it believed that it met the requirements and key criteria for such an award, but expected to award future contracts for ADHD services under Direct Award Process B using a revised service specification.[12]

29. In proceeding via Direct Award Process C, NENC's internal records show that, having carried out an evaluation process consistent with the requirements of Direct Award Process C, it concluded that Psychiatry UK "has met all the requirements within Regulation 20 on compliance check and has passed the evaluation of key criteria. The existing provider is satisfying the original contract and will likely satisfy the proposed contract to a sufficient standard. The proposed new contract meets all of the minimum threshold criteria for Direct Award Process C".[13]

30. NENC told the Panel that, notwithstanding the award of any new contract to Psychiatry UK, new providers that wished to start supplying ADHD services in the ICS, including TOC, could apply to be accredited via an online platform

[10] Letter from NENC to TOC dated 4 April 2024 and NENC response to Panel information request on 22 April 2024.
[11] NENC meeting with the Case Panel on 3 May 2024.
[12] NENC response to Panel information request on 22 April 2024.
[13] NENC, *Psychiatry_UK_QHM-01H-ST-24-50165_Decision Template C* (supplied to the Panel in response to the Panel's initial request for records relating to its provider selection decision).

(known as Atamis) that allows suppliers of patient choice services to register with NENC.[14] Providers that are accredited by the ICB are able to obtain a contract with the ICB for the provision of these services to patients.

5. Panel Assessment and Advice

5.1 Assessment

31. The Panel's evaluation of the issues raised by TOC has focused on:
    a. whether the Online ADHD Service is a service where patients have a legal right to choose their provider; and
    b. if so, whether under the PSR Regulations NENC was free to use Direct Award Process C to award a new contract to Psychiatry UK.

32. It is common ground between the Parties that patients, when referred by their GP, have the right to choose their provider of ADHD services. As set out above, NENC told the Panel that some patients in the ICS are exercising this right by accessing ADHD services at providers based outside the ICS (see paragraph 15).

33. The Parties' understanding is supported by NHS Patient Choice Guidance. This states that "for mental health referrals, where a patient requires an elective referral, for a first outpatient appointment including any subsequent treatment if required, with a consultant or a health care professional or their team, the patient can choose any clinically appropriate provider that holds a qualifying NHS Standard Contract with any ICB or NHS England for the service which the patient needs as a result of the referral".[15] This right is given legal effect by Part 8 of the National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012.

34. The Case Panel additionally consulted NHS England's national patient choice team, which confirmed that the service commissioned by NENC is one where patients have a right to choose their provider.

35. Given that the Online ADHD Service in North Cumbria is one where patients have the right to choose their provider, the Panel considered whether NENC was free to use Direct Award Process C to award a new contract to Psychiatry UK.

36. The PSR Regulations, under para 6(4), provide that "where the proposed contracting arrangements relate to relevant health care services in respect of which a patient is offered a choice of provider … the authority must follow Direct Award Process B". Para 6(5) also states that "where the relevant authority is not required to follow Direct Award Process A or Direct Award

[14] NENC response to Panel information request on 25 April 2024.
[15] See NHS England, *Patient choice guidance*, available at https://www.england.nhs.uk/long-read/patient-choice-guidance/#:~:text=Patients'%20legal%20rights%20to%20choice,direct%20control%20over%20their%20care.

Process B … the relevant authority must follow one of Direct Award Process C, the Most Suitable Provider Process or the Competitive Process".

37. The PSR statutory guidance further states that "Where relevant authorities are required to offer choice to patients under regulation 39 of the National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012, they cannot restrict the number of providers and therefore direct award process B must be followed."[16]

38. In other words, commissioners must use Direct Award Process B to contract for all services where patients have a legal right to choose their provider, and Direct Award Process C is not available to commissioners in situations where Direct Award Process B must be used.

39. Discussions with NENC during this review provided the Panel with helpful explanation and context for NENC's decision to award a new contract to Psychiatry UK under Direct Award Process C. However, as set out above, NENC is required to use Direct Award Process B for this service, and the PSR Regulations do not provide commissioners with any discretion to choose an alternative provider selection process where patients have the right to choose their provider.

40. Given this, the Panel concludes that any award by NENC to Psychiatry UK of a contract for the supply of Online ADHD Services under Direct Award Process C would be in breach of the PSR Regulations.

5.2 Advice

41. Given the Panel's conclusion that NENC would be in breach of the PSR Regulations if it were to award a contract to Psychiatry UK for the Online ADHD Service under Direct Award Process C, three options are open to the Panel (in accordance with its procedures). The Panel may advise that:
    - the breach had no material effect on the commissioner's selection of provider and the commissioner should proceed with awarding the contract as originally intended;
    - the commissioner should return to an earlier step in the provider selection process to rectify the issues identified by the Panel; or
    - the commissioner should abandon the current provider selection process.

42. The Panel considers that neither of the first two potential remedies set out above are satisfactory. Both would lead to the award of a contract to Psychiatry UK under Direct Award Process C in contravention of the PSR Regulations. As a result, the Panel concludes, and advises NENC, that the only appropriate remedy is for it to abandon the current provider selection process.

[16] See NHS England, *The Provider Selection Regime: statutory guidance*, available at https://www.england.nhs.uk/long-read/the-provider-selection-regime-statutory-guidance/.

43. The Panel notes that NENC may still wish to commission an Online ADHD Service for patients in North Cumbria and, if so, it needs to do so under Direct Award Process B. The Panel also notes that, in the meantime, as set out in paragraph 15, patients in North Cumbria can, under patient choice rules, access online ADHD services from providers who have contracts with other ICBs (as already happens with patients elsewhere in the ICS).