NATIONAL ASSOCIATION OF
Community Health Centers

Important Content Note:

This technical assistance resource was developed prior to the August 2017 release of the Health Center Compliance Manual by the Health Resources and Services Administration's (HRSA) Bureau of Primary Health Care (BPHC). The BPHC Compliance Manual, issued August 2017, indicates where PINS, PALs and other program guidance are now superseded or subsumed by the BPHC Compliance Manual.

See: https://bphc.hrsa.gov/programrequirements/pdf/healthcentercompliancemanual.pdf

RISK MANAGEMENT SERIES

NATIONAL ASSOCIATION OF Community Health Centers

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Information Bulletin #9

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Note that in all Information Bulletins:

The term **"health center"** refers to public or private nonprofit entities that: (1) receive grants under Section 330 of the Public Health Service Act (Section 330), including Sections 330(e), 330(f), 330(g) and 330(h) (collectively "Health Center Program Grantees"); and (2) entities that have been determined by the Department of Health and Human Services (DHHS) to meet the Section 330-Related Requirements to receive funding without actually receiving a grant ("health center look-alikes").

The term **"Section 330-Related Requirements"** refers to requirements set forth in:

- Health Center Program Statute: Section 330 of the Public Health Service Act (42 U.S.C. §254b),
- Program Regulations: 42 CFR Part 51c and 42 CFR Parts 56.201-56.604
- Health Center Program Requirements: http://www.bphc.hrsa.gov/programrequirements/index.html

The term **"Grant Requirements"** refers to Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards: 2 CFR Part 200, as adopted by DHHS at 45 CFR Part 75.

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Providing After-Hours Coverage: What Health Centers Need to Know

Health centers receiving grant support under Section 330 of the Public Health Service Act and Federally Qualified Health Center (FQHC) Look-Alikes are required to make arrangements for emergency medical care during hours in which the health center is closed in order to assure continuous and comprehensive care for their patients. To accomplish this, health centers should establish and implement policies and practices and enter into contracts and agreements that meet statutory and regulatory requirements of the Health Center Program, address terms and conditions of their grant awards, and reduce liability associated with after-hours care.

This Information Bulletin:

- Presents Health Center Program requirements regarding after-hours coverage
- Explores how a health center can reasonably meet these requirements
- Provides guidance concerning risk management/liability limiting policies and/or practices that a health center should consider adopting in implementing an after-hours coverage arrangement

AFTER-HOURS COVERAGE REQUIREMENTS

Section 330 (k)(3)(A) of the Public Health Service Act requires health centers to assure that "the required primary health services of the center will be available and accessible in the catchment area of the center promptly, as appropriate, and in a manner which assures continuity." The health center regulations at 42 CFR §51c.102(h)(4) define primary care to

include,"[E]mergency medical services, including provision, through clearly defined arrangements, for access of users of the center to health care for medical emergencies during and after the center's regularly scheduled hours." In response to statutory and regulatory requirements, Program Requirement Five states that, "Health center provides professional coverage for medical emergencies during hours when the center is closed."

The *Form 5A Service Descriptor Guidance*[1], which describes minimum general elements of health center required and additional services explains the definition of "after-hours coverage" stating:

> *after the health center's regularly scheduled hours, at a minimum, after-hours coverage includes the provision of telephone access through clearly defined written arrangements, to an individual who has the qualification and training (consistent with licensing requirements in the health center's jurisdiction) to exercise professional judgment in assessing a health center patient's need for emergency medical care and, if appropriate, who can then refer patients to a covering physician or licensed or certified independent practitioner, and/or to locations such as emergency rooms or urgent care facilities for further assessment or immediate care. A patient's need for emergency medical care might arise from an emergent physical, oral, behavioral and/or other health care need and therefore, the health center's after-hours arrangement must have the capacity to address comprehensive emergent health situations.*

MEETING AFTER-HOURS REQUIREMENTS

In order to meet Health Center Program after hours coverage requirements, health centers must make certain that professional services for medical emergencies are available to health center patients after the health center's scheduled hours through agreements that clearly define the arrangements. They also must ensure that their patients know how to access after-hours care for medical emergencies.

Health centers should ensure that they have clear internal policies and procedures that describe their after-hours coverage and how patients – including patients with limited English proficiency, disabilities, and literacy issues – can access such after-hours coverage. The kinds of policies and procedures and agreements that health centers must establish will depend largely on how a health center intends to provide after-hours coverage, such as the health center's service delivery model for after-hours care and the level of after-hours coverage the health center will provide or arrange for.

Health center policies and procedures should specifically address the after-hours coverage system developed by the center. For example, all after-hours interaction with patients must be documented. Health center policy must address the documentation of patient calls, the information provided to patients, etc. Hospitalization tracking policies should address discharge planning for patients referred to the emergency room during after-hours. Risk management systems must include analysis of after-hours coverage systems in undertaking the reduction of all potential risks to the health center.

1 *See Service Descriptors for Form 5A: Services Provided* at http://bphc.hrsa.gov under Program Requirements, Scope of Project, Change of Scope.

In addition to developing solid internal policies and procedures regarding the provision of after-hours care at the health center, health centers should ensure that all arrangements with outside referral providers are in writing with clearly documented terms, conditions, and responsibilities. When the health center contracts out the responsibility for after-hours coverage, those terms should, to the greatest extent practical, limit the duties of the health center and impose the duties of providing professional services and the exercise of professional judgment on the referral provider. By including such provisions in a written after-hours coverage agreement, a health center can make clear to all concerned – the health center, the referral provider, and the patient – that the referral provider is responsible for all after-hours treatment given, and is ultimately liable for any negligent treatment.

RISK MANAGEMENT IN AFTER-HOURS CARE

Managing Risk in Health Center Operated After-Hours Coverage

A health center can operate its own after-hours coverage through an internal call schedule among providers. Each service made available for after-hours coverage (*e.g.* pediatrics, family practice and internal medicine, obstetrics and gynecology) should have clinicians on call who can address calls for that specialty for the entire after-hours period. In this kind of arrangement, the health center may use a separate clinician (*e.g.*, RN) for initial answering/triage with referral to the on-call clinician or it may use a contract call service to do the initial call answering and triage and referral to the on-call clinician. In either case, records of the call to the triage individual/service and of the consultation with the on-call provider must be maintained. If the health center contracts for the initial answering/triage service, then it must be cognizant of the issues described later in this information bulletin regarding after-hours coverage contracts. When health centers operate the after-hours coverage in-house, they may refer patients to the local hospital emergency room or urgent care facility. If there is no local hospital emergency room or urgent care facility nearby, then the health center may contract with local providers to provide the after-hours coverage.

Managing Risk When Contracting for After-Hours Health Services

Section 330 also permits health centers to have contracts or other types of agreements to secure services for health center patients that it does not provide directly. The health center may contract for services of outside referral providers to assist in the provision of after-hours coverage of its patients.

There are a number of models that a health center can use to secure after-hours coverage.

1. Arrangements for after-hours coverage pursuant to which the provider receives payment directly from the health center for services rendered can be viewed as making the provider an agent of the health center; therefore, the provider's actions would likely be attributable to the health center. If the referral provider is acting as the health center's agent, the written agreement between the health center and the provider must give the health center control over the provider.

2. The provider receives after-hours referrals from a health center, but maintains billing authority vis-a-vis third-party payors and the patients themselves. The provider should have a fairly clear understanding that he/she does not act in any way "on behalf of " the health center.

Both kinds of arrangements for the provision of services that the health center provides through an outside referral provider should be in writing and clearly state the:

- Time period during which the agreement is in effect
- Specific services it covers (direct patient care, answering service, triage, etc.)
- Special conditions under which the services are to be provided
- The sole obligations as between the health center and the provider are those expressly set forth in the agreement
- Terms and mechanisms for billing and payment

In addition, for those referral arrangements where the referral provider is in control of the care provided (instead of the health center), the referral agreements should also stipulate that, among other things, the referral provider:[2]

- Is not an agent, employee, or representative of the health center,[3]
- Does not and is not authorized to act on behalf of the health center,
- Must maintain his/her own medical records related to services rendered for a minimum specified period of time,
- Is responsible for billing third-party payors and patients for those services,
- Exercises his/her own independent professional judgment and is fully liable for the treatment provided (or any failure to provide treatment),
- Maintains his/her own professional liability insurance in agreed-upon amounts,[4]
- Ensures that the care given by a referral provider staff is high quality,
- Furnishes written and verbal information to the patient at the point of initial contact regarding: (1) payment terms (*i.e.,* the patient's responsibility to pay to the provider); (2) the fact that the provider is not associated with the health center, and (3) the need for the patient separately to follow-up with the health center about his or her condition

Such statements will reinforce the notion that the provider operates independently of the health center and that the conduct of the provider is therefore in no way attributable to the health center. Notification should be in plain and understandable terms, and, again, should be in a language that the patient understands. The health center should develop a standard statement (translated into all appropriate languages) for both written and verbal notifications to the patient that would be included as an addendum to the agreement between the health center and the provider.

2 Without such an express delineation between the health center's role and the after-hours provider's role, the health center runs the risk of being held responsible for the conduct of that provider.

3 A written agreement establishing an after-hours care arrangement should also draw a very bright line between the health center and the provider as independent entities.

4 In most circumstances, FTCA coverage will not be available to after-hours care providers. Most providers will not be "employees" or "contractors" of a health center within the meaning of the Federally-Supported Health Centers Assistance Act, 42 U.S.C. § 233, either because they are not individually contracted, they do not work at least 32 and 1/2 hours per week for the health center, or they do not fall within a specialty that is exempt from the 32 and 1/2 hour requirement.

Health centers should follow the same "due diligence" process in entering into after-hours coverage arrangements with providers that they follow in hiring and/or contracting with health care professionals for their core clinical program. Depending on the specific arrangements for after-hours coverage, contract clinicians may have to be credentialed and privileged consistent with HRSA policy. [5]

Any written agreement for after-hours referrals or the purchase of after-hours services, even an answering service, must address professional liability protection. The agreement should expressly state that it is the provider's responsibility at all times during the term of the agreement to maintain professional liability insurance at a level and in an amount satisfactory to the health center. The agreement should further state that the provider will deliver current proof of insurance upon request of the health center. Should a provider meet the requirements for protection under the FTCA program, the agreement should acknowledge such protection.

Some providers will ask that a health center indemnify them against their own liability in connection with after-hours care to health center patients**.** Try to avoid indemnity provisions in contracts. Not only do indemnity clauses expose contracting parties to potentially open-ended liability, but Section 330-supported health centers, in particular, should bear in mind that the FTCA program does not provide protection for indemnification of third parties.[6]

Any indemnification clause in an agreement for after-hours coverage should run not from the health center to the provider, but rather vice versa. Depending on the health center's level of confidence in the provider and in its own system of quality assurance, it may be advisable to insist that the provider agree to indemnify the health center against any liability (including attorney fees and other costs of defense) arising out of the provider's negligence.

Managing Risk When Using Cross-Coverage Agreements

In lieu of arranging for after-hours care through a contract referral provider, a health center may develop cross-coverage arrangements with other providers to provide after-hours coverage for its patients in one or more services. In these arrangements, the health center providers triage/treat the other provider's patients (*i.e.*, non-health center patients) in return for the other providers treating health center patients on a scheduled basis. Cross-coverage agreements, like all other contracts for after-hours care must be carefully crafted to avoid unnecessary liability.

In a cross-coverage agreement, the health center clinician will provide services to a "non-health center patient." For deemed health centers, as a general rule, the provision of services to non-health center patients by health center providers is not an activity covered under the Federal Claims Tort Act (FTCA) program. There are, however, limited exceptions. The Federally Supported Health Centers Assistance Act (FSHCAA) and 42 CFR Section 6.6(d) do authorize FTCA coverage for services to non-health center patients in certain activities and arrangements, including some cross-coverage arrangements between health centers and other community providers. For these arrangements to be afforded the FTCA program's protection, they must be for after-hours services only and there must be a requirement in the health center clinician's employment agreement, contract or other such

5 See Policy Information Notice 2002-22, *Clarification of Bureau of Primary Health Care Credentialing and Privileging Policy outlined in Policy Information Notice 2001-16* at http://bphc.hrsa.gov under Program Requirements, PINs/PALs.

6 See page six of *Federal Tort Claims Act Health Center Policy Manual* at http://bphc.hrsa.gov under Federal Tort Claims Act, Health Center Program, under Related section.

document to provide periodic or occasional cross-coverage for patients of the other providers. If these requirements are not met, it is likely that there will be no FTCA coverage. It is important to remember that the immunity provided under the FTCA program will not extend to the other, non-health center parties to the cross-coverage agreement.

CONCLUSION

Health centers are required to provide professional coverage for medical emergencies during hours when the health center is closed. Health center patients must be made aware of the availability of, and procedures for, accessing professional coverage after hours, including patients with limited English proficiency or disabilities. To accomplish this and to demonstrate such compliance, the health center must take care in developing and implementing after-hours care referral policies, procedures, and arrangements. In addition to clearly laying out how the health center will provide after-hours coverage, these policies, procedures and arrangements should identify and address various potential risks. Health centers can avoid such pitfalls by adopting measures related to planning, provider selection, quality assurance, and credentialing and carefully structuring arrangements with after-hours providers. By putting these recommendations into practice, a health center can greatly reduce its exposure to professional liability lawsuit suit in provision of after hours coverage and, more importantly, assure that the after hours care provided is of the highest quality.

Further Reference

See the Risk Management Series Information Bulletins (Updated 2016) on the NACHC website www.nachc.com and search MyNACHC. In particular, note:

#1 –Risk Management, Risk Management Programs and Your Health Center

#2 – Do's and Don'ts of Contracting for Services

#6 – Credentialing and Privileging of Health Center Practitioners: Tips to Help Navigtate the Legal Pitfalls

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