



**RISK
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How to Minimize Liabilities Associated with After-Hours Coverage

Health centers receiving grant support under Section 330 of the Public Health Service Act are required to make arrangements for patient care during hours in which the health center is closed, thus assuring continuous and comprehensive care for their patients. As a first step, health centers can establish and implement policies and practices that meet regulatory mandates and expectations of the Bureau of Primary Health Care (“BPHC”), address terms and conditions of their grant award, and in some measure, reduce any significant risk of liability associated with care given by an after-hours referral provider.

For more information contact

Jacqueline C. Leifer, Esq. or
Robert A. Graham, Esq.
Feldesman Tucker Leifer Fidell LLP
2001 L Street NW
Washington DC 20036
Telephone: (202) 466-8960
Fax: (202) 293-8103
Email: RGraham@feldesmantucker.com

or

Malvise A. Scott
Vice President, Programs and Planning
National Association of Community
Health Centers, Inc.
7200 Wisconsin Avenue, Suite 210
Bethesda, Maryland 20814
Telephone (301) 347-0400
Fax (301) 347-0459
Email: MScott@nachc.com

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This Information Bulletin:

- ◆ Presents BPHC’s expectations regarding after-hours coverage;
- ◆ Explores how a health center can reasonably satisfy these expectations and maintain compliance with the terms of its grant award; and
- ◆ Provides guidance concerning risk management/liability limiting policies and/or practices that a health center should adopt in implementing an after-hours coverage arrangement.

Although the administrative, management, and legal concerns regarding after-hours care arrangements are in many ways similar to those in a health center’s basic program of clinical care, there are certain issues specific to after-hours coverage that might not be addressed through the health center’s general policies and procedures. In particular, there are risks of legal liability arising in the context of after-hours care referrals that do not, as a general matter, arise in the context of a health center’s direct provision of services. Health centers should be aware of the risks associated with after-hours care arrangements and should take measures to insulate the health center from legal exposure for the acts and omissions of those with whom it has established such referral arrangements.¹

1 If after-hours care is provided solely by health center clinicians acting within the scope of project, the United States should fully cover any related malpractice claims under the Federal Tort Claims Act (“FTCA”) where the health center has been deemed under 42 U.S.C. § 233(g). This Bulletin focuses on after-hours care by outside clinicians.

As explained below, such measures consist largely of terms recommended for inclusion in any written agreement between a health center and a referral provider establishing an after-hours coverage arrangement. 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 provider. By including such provisions in a written referral 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.

BPHC'S AFTER-HOURS COVERAGE REQUIREMENTS

On August 17, 1998, BPHC issued Policy Information Notice (“PIN”) # 98-23 entitled “Health Center Program Expectations,” which describes federal expectations of entities funded by the Bureau of Primary Health Care. PIN # 98-23 at pages 2-3 summarizes for health centers the legal requirements and “best practices” that they should implement in order to operate a successful program.

Among the expectations set forth in the PIN with regard to a health center’s clinical program is “[t]he provision of comprehensive and continuous care, [which] includes care during hours in which the health center is closed.” In order to meet this expectation – a health center must have in place a coverage system that, at a minimum:

- ◆ Ensures telephone access to the covering clinician,
- ◆ Has established mechanisms for patients needing care to be seen in an appropriate location, and
- ◆ Assures timely follow-up by health center clinicians for patients seen after-hours.

PIN #98-23 further advises health centers to consider the linguistic needs of their patients when designing their after-hours coverage system.

MEETING AFTER-HOURS REQUIREMENTS

Health centers can use many of the same procedures it follows with its general clinical program (*e.g.*, credentialing, cultural/linguistic appropriateness, *etc.*) in structuring and carrying out its after-hours care referral arrangements.

Service Delivery Models for After-Hours Care

Considerations that drive a health center’s selection of its service delivery model for direct patient care also are relevant to its selection of delivery model for after-hours care.

As noted in PIN # 98-23, at pages 15 and 16, those considerations fall into four categories – location, hours, mix of services, and types of service providers.

Location Factors in After-Hours Care

Providers in the area – Contact other providers located in the vicinity of the health center’s existing sites.

Transportation services – Consider contracting with transportation service providers during off-hours to take patients to and from after-hours care providers that are located outside of the community served by the health center or are otherwise inaccessible. Depending on the anticipated frequency of need for after-hours care, this may be as simple a matter as having a taxi service on-call to bring patients to providers that are not otherwise accessible to the patient.

Schedule of After-Hours Care

All non-business hours— Include all non-business hours. Otherwise, the health center will not meet BPHC’s direction to provide “comprehensive and continuous care . . . during hours in which the health center is closed,”

Mix of Services in After-Hours Coverage

Community needs— As with a health center’s basic program of health care delivery, the mix of services that a health center makes available through after-hours arrangements “is influenced by demographic, epidemiological, resource and marketplace factors.” A health center should develop its after-hours care arrangements with an eye toward meeting the particular needs of the population that the health center serves. PIN # 98-23

at page 16 states that “communities with high prevalence of certain health problems (e.g., tuberculosis, HIV, diabetes, hypertension, mental illness, substance abuse) should design their mix of after-hours services to best address those issues.”

Critical/urgent care— Because the need for after-hours care will, in all likelihood, consist primarily of critical/urgent medical care (as opposed to routine preventive/primary care or chronic care management to address non-emergent conditions), consider the type(s) of service providers to include in a health center’s after-hours care delivery arrangements should be driven largely – if not exclusively – by the mix of services the health center makes available after-hours. That is, the medical professionals with whom a health center arranges after-hours coverage should, obviously, be able to provide the types of care that the health center has included within its after-hours mix of services.

Contracting for After-Hours Health Services

BPHC states in PIN # 98-23 at p. 16 (and as permitted explicitly by Section 330), “health centers may have contracts or other types of agreements to secure services for health center patients that it does not provide directly.”

BPHC further advises that any written agreement with a provider should address: “credentialing of contracted service providers; the extent to which the contracted services and/or providers are subject to the health center’s quality improve-

A health center should develop its after-hours care arrangements with an eye toward meeting the particular needs of the population that the health center serves.

ment and risk management guidelines and requirements; and any data reporting requirements.”
Id. at p. 17.

This guidance relates to arrangements of a health center for after-hours coverage since the chief purpose of arranging for such coverage is precisely “to secure services . . . that it does not provide directly” during normal hours of operation. BPHC’s guidance on “contracts or other types of agreements” for health services that it doesn’t provide directly has a strong bearing on the manner and substance of a health center’s agreements with providers for after-hours care. Specifically, BPHC instructs that arrangements for the provision of services that the grantee organization provides through a subcontractor should be in writing and clearly state the:

- ◆ Time period during which the agreement is in effect,
- ◆ Specific services it covers,
- ◆ Special conditions under which the services are to be provided, and
- ◆ Terms and mechanisms for billing and payment.

In the context of establishing after-hours coverage arrangements, the foregoing is particularly sound advice.

Depending upon the specific mechanism that a health center selects to carry out its after-hours care obligations, BPHC’s guidance will apply in different ways.

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 relatively tight controls 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.

As a general matter, all such referral agreements should stipulate that, among other things, the referral provider:

- ◆ Is not an agent, employee, or representative of the health center.
- ◆ Must maintain his/her own medical records related to servic-

es rendered.

- ◆ Is responsible for billing third-party payors and patients for those services.
- ◆ Is fully liable for the treatment provided (or any failure to provide treatment).
- ◆ Must maintain professional liability insurance in agreed-upon amounts.
- ◆ Ensures that the care given by a referral provider is high quality.

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. (See below for a more detailed discussion of liability concerns and risk management practices in after-hours contract and referral arrangements).

Health Care Planning for After-Hours Coverage

The "health care planning" element of BPHC's program expectations for a health center's clinical program requires that the health center "develop health care goals and objectives as part of the organization's planning process." In the context of planning the mix of services available after-hours, centers should review the community's needs and prioritize those services needed with the greatest frequency during the hours when the health center is closed.

As noted in PIN # 98-23 at page 15, BPHC directs health centers to account for "the linguistic needs of their patients when designing their after-hours coverage system."

In reviewing community needs, health centers can identify the prevalence of limited English proficiency ("LEP") in the patients they serve, the variety of languages spoken, and the best methods of communicating with people who speak other languages.

The results of this review will, in turn, influence the health center's policies and activities relating to after-hours coverage in at least two respects.

1. The manner in which the health center must communicate to the LEP patient with directions or referral to an after-hours care provider.

Obviously, if the health center's after-hours telephone message system is in a language that a caller does not understand, any instructions provided to that caller through that system regarding availability of after-hours care will not serve the purpose of putting the patient in contact with a referral provider. Accordingly, whatever the health center's review of community characteristics reveals in the way of linguistic needs should guide the health center in tailoring its methods for after-hours care referral to meet those needs.

2. The health center's selection of providers with whom the health center enters into after-hours arrangements.

That is, a health center should take steps to ensure that a referral physician or other medical professional is able to convey advice concerning care and treatment in a way that the patient can understand it, and thus enable the patient to make meaningful

decisions about his or her medical care. If the health center is not able to obtain after-hours coverage through providers with the requisite linguistic competence, the health center (or the referral provider) can make alternative arrangements (through interpreters or otherwise) to facilitate communication between the patient and the after-hours caregiver. Which party will assume responsibility for addressing LEP needs should be spelled out in the agreement.

Clinical Staffing for After-Hours Care

BPHC identifies five areas of concern that health centers must address in order to meet BPHC's expectations for clinical staffing:

1. *Leadership,*
2. *Staffing patterns,*
3. *Credentialing/privileging,*
4. *Continuing professional education, and*
5. *Affiliation with teaching programs.*

Of these five, credentialing/privileging has the greatest relevance to a health center's program of after-hours care, particularly for the purposes of minimizing potential liability to the health center associated with such care. Whether a health center will be legally accountable for the conduct of after-hours providers may turn (at least in part) on the efforts that the health center undertakes to assure the quality of those providers. If the health center fails to exercise reasonable care in selecting providers that have the requisite qualifications, background, experi-

ence, and training to provide the services needed, it can set in motion a “snowball effect,” *i.e.*, the health center will:

- ◆ Face an increased risk that it will enter into an after-hours arrangement with an unqualified provider,
- ◆ Who provides sub-standard treatment,
- ◆ Resulting in injury to a health center patient, and thus
- ◆ Place itself in jeopardy from a liability standpoint for having directed the patient to the negligent provider.²

Accordingly, health centers should follow the same “due diligence” process in entering into after-hours coverage arrangements with providers as they follow in hiring and/or contracting with health care professionals for their core clinical program. BPHC summarizes that “formal process” as one that includes:

- ◆ Reference to and review of the National Practitioner Data Bank;
- ◆ Verification of education and licenses;
- ◆ Adherence to “standards of national accrediting agencies,” *e.g.*, JCAHO, AAAHC;

- ◆ Adherence to the “requirements for coverage under the Federal Tort Claims Act (“FTCA”);³ and
- ◆ Ongoing credentialing of providers, with specific consideration of quality assurance findings regarding such providers.

By implementing and adhering to BPHC-recommended process, a health center exercises what BPHC has determined to be “due care” in establishing after-hours coverage arrangements, and thus substantially reduces liability exposures, and, more importantly, reduces the risk of exposing patients to substandard treatment.

Clinical Systems and Procedures in After-Hours Care

The final expectation listed in PIN # 98-23 that has some bearing on structuring and implementing a program of after-hours care deals with the administrative and record-keeping aspects of a health center’s clinical operation.

PIN # 98-23 page 20, requires that health centers maintain writ-

ten policies and procedures encompassing:

1. *Hours of operation,*
2. *Patient referral and tracking systems,*
3. *Use of clinical protocols,*
4. *Risk management procedures,*
5. *Procedures for assessing patient satisfaction,*
6. *A consumer bill of rights, and*
7. *Patient grievance procedures.*

Once again, some – but not all – of these matters are relevant to a health center’s after-hours coverage arrangements. For instance, while “hours of operation” policies will impact upon after-hours arrangements only to the extent that they define when such arrangements are needed, health center policies governing “patient referral and tracking systems” and “risk management procedures” should include provisions directed specifically at concerns that arise in the context of after-hours coverage.

With regard to “patient referral and tracking systems,” written policies and procedures should provide for recording after-hours visits and/or referrals in patient records, as well as follow-up visits with the patient within a reasonable time after that visit. This would serve the purpose not only of addressing BPHC’s direction that health centers assure “timely follow-up by health center clinicians for patients seen after-hours,” but also of ensuring that health centers remain abreast of all of a patient’s medical conditions and the treatment received for those conditions.

By obtaining and recording information regarding diagnoses, advice, and care given during an after-hours

2 Bear in mind that health center organizational liability for after-hours referrals is covered under the FTCA for “deemed” health centers. Nonetheless, risk management obligations should be taken very seriously.

3 Note that, in most circumstances, FTCA coverage will not be available to after-hours care providers. This is due to the fact that most such 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. See 42 U.S.C. § 233(g)(5). The reference to the FTCA in the text above is simply for the purposes of identifying the standards to which a health center should hold an after-hours care provider in order to ensure quality treatment for patients needing treatment outside of health center business hours.

visit, a health center can better enable its staff to exercise their professional judgment in follow-up visits and track the quality of care provided by an after-hours provider. This yields the dual benefits of facilitating compliance with BPHC's Program Expectations and minimizing the risk of improper care by health center staff due to lack of current and/or complete information about a patient. The referral agreement should specifically address what information (and when) the referral provider will convey to the health center and in what format.⁴

Likewise, BPHC's requirement of written "risk management procedures" impacts upon a health center's program of after-hours care. As discussed throughout this Bulletin, there are a number of concerns peculiar to after-hours coverage arrangements that create liability exposures. Any set of comprehensive written "risk management procedures" should therefore address those peculiar vulnerabilities, in addition to policies geared primarily toward the health center's direct provision of services.

OTHER POLICIES AND PROCEDURES TO MINIMIZE LIABILITY

By adhering to BPHC's Program Expectations as described above, a health center can go a long way toward reducing its legal exposure for negligent treatment of a health center patient by an after-hours provider. The Program Expectations clearly contemplate a system of policies and practices that ensure meaningful access to quality care for health center patients, including during non-business hours. It follows, then, that a program of after-hours care that utilizes such a system will safeguard against sub-standard treatment and any attendant tort liability for a health center.

There are, however, certain additional steps, particularly in the area of contracting for services, which a health center can take to minimize the threat of liability. Such measures serve primarily to place providers (and patients) on notice of "who is responsible for what" both in terms of payment and treatment. **By making clear in writing and, as appropriate, verbally to all concerned that it is the after-hours provider who is ultimately responsible for after-hours care, and it is only the after-hours provider with whom the patient has a relationship for the purposes of such care, a health center can substantially insulate itself against possible suit.**

Malpractice Insurance Requirements

One matter that a health center should address in any written agreement for after-hours referrals or the purchase of after-hours services is that of professional malpractice coverage.

Any such 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.

☠️ BEWARE! ☠️

Some providers will ask that a health center indemnify them against their own liability in connection with after-hours care to health center patients. **DO NOT AGREE TO THIS!**

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 FTCA does not cover indemnification of third parties. See PIN # 99-08 ("Health Centers and The Federal Tort Claims Act ") at pp. 9-10.⁵

⁴ Note that, under certain circumstances, the DHHS Office of Inspector General has clarified that a primary care provider may require a referral provider to refer back without running afoul of anti-kickback prohibitions. 42 C.F.R. § 1001.952(s).

Employee/Agent Disclaimers

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.

Toward this end, the disclaimer should contain definitive statements to the effect that:

- ◆ *The provider is not an employee, agent, or representative of the health center.*
- ◆ *The provider does not and is not authorized to act on behalf of the health center.*
- ◆ *The provider exercises his or her own independent professional judgment.*
- ◆ *The sole obligations as between the health center and the provider are those expressly set forth in the agreement.*

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.

Patient Notification Provisions

Perhaps the single most important measure that a health center can employ to separate itself from the relationship between a patient and an after-hours provider is by way of notification to the patient seeking after-hours care.

Accordingly, health centers should consider including in their after-hours provider agreements a requirement that the provider furnish

- ◆ *Written and verbal information to the patient at the point of initial contact regarding payment terms (i.e., the patient's responsibility to pay to the provider),*
- ◆ *The fact that the provider is not associated with the health center, and*
- ◆ *The need for the patient separately to follow-up with the health center about his or her condition.*

Notification should be in plain and understandable terms, and, again, should be in a language that the patient understands. Further, the health center could 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.

CONCLUSION

As is evident from the foregoing, health centers must take care in developing and implementing after-hours care referral arrangements to identify and address various potential risks. Health centers can avoid such pitfalls by adopting measures to meet BPHC's Program Expectations 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 suit in connection with care given by referral providers and, more importantly, assure that the care provided by such providers is of high quality.

Further Reference

U.S. Department of Health and Human Services, Health Resources and Services Administration, BPHC of Primary Health Care, Policy Information Notice 99-23, "Health Center Program Expectations" (Aug. 17, 1998).

"Risk Management Series, Information Bulletin #1 – An Introduction to Risk Management Concepts" (Nov. 2002).

"Risk Management Series, Information Bulletin #2 – Key Contract Issues Facing Health Centers" (Nov. 2002).

"Risk Management Series, Information Bulletin #9 – Credentialing and Privileging of Health Center Clinicians: Tips to Help Navigate the Legal Pitfalls" (March 2004).

5 If anything, 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. For a further discussion of indemnification and insurance issues in health center contracting, see "Risk Management Series, Information Bulletin #2 – Key Contract Issues Facing Health centers" (Nov. 2002).



National Association of Community Health Centers, Inc.®

7200 Wisconsin Avenue, Suite 210

Bethesda, MD 20814

Telephone: 301-347-0400

Fax: 301/347-0459

Website: www.nachc.com