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MEMORANDUM

TO: Ronald Yee, Chief Medical Officer, National Association of Community Health Centers

FROM: Martin Bree
@ftlf.com

DATE: May 5, 2014

RE: FTCA and Health Center Residency Programs

You have asked us to prepare an issue brief on the Federal Tort Claims Act coverage of health center residency programs. Below is our analysis of these issues. Our opinions are based on current HRSA policy and Department of Health and Human Services and Department of Justice practices. If you have any questions please contact me at 202-600-3516.

I. Introduction

Medical residency training programs provide new physicians the opportunity to develop clinical skills and attain competencies in a particular area of expertise after graduation from medical school. According to the Accreditation Council for Graduate Medical Education, there were more than 9,000 residency programs and 678 sponsoring institutions training nearly 115,300 residents during the 2011-2012 academic year.¹

Most residency programs require residents to undertake clinical rotations in a variety of settings, including community health centers. In fact, numerous health centers are involved with residency programs, serving as sponsors of residency programs or as training sites for medical schools, among other roles. Unsurprisingly, there are many issues involved in establishing and serving as a residency site, one of which is how to handle medical malpractice insurance for residents. This issue brief will discuss the extent and the limitations of Federal Tort Claims Act (FTCA) coverage of residency program activities in health centers and other resources for malpractice protection.

II. Residency Programs in Health Centers

Health center relationships with residency programs can take a variety of forms. A common arrangement is one in which a health center collaborates with a medical school or hospital, often known as an “institution-sponsored program.” In the simplest form of this arrangement, a health center contracts with a sponsoring institution to serve as a training site for the

¹ ACGME GME Data Resource Book 2011-2012.

institution's residents. The residents are employees of the sponsoring organization and the health center serves as a location for their training. Health center staff and/or the sponsoring institution staff serve as supervisors (also known as preceptors) of the resident. An institution sponsored program can also be more complex. For example, a health center interested in securing a particular level of clinical capacity could agree to assume ownership of a clinical site previously operated by the institution in exchange for providing the institution with continued operation of the residency program.

A second type of residency program arrangement is the "health center-sponsored residency program." In this form of arrangement, a health center typically receives funding from other sources to operate or manage a residency program. The residents are typically employees of the health center who train both at the health center and at other sites. By way of example, consider a health center that sponsors a family practice residency program. The program's residents would complete some of their family medicine rotations at the health center (*e.g.*, maternal and child health), but would likely travel to other non-health center sites for other elements of the rotation (*e.g.*, behavioral health, geriatrics, etc.).

The Affordable Care Act (ACA) supports the involvement of health centers in residency training programs.² Pursuant to the ACA, the Teaching Health Center Graduate Medical Education Program, which started in 2011, provides financial assistance to health centers involved in the training of primary care providers. According to the HRSA website, awards are made for direct expenses associated with sponsoring an approved graduate medical or dental residency training program and indirect expenses associated with the additional costs relating to training residents in such programs.³ In July 2013, HRSA made 33 awards under this program.

III. Federal Tort Claims Act (FTCA) Coverage Norms

The Federally Supported Health Centers Assistance Act (P.L. 102-501 (1992) and P.L. 104-73 (1995)) extends professional liability coverage to Section 330-funded community health centers and to certain individuals employed by or affiliated with the health center. The FTCA provides occurrence-based coverage for professional malpractice to a health center that is "deemed" eligible by HRSA only for acts or omissions by the health center, its qualified individual providers, and/or other eligible individuals that:

- Occur on or after the effective date that HRSA determined the health center met the requirements for FTCA coverage (*i.e.*, approval of the deeming application);
- Are within that health center's approved scope of project; and
- Are within the scope of employment, contract for services, or duties as an officer or director of the corporation.⁴

² Section 5508 of the Affordable Care Act amended Part C of Title VII of the Public Health Service Act (42 U.S.C. 293k et. seq.) to provide \$230,000,000 for training of medical and dental residents in community-based ambulatory care settings.

³ <http://bhpr.hrsa.gov/grants/teachinghealthcenters/>

⁴ See 42 CFR §6.6.

To understand what is not (or may not be) covered by FTCA, it is important to briefly review the general FTCA coverage requirements. FTCA covers malpractice claims or suits filed against a deemed health center that arise from services and sites within the health center's HRSA-approved scope of project. In addition to covering the deemed health center, FTCA coverage extends to the health center's employees, whether full-time or part-time, as well as individually contracted clinicians who otherwise meet FTCA eligibility requirements and who provide services to health center patients for at least 32 ½ hours a week, provided that the activity performed is within the eligible provider's scope of employment or contract. There is no minimum hours-per-week requirement, however, for individually contracted clinicians who provide services in the fields of family practice, general internal medicine, general pediatrics, and obstetrics/gynecology.

Under limited circumstances, certain inpatient or residential provider services furnished to health center patients (*e.g.*, rounding activities conducted in hospitals and nursing homes) and certain services provided to non-health center patients and/or at non-health center sites (*e.g.*, on-call or cross coverage arrangements that meet specific regulatory requirements) may also be covered.

Typically, FTCA will not cover services provided to non-health center patients and/or at non-health center sites, unless the health center obtains specific approval of such arrangements.⁵ Notwithstanding, HHS has published regulatory examples that constitute exceptions to this general rule, thus establishing coverage for certain health center activities involving the provision of services to non-health center patients and/or at non-health center sites, without the need to obtain specific clarification or a particularized determination of coverage.⁶ See Appendix A for a listing of examples of care to non-health center patients that have been approved by the Secretary of HHS.

IV. Application to Residency Programs

Health centers reviewing FTCA coverage of services provided incident to a residency program should focus on two groups of individuals: the residents and those who are teaching/supervising them. FTCA coverage of these individuals will depend on a variety of factors, but ultimately, the analysis of whether FTCA coverage applies in residency programs is identical to the analysis for any other clinician practicing in a health center.

A. Institution-Sponsored Residency Programs

Residents: In institution-sponsored residency programs, the residents are typically employees of the sponsoring institution. Since they are not employees

⁵ See the Bureau of Primary Health Care's Policy Information Notice 2011-01 for more information about the definition of a health center patient and when HHS has approved FTCA coverage for care to non-health center patients.

⁶ A particularized determination is a request by a deemed health center for approval of care to non-health center patients.

or contractors of the deemed health center, there can be no FTCA coverage for the resident. Therefore, in this type of arrangement, the sponsoring institution should provide the resident with malpractice protection. The agreement between the health center and the sponsoring institution should address this issue and the health center should receive proof of malpractice coverage of the residents at least annually.

Supervisors/Preceptors: Oftentimes, employed staff of the sponsoring institution supervises the resident at the health center site. If this supervising physician is neither an employee nor FTCA eligible individual contractor (see discussion of contractors above) of the deemed health center, he/she is not eligible for FTCA coverage.

If, however, the supervisor/preceptor is an employee or FTCA-eligible individual contractor of a deemed health center in which residents are stationed, the supervisor/preceptor may be eligible for FTCA coverage for their supervision of residents if the following conditions are met:

Scope of Project: The services provided by the residents during the supervision must be within the health center's scope of project.

Patient Status: The supervision must take place during the care of a health center patient or the care of a non-health center patient that has been approved by the Secretary of HHS (see Appendix A).

Location of Services: The supervision can occur at the health center site(s) or at other non-health center locations, depending on the patient status. For example, if a health center-employed physician is supervising a resident who is treating a hospitalized health center patient and the services provided are within the scope of project, there can be FTCA coverage for the supervising physician. However, if a health center physician is involved in the supervision of a resident in a non-health center site, involving the care of a non-health center patient, there will be no FTCA coverage.

B. Health Center-Sponsored Residency Programs

Residents: In a health center-sponsored residency program the resident is typically an employee of the deemed health center. As an employee, the resident is eligible for FTCA coverage if all FTCA program requirements are met:

Scope of project: Services provided by the health center-employed resident must be within the scope of project. If a resident, as part of his/her training, provides services that are not within the scope of project, there can be no FTCA coverage, regardless of the location of the rotation or the status of the patient as a health center patient.

Patient Status: To be covered by FTCA, health center employed residents must be caring for health center patients, unless the care to the non-health center patient has been approved by the Secretary of HHS through regulation or an approved particularized determination (See Appendix A).

Location of Services: There can be FTCA coverage for services provided by the health center employed resident at health center sites or other locations where health center staff follow health center patients to maintain continuity of care. Examples of the latter include care of health center patients who have been admitted to a hospital and care of health center patients who are residents of nursing homes.⁷ Generally, however, services provided by residents to non-health center patients at non-health center sites are not covered by the FTCA. For example, if a family practice resident (who is also an employee of the sponsoring and deemed health center) were to participate in a surgery rotation at a non-health center surgical practice, he would not have FTCA coverage since the patients are not health center patients, and the site is not a health center site. A potential solution to this type of situation would involve submitting a particularized determination to HHS to request approval for the care to the non-health center patients during the surgical rotation. The likelihood of approval of such a request is unknown.

Supervisors/Preceptors: As with institutional-sponsored residency programs, individual supervising/teaching the resident must be an employee or individual contractor of the deemed health center to be eligible for FTCA coverage. The question of FTCA coverage in this instance will follow the same rules as for the employed resident.

V. Credentialing and Privileging

Credentialing and privileging of health center providers is required for participation in the FTCA program. Policy Information Notice 2001-16 *Credentialing and Privileging of Health Center Practitioners* and Policy Information Notice 2002-22 *Clarification of Bureau of Primary Health Care Credentialing and Privileging Policy outlined in Policy Information Notice 2001-16* provide the requirements of a credentialing and privileging policy in health centers. Neither of these policies specifically addresses the credentialing of residents. The Joint Commission does not require credentialing of institutionally sponsored residents in training by ambulatory care facilities.

In institutional-sponsored residency programs, a health center's agreement with the sponsoring institution must address the credentialing of residents. A health center should carefully evaluate the sponsoring institution's resident credentialing policy and procedure to insure it

⁷ While these locations are not health center sites as shown on Form 5, Part B, they must be listed on Form 5, Part C as locations where health center staff goes from time to time to see health center patients.

encompasses the health center's own credentialing requirements. For example, if a health center's credentialing policy requires criminal background checks on all individuals working in the health center, the health center must ensure that residents also receive criminal background checks. It does not matter which entity actually performs the check.

In the case of the health center-sponsored residency training program where the resident is an employee of the health center, a health center should include the residents in its credentialing program.

VI. Addressing Liability Issues

In the case of an institutional-sponsored residency program, any agreement between an institution and a health center should specify all insurance responsibilities. In health center-sponsored residency programs, the agreement should enable the health center to substitute FTCA coverage in lieu of malpractice insurance obligations under the agreement. In either type of program, health centers must ensure that the potential gaps in liability insurance for residents and supervisors/preceptors discussed in this issue brief are eliminated before embarking on a residency training program.

The simplest approach to cover gaps in FTCA coverage is to have the residency program partner provide the malpractice coverage. In an institutional-sponsored program, the health center can negotiate with the sponsoring institution to have the institution provide malpractice protection in those instances where FTCA coverage is doubtful. For example, the agreement could include language describing the sponsoring institution's obligation to pay for or demonstrate that the program's residents have sufficient professional liability coverage. This is the preferred course of action because it places the responsibility for malpractice protection on the institution promoting the program.

Obtaining wrap-around ("gap") insurance is an alternative solution. Gap insurance is a professional liability insurance policy that covers activities not protected by the FTCA. Policies are generally written to cover all activities and services provided by the health center (e.g., cross coverage, nursing home, and residency program activities) that would not be protected by the FTCA. Under such a policy, specific known gaps in FTCA coverage are protected, such as the rotation of a health center-employed resident to a non-health center practice. In addition, unexpected gaps in coverage are protected, such as denial of FTCA coverage of a service that was expected to be considered within the health center's scope of project.

Regardless of the method chosen to address gaps in coverage, health centers engaged in any type of residency training must catalogue the potential gaps in FTCA coverage and ensure that they have professional liability protection to address them.

VII. Conclusion

Ronald Yee, Chief Medical Officer

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There are many issues involved in health centers establishing and serving as residency sites. Regardless of the type of residency program, malpractice protection for the health center staff involved in the program, the residents themselves, and those who supervise and train them, must be carefully considered. The protection afforded by the FTCA has limitations and health centers must ensure that they account for the potential gaps in coverage before participating in residency training programs.

Appendix A

HHS has published regulatory examples (42 CFR Part 6) that constitute exceptions to this general rule, thus establishing coverage for certain health center activities involving the provision of services to non-health center patients, without the need to obtain specific clarification or a particularized determination of coverage, provided that:

- All requirements of the regulatory example are exactly met; and
- The activity is listed and described on the health center's scope of project form (generally, Form 5 – Part C, which lists "Other Activities/Location") and documented and described in the health center's Section 330 grant application narrative, with sufficient detail to ensure that there is no confusion regarding the type, level and intensity of services provided.

Pre-Approved Regulatory Examples

As long as the conditions discussed above are met, FTCA will cover deemed health centers and their qualified providers for the activities performed under the following regulatory examples, regardless of the fact that services are provided to non-health center patients and/or at non-health center sites:

- *Hospital or emergency room on-call arrangements:* The health center requires its physicians to obtain staff privileges at a hospital, and the hospital as a condition of obtaining such privileges (and thus being able to admit the center's patients to the hospital), requires the physicians to agree to provide periodic hospital or hospital emergency room call. The physician's employment agreement or contract for services must clearly require that such privileges are a condition of employment or required under the contract.
- *After-hours cross coverage arrangements with community providers:* The health center makes arrangements with local community providers for after-hours coverage of its patients, and agrees to provide the services of its providers for after-hours cross-coverage. The provider's employment agreement or contract for services must require periodic after-hours cross-coverage for the patients of the community providers.
- *School-based or school-linked clinics:* The health center's staff provides primary and preventive health care services at a facility located in a school or on school grounds, or at a site not located on school grounds, to students of one or more schools, based on a written affiliation agreement with the school.
- *Immunizations and health fairs:* On behalf of the health center, staff conducts or participates in an event to immunize individuals against infectious illnesses, or participate in a health fair to attract community members for purposes of performing health assessments. Such events may be held in the health center, on its grounds, or elsewhere in the community served by the health center (such as community centers).

- *Outreach for homeless persons or migrant and seasonal farm-workers:* The health center's staff travel to a shelter for homeless persons, a street location where homeless persons congregate, or a migrant farmworker residence camp to conduct intake screening to determine those in need of clinic services (which may mean health care is provided at the time of such intake activity or during subsequent clinic staff visits at the same location).
- *Coverage in Certain Individual Emergencies:* A health center provider is providing or undertaking to provide covered services to a health center patient within the approved scope of project of the center, or to an individual who is not a patient of the health center under the conditions described in this appendix, when the provider is then asked, called upon, or undertakes, at or near that location and as the result of a non-health center patient's emergency situation, to temporarily treat or assist in treating that non-health center patient. In addition to any other documentation required for the original services, the health center must have documentation (such as employee manual provisions, health center bylaws, or an employee contract) that the provision of individual emergency treatment, when the practitioner is already providing or undertaking to provide covered services, is a condition of employment at the health center.

Particularized Determinations of FTCA Coverage

To ensure coverage for activities provided pursuant to a pre-approved regulatory example, HRSA urges deemed entities be "painstakingly exact" in ensuring that their proposed activities fit "squarely" within one of the examples provided. In cases where an activity does not exactly meet one of the examples, the deemed entity may seek a particularized determination of FTCA coverage. The regulations establish three approval criteria for particularized determination requests, any one of which can be used to justify a determination of coverage:

- The provision of the services to non-health center patients benefits the health center's patients as well as the general populations that could be served by the health center through community-wide intervention efforts conducted within the communities served by the health center.
- The provision of the services to non-health center patients facilitates the provision of services to the health center's patients.
- The services rendered are otherwise required to be provided to the non-health center patients under an employment contract or similar arrangement between the health center and the covered provider.