NATIONAL ASSOCIATION OF Community Health Centers®

Legal Lessons Learned from the Pandemic for Health Center Boards

BACKGROUND

Health centers have been on the frontlines combatting the national public health emergency related to COVID-19. The public health emergency has had a profound impact on health center operations, due to the initial mandatory lockdowns, social distancing, and other precautionary efforts to stop the spread of this unprecedented virus, and, more recently, the push to vaccinate entire communities. Health centers have had to reduce or close certain services (and later, reopen them), furlough staff (and then re-hire them), add temporary sites, rapidly adopt telehealth, all while navigating a financial rollercoaster. Health center boards have had to adapt to governing virtually and make rapid-fire decisions on matters that are significant to patients and employees. At the same time, they have had to fulfill overall board roles, including ensuring compliance with the Health Services and Resource Administration's (HRSA) Health Center Program requirements, as well as other relevant federal, state, and local laws and regulations and guidance.

Some of the health center board governance practices adopted during the pandemic may ensure improved governance for the foreseeable future and beyond. This short resource highlights legally-focused governance lessons learned during the pandemic. It also details considerations for assuring and maintaining a reasonable level of flexibility in the health center's bylaws and key board-approved policies. These considerations help enable effective decision-making and ensure compliance with the Health Center Program requirements, both during and after a government-declared public health emergency. This resource also includes discussion questions for boards to use at board or committee meetings.

Items to Consider

The consumer-majority, community-based board has been central to the health center model since the inception of the Health Center program. The board plays a vital role in assuring the overall success and sustainability of the health center. Overall board roles focus on oversight, strategy, and the board's own functioning; the **Governance Guide for Health Center Boards** by the National Association of Community Health Centers (NACHC) provides a broad overview of board roles.[1] From a legal perspective, the board is responsible for establishing the core policies that govern operation of the health center. In addition, the board must approve each site location, the scope and availability of services; oversee quality, patient satisfaction, service utilization, and financial performance; and conduct periodic strategic planning and capital planning. Additionally, according to the federal regulations for the health center grant program, the health center board is specifically required to ensure compliance with all applicable federal, state, and local laws.[2] The magnitude and importance of this obligation cannot be overstated.

1 For discussion of overall board roles, see the **Governance Guide for Health Center Boards.**

2 42 C.F.R. § 51c.304(d)(v); 42 C.F.R. § 56.304(d)(vi). Items noted in this list are requirements of the HRSA Health Center Program. Boards also need to focus on broader board roles and responsibilities. For discussion of overall board roles, see the **Governance Guide for Health Center Boards.**

Below are various legal lessons from the pandemic and good practices to help boards.

- **The board must be advised continuously about relevant federal, state, and local laws and regulations and applicable guidance, including those related to standards of care, clinical licensure, etc.** During the pandemic, most federal and state government agencies offered various flexibilities to health centers regarding governance processes, operations, and the substance of key board-approved policies. For example, some of the federal and state flexibilities provided to health centers were:
  - HRSA stated in its "COVID-19 Frequently Asked Questions (FAQs)" that "during this public health emergency there may be certain requirements with which a health center cannot demonstrate compliance within the timeframe or specific manner indicated in the Compliance Manual" and it "will consider the impact of the COVID-19 public health emergency on the ability of health centers to demonstrate compliance with Health Center requirements when making future compliance determinations."[3]
  - The HRSA COVID-19 FAQs also provided flexibility for the health center to adjust its policies for billing and collections and/or sliding fee discounts (with the health center board's approval) based on the unique circumstances of the health center and patient population served as long as the change is consistent with applicable statutory and regulatory requirements.[4] For example, the frequency of eligibility verification might be extended beyond one year to eighteen months if patients could not come in to the health center due to stay-at-home orders in the State or locale.
  - Pennsylvania permits licensed practitioners in other states to provide services to Pennsylvanians via telemedicine for the duration of the emergency without obtaining a Pennsylvania license, provided the practitioner is licensed and in good standing in their home state or country and the practitioner provides notice to the Pennsylvania Board that normally provides temporary licenses to such practitioners with contact and licensure information.[5]

  Health center boards that took advantage of such flexibilities should maintain documentation of changes made, along with a reference to the relevant statute or regulation. It will be critically important for the board to determine whether these changes will continue indefinitely post-emergency, terminate with a declared end to the emergency, or remain in effect until a specific date. In addition, as policies, statutes, and regulations change (with some examples noted above), each board should evaluate how best to remain informed of the legal updates. For example, the compliance officer could be allocated time at each monthly meeting to brief the board on legal updates.
- **The board must ensure it remains compliant with board authority and composition requirements as outlined in Chapters 19 and 20 of the HRSA Health Center Program Compliance Manual (Compliance Manual).** Although many boards have often had to make quick and constant decisions to address urgent issues (e.g., approving policies regarding telehealth visits), this does not diminish their obligation to comply with Health Center Program requirements. The requirements of the HRSA Health Center Program have not been changed during the pandemic and must be continuously met. Board members should refer directly to the Compliance Manual for requirements of the HRSA Health Center Program. If the board has not yet done so, consider creating an annual work plan that captures all required board actions and staggers the work throughout the year. The Governance Guide for

3 HRSA, COVID-19 Frequently Asked Questions (FAQs), available at: https://bphc.hrsa.gov/emergency-response/coronavirus-frequently-asked-questions?field_faq_category_tid=286&combine= (last accessed Dec. 11, 2021). See Program Oversight and Monitoring Section, Questions 1.

4 Id. at Question 4.

5 Pa. Dep't of State, Pennsylvania Authorizes Licensed Health Care Professionals to Provide Services via Telemedicine During Coronavirus Emergency (Mar. 18, 2020), available at: **https://www.dos.pa.gov/Documents/2020-03-18-Telemedicine-Summary.pdf.**

Health Center Boards addresses good practices related to board work plans in Chapter 10 and contains a sample work plan in Appendix 20. A work plan can also help boards focus on important and required governance roles and responsibilities that extend beyond Health Center Program requirements.

Emerging from the pandemic, boards can benefit from reflecting on changes made to governance processes and practices during the pandemic. This will help ensure the changes do not jeopardize compliance with Health Center Program requirements. For example, a consumer board member may not have had a documented face-to-face visit in the past 24 months if they could not physically enter a health center facility during the pandemic. Do the health center bylaws, board resolution, or board-approved policies allow for a telehealth visit to be treated as a face-to-face visit, for purposes of determining who qualifies as a consumer board member?

- **Ensure the health center is continuously operating in accordance with its bylaws, including any process for amendments, and consider bylaw amendments that give the board flexibility in case of crisis.** The board must continue to operate as required by the health center bylaws. However, specific bylaw provisions may have constrained the board in circumstances where more flexibility may be needed due to the state of emergency and beyond. If this has occurred, the board may wish to consider adopting language in the bylaws that gives the board more flexibility. Specific provisions in bylaws that were regularly amended during the pandemic include:

1. **Quorum**: In the **Compliance Manual,** HRSA acknowledges the flexibility of each health center's board (subject to state law) to determine what number of board members would constitute a quorum for the transaction of business. Generally, a quorum of a simple majority is a good practice, to ensure at least one consumer board member is present at any meeting in which business is lawfully transacted. However, to provide flexibility, the bylaws might state that only during a government-declared emergency, a quorum of one-third (or some other number less than the majority) of the board members would suffice. As with any bylaws change, health center boards should confirm compliance with applicable state and local law.
2. **Executive Committee:** The Executive Committee may not meet in place of the full board to satisfy the monthly board meeting requirement. However, the Compliance Manual does allow the Executive Committee to act on behalf of the board in emergencies, provided those actions are ratified at next board meeting.[6]
3. **Virtual Board Meetings:** Boards have been meeting virtually during the pandemic. HRSA permits virtual meetings as long as all board members can hear one another and participate.[7] If this step has not already been taken, health center boards should double-check that their health center bylaws authorize virtual meetings. Furthermore, individual states vary in their open meeting law requirements (if any), which may then impact whether boards can hold meetings virtually. Each health center should analyze whether such laws apply to its organization.[8] During virtual board meetings (or hybrid meetings), boards should follow the same processes that would apply to in-person meetings, including meeting quorum requirements and ensuring meaningful participation.[9]
4. **Board Member Recruitment and Orientation:** The process for board member recruitment and education may have been

6 Note that some health center's bylaws vest the Executive Committee broader authorities than permitted in the **Compliance Manual**. If so, the bylaws should be amended accordingly.

7 Please see **Chapter 19: Board Authority,** footnote 3 of the Health Center Program Compliance Manual.

8 Open meeting laws typically do not apply to non-profits, but there may be exceptions in particular states.

9 Various resources are available regarding board meetings, including **Virtual Board Meetings: Tips for Health Center Boards** and **Hybrid Meetings: Our Next Normal?.**

adjusted given the virtual environment during the COVID-19 pandemic. However, it is important to follow the processes that have been established in the health center's bylaws. If the health center adjusted any such processes, assess whether the health center prefers the new process to the original process. For example, if the board interviewed potential board members virtually, the board should consider whether this practice is more efficient than in-person candidate interviews. All boards should consider whether their bylaws or other board-approved protocols reflect the process that will be used after the declared emergency ends. More information on good practices related to recruitment and orientation can be found in the **Governance Guide for Health Center Boards** (Chapter 2), **"Recruiting and Retaining Board Members: Considerations During and Immediately Post-Pandemic,"** and **New Board Member Orientation: PowerPoint Template & Facilitator Guide.**

- **Evaluate whether any health center policies should be modified during the state of emergency, and again after the state of emergency is lifted.** Many health centers modified certain policies (e.g., documentation of patient eligibility for services, telehealth, personnel, and financial management) to address various challenges that occurred during the pandemic. HRSA specifically acknowledged in its **COVID-19 FAQs** that health center boards could approve modifications or amendments to certain policies in response to the COVID-19 emergency. However, it is important to review the specific **FAQ** to determine how much that specific policy can be modified. Reviewing each relevant FAQ also ensures the board is informed as it determines whether to approve policy revisions.

  Examples of board-approved policies that were modified likely include:

  - **Billing and collections and/or sliding fee discounts,** including how often the health center documents a patient's eligibility for discounts off charges or nominal fees, and what documentation would be acceptable.
  - **Personnel** policies related to working remotely, furlough, sick leave, and the like. Consulting with labor law counsel is important when modifying these types of policies.
  - **Financial management** policies related to using various special federal and state funding streams to support efforts to combat COVID-19, to ensure compliance with requirements specific to each source of funding (e.g., cost center accounting, allowable costs, and reporting).

  Make sure there is documentation of board approval of significant policy modifications. Documentation might occur by board resolution, in meeting minutes, or both. Such documentation should describe the challenges in complying with the original policies because of the emergency, any legal flexibilities permitted and to what extent, and how the proposed modification would impact the identified challenges and flexibilities.

  When the emergency declaration ends, it will be important to determine whether the policy modifications continue to be permitted by HRSA, and other federal and state laws as applicable. If any modifications are still permitted, the board should determine whether the modified policies better serve the health center's interest than the old policies. For example, modified personnel policies that increase flexibility to work remotely may or may not be worth retaining. Given that the expenditure of some of the special federal and state funding streams will continue well beyond the emergency declaration, the financial management policy modifications will very likely need to continue in force.

- **Ensure documented board approval of significant adjustments to health center operations including the scope of services provided within the Health Center Project, service site location(s), and hours of operation.** Many health centers have temporarily opened new sites, closed sites, adjusted the scope of services (particularly dental services), and changed the hours of operation at specific sites. Health centers should document board approval of these decisions and any related communications with HRSA.

Ensuring the health center is providing notice to patients about temporary site and service reductions and expansions during the state of emergency has been and continues to be particularly important. For example, providing notice through multiple means of communication can help overcome the technology limitations experienced by some health center patients. A health center who followed this good practice could have provided notice in local media, public service announcements, newspaper announcements, and/or telephone calls. These notification practices will likely be worth instituting on a permanent basis, particularly since many health centers are planning additional sites, services, and hours of operation as a result of the recent federal funding infusions.

- **Ensure policies and practice comply with applicable laws or requirements regarding standards of care, patient consent, and clinical licensure.** Many states relaxed licensure requirements for different categories of clinicians. Be sure to determine whether these changes are effective only for the duration of the emergency.

DISCUSSION QUESTIONS BOARDS MAY WANT TO CONSIDER

Below are various questions that boards may wish to consider related to legal considerations and governance:

General

- Is the health center operating in accordance with its bylaws? Are any bylaw amendments needed?

Compliance with Health Center Program requirements and applicable federal, state, and local laws and regulations:

- Is the health center keeping records of all flexibilities it took advantage of during a government-declared state of emergency? Do any of these flexibilities expire when the declared emergency ends?
- Is the board receiving periodic updates about relevant federal, state, and local laws and regulations especially related to the pandemic?

Virtual Board Meetings:

- Do the bylaws allow for rescheduling a monthly board meeting or having a special meeting? If so, what is the process?
- As state or local agencies lift restrictions, such as stay at home orders, has the board consulted with local counsel prior to meeting in-person to determine when in-person meetings become permissible? Additional points for consultation include whether there are continuing legal or other restrictions (e.g., meetings are allowed if board members social distance, wear masks, or are fully vaccinated).

Telehealth:

- Does providing services via telehealth impact patient registration processes? These processes include assessing patients for sliding fee discount program eligibility (e.g., allowing for self-attestation of income).
- Has the health center management team indicated to the board that it has reviewed and confirmed that policies and operations comply with applicable laws that affect telehealth (e.g., licensing, patient privacy, informed consent, Medicare and Medicaid billing)?

Clinical Licensure

- Do the clinician licensure modifications during the COVID-19 emergency specify the type of license and type of provider (e.g., physicians, nurses, physician assistants, pharmacists, or behavioral health professionals)?
- Do these modifications require an out-of-state provider to follow a special process to practice in the state (e.g., temporary license application)?
- Has the state relaxed licensure requirements for providers or staff furnishing telehealth services?

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