



Memo

To: Kavita Mehta
 Chief Executive Officer
 Association of Family Health Teams of Ontario

From: Kathy O'Brien

Date: February 8, 2018

Re: **2018-2022 MOHLTC-FHT Funding Agreement Template**

This memo summarizes my comments on the new 2018-2022 Family Health Team (“FHT”) funding agreement with the Ministry of Health and Long-Term Care (“MOHLTC”) and also identifies any material deviations from the prior 2011-2016 form of FHT funding agreement. Where there is no material difference between the prior funding agreement and this agreement, this memo may make no comment.

Recommendations are highlighted in **bold**.

Section	Summary of Provision	Comments
Parties	The agreement is between the MOHLTC and FHT.	<p>Despite the fact that Bill 41, the <i>Patients First Act, 2016</i>, transitioned regulatory and funding oversight of the FHTs from the MOHLTC to the local LHINs by amending the <i>Local Health System Integration Act, 2006</i>, the funding itself has not yet been transferred to the LHINs. As a result, the funding agreement remains between the MOHLTC and the FHT.</p> <p>The assignment clause does allow the MOHLTC to assign the agreement, without consent, to any Ministry or Agency of the Government of Ontario – we assume this will facilitate the assignment of the MOHLTC’s role under the agreement to the LHINs in due course.</p> <p>Although the FHTs may prefer to stay under the direct regulatory and funding authority of the MOHLTC, it is inevitable (given the changes to the LHIN legislation)</p>

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		that the LHINs take over this role at some point.
Parties	This agreement requires the FHT to be incorporated as a not-for-profit corporation (unless exempted by the MOHLTC).	The requirement to be incorporated is new and is not surprising. Contracting with an unincorporated FHT can put the MOHLTC at a disadvantage because there is no clear legal entity to pursue in case of breach. Recommendation: Any unincorporated FHTs need to take immediate steps to become incorporated.
Background/ Recitals	“The Ministry and the Recipient work together to develop collaborative partnerships with other primary care practices in the LHIN sub-region to ensure access and equity in delivery of interdisciplinary primary care services.”	Unlike the previous agreement, this version contains background clauses (which can be used to help interpret the agreement obligations). This language highlights the expectation that the MOHLTC and the FHT will together develop “collaborative partnerships with other primary care practices” in the LHIN sub-region.
1.0 Definitions	The definition of “Recipient Personnel” expressly excludes the physician in the Affiliated Physician Group.	This is a welcome clarification that the FHT corporation is not liable for the actions of the physicians in the Affiliated Physician Group.
2.1 Term	The agreement commences on April 1, 2018 and ends on March 31, 2022.	This is a 4-year funding agreement with no contemplated extensions.
3.1 Composition of the FHT	The FHT shall be comprised of its voting members (as defined in not-for-profit corporation legislation), together with any advisory committees it chooses to establish.	Some (not all) previous versions of the funding agreement had prescribed that the FHO physicians must be members of the FHT corporation. It is a positive development that this agreement does not prescribe the composition of the governance structure of the FHT. The FHT corporation is therefore able to determine for itself the composition of the Board and of the FHT corporate membership. (The MOHLTC is prescriptive about other elements of the governance structure – see below under Section 5.1). The reference to “together with any advisory committees it chooses to

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		<p>establish” is a bit odd. My interpretation is that the FHT can limit its voting members as it sees fit (in compliance with the applicable legislation) and it may involve individuals in an advisory capacity outside the formal governance structure.</p>
<p>3.2 Affiliated Physician Collaboration</p>	<p>It is a condition of continued funding that the FHT be affiliated with an Affiliated Physician Group (one of: a FHN, FHO or Rural and Northern Physician Group Agreement).</p> <p>All physicians who are signatories to the physician services agreement must agree to be affiliated with the FHT.</p>	<p>Rather than focusing on involving the physicians in the FHT governance structure, this funding agreement requires an affiliation between the FHT and the Affiliated Physician Group.</p> <p>Each physician in the Affiliated Physician Group must agree to be affiliated with the FHT.</p> <p>Recommendation: To be able to demonstrate compliance with this obligation, a simple affiliation agreement may need to be signed between the FHT and the Affiliated Physician Group, with a mechanism established to have new physicians also agree to the affiliation.</p>
<p>4.1 Recipient Personnel</p>	<p>This agreement requires that all interdisciplinary team members and administrative staff be employees of the FHT, unless otherwise agreed to by the MOHLTC.</p> <p>There is a continuing obligation from the last funding agreement to ensure that:</p> <ul style="list-style-type: none"> • the terms of any employment contract are consistent with this Agreement • the FHT cannot negotiate termination payouts or severance greater than the minimum requirements of the <i>Employment</i> 	<p>I believe the take-away from this section is that the MOHLTC is requiring employment arrangements with all health care and administrative staff. Independent contractor arrangements are only permitted as an exception with MOHLTC approval.</p> <p>A FHT may question whether an employment contract is inconsistent with the terms of this agreement if it doesn't terminate on March 31, 2022 (i.e., if it extends beyond the expiry of this agreement). I do not believe so. Employment contracts can be indefinite or extend beyond March 31, 2022, as long as the severance requirements comply with the minimum requirements of the <i>Employment Standards Act</i> and common law.</p>

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	<p style="text-align: center;"><i>Standards Act</i> and common law</p> <p>There is a new, closely related requirement that the FHT cannot make any settlement offers to any employees that exceed that minimum without MOHLTC prior approval.</p>	
5.1 Governance	<p>There is a new requirement that, <i>prior to the execution of this agreement</i>, the FHT must establish a governance structure that addresses, at a minimum, the matters listed in Schedule A – Appendix 1.</p> <p>The FHT may not change its governance structure without advising the MOHLTC within 30 days.</p> <p>Schedule A – Appendix 1 requires the FHT to have, <i>as a condition of continued funding</i>, a written governance structure that addresses various issues – see comments in next column.</p>	<p>The governance requirements that must be addressed in written documents are:</p> <ul style="list-style-type: none"> • admission, withdrawal and expulsion of members (<i>this is not new</i>) • approval and review process for hiring and termination of FHT staff (<i>this is new and not usually found in by-laws – this will require the creation of a Board policy if it does not exist now</i>) • any decision of the FHT to terminate the agreement (<i>typically this would not be addressed in by-laws, but given this requirement, it should. FHTs may want to set out what threshold level of support is required to terminate the funding agreement – e.g., a simple majority of the Board; a supermajority of the Board; Board approval plus member approval, etc.</i>) • a process for monthly review and assessment of the Service Plan to determine compliance with this agreement and to develop an action plan for improvement where necessary (<i>this is new – I would argue this is a basic governance responsibility of the Board, but the by-laws or Board policy will need to expressly require this</i>) • a process to identify and manage

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		<p>potential conflicts of interest regarding the Service Plan and all members, directors and staff associated with the Service Plan, including an established protocol to disclose in writing to the MOHLTC without delay any actual or potential conflict of interest <i>(this is not new, but includes more detail – note that it is unclear whether “conflict of interest” in Schedule A has the same narrow meaning as “conflict of interest” in Section 6.2 – I would argue not – I think it is the typical definition of conflict of interest)</i></p> <ul style="list-style-type: none"> • subject to the FHT’s <i>best efforts</i>, ensure that its Board has the following adequate skill sets: <ul style="list-style-type: none"> ○ finance ○ risk management ○ human resources ○ planning ○ program development ○ clinical skills <p>If there are gaps in these skills, the FHT must make best efforts to address the gaps, either by:</p> <ul style="list-style-type: none"> • education • retaining external expertise <i>(this could be through recruiting independent directors, engaging volunteers who are not directors to act as advisors to the Board or serve on Board committees, or paying for expertise (if there are available funds))</i> <p>An annual attestation about the Board’s</p>

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		<p>skills is required – the form of the attestation is not yet appended to the agreement.</p> <p>It may be challenging for FHTs to update their governance documentation (by-laws and Board policies) to reflect all of these requirements by April 1. It’s one thing to change the documentation, and another to actually implement a skills-based Board. The FHT will have to do the exercise of determining whether its existing Board or identified candidates collectively have the required skills. If not, it can take time to find and recruit external independent directors or committee members. This is not done overnight.</p> <p>I do note that the agreement requires the FHT to use “best efforts”, which is not the same as actually being required to implement the skills-based Board on April 1st. But to meet the “best efforts” threshold, the FHT Board would need documentation in place and a plan to close any gaps in the skills matrix.</p> <p>Note also the requirement to advise the MOHLTC of any changes in governance structure within 30 days – this is not prior notice, but post-change.</p>
6.0 Conflict of Interest	<p>This provision prohibits any person associated with the FHT from having a “conflict of interest”, which is narrowly defined for this provision only as:</p> <p>“a situation in which an unqualified person associated with the FHT or any unqualified member of his or her family is able to benefit financially from his or her involvement in the FHT.”</p>	<p>This is identical to the previous funding agreement. I repeated it to show that the definition of “conflict of interest” here is much narrower than I believe is intended in Schedule A – Appendix 1, which requires a process to deal with typical conflicts of interest. I would define a typical conflict of interest, in the not-for-profit corporate setting, to be:</p> <p>“any situation that impairs or interferes with (or appears to impair or interfere with) a Director’s ability to vote objectively and in the best interests of the FHT.”</p>
6.3 Conflict of Interest	An annual conflict of interest attestation must be submitted.	I note that the form of the attestation is supposed to be attached to the agreement

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		and is missing.
6.4 Conflict of Interest	<p>The FHT must ensure that the directors:</p> <ul style="list-style-type: none"> • comply at all times with laws applicable to fiduciary laws and applicable declarations • abstain from voting on matters for which they may have a conflict of interest 	<p>Two comments:</p> <ol style="list-style-type: none"> 1. The FHT should ensure that its written governance documentation, as required by Schedule A – Appendix 1, addresses these two matters specifically. 2. FHTs that are registered charities with Canada Revenue Agency have additional conflict of interest rules at charitable law. A declaration of a financial conflict of interest is insufficient – financial conflicts of interest are prohibited.
7.1 Funding and Budget	<p>As a condition of continued funding, the FHT bank account and the FHT name under this agreement must be identical (unless the MOHLTC agrees otherwise).</p> <p>The bank account must name at least two authorized signing authorities.</p>	These are new requirements (but not onerous).
7.2 Funding and Budget	<p>The MOHLTC may adjust or suspend payment of funds for these reasons:</p> <ul style="list-style-type: none"> • failure to submit reports • failure to adhere to the Service Plan • any other breach of the terms of this agreement by the FHT or FHT Personnel 	The first bullet was in the previous funding agreement. The second and third bullets are new, but not surprising.
7.3 Funding and Budget	The FHT must expend the funding in each funding year only in accordance with the annual budget.	This is a new (but again, not surprising) requirement to expend funding in the funding year.
7.5 Funding and	The FHT may not (without the	The previous agreement also included this

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Budget	MOHLTC's prior written consent) sell or dispose of any equipment valued at \$5,000 or more.	requirement for furnishings. Furnishings are omitted here (which makes sense, since they lose value more quickly than equipment).
7.7 Revised Schedules	The MOHLTC can replace any of the Schedules (including the Service Plan and the Budget), upon consultation with the FHT.	<p>Note that the MOHLTC can unilaterally amend any Schedule to this agreement, and the FHT's only recourse is to terminate this agreement (on 90 days' notice).</p> <p>This is obviously not a particularly attractive or viable option for the FHT.</p> <p>I suspect this is not a negotiable provision.</p>
8.1 Interest	The FHT must account to the MOHLTC for interest earned in every audited financial statement provided to the MOHLTC.	This is a new requirement. The FHT should advise its auditors.
8.3 Rebates, Credits, Refunds	The FHT may not use any of the funding for any costs for which it will or can receive a rebate, credit or refund.	This new obligation puts a positive obligation on the FHT to obtain eligible rebates, credits and refunds.
9.1 Other Funding Terms	The MOHLTC can impose additional terms and conditions on the use of the funds at any time, in its sole discretion.	<p>This new power effectively gives the MOHLTC the ability to add to the FHT's contractual obligations at any time.</p> <p>This is not unusual for a government funding agreement.</p> <p>Recommendation: It would be preferable if the MOHLTC provided reasonable (e.g., at least 90 days' notice) before imposing a new term or condition, to allow the FHT time to react and to respond.</p>
10.1 No Charges to Patients	The FHT, including FHT employees, agents and subcontractors, cannot allow anyone (including a patient) to be billed for services funded pursuant to this agreement, unless specifically authorized.	This is a new requirement.
11.3 Reports	All reports, financial statements and submissions of information have to be approved by a person with	This is a new requirement.

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	authority to bind the FHT.	
11.4 Retention of Documents	All financial records must be kept for a period of 7 years from the start of the funding year to which they relate.	This is a change from the prior funding agreement, which required financial documents to be kept for 7 years from the termination/expiration of the agreement. This retention period is shorter.
11.6 Non-Compliance	Where the MOHLTC conducts an audit and the MOHLTC discovers non-compliance, it may make recommendations to the FHT on how the FHT may achieve compliance, and then the FHT has to submit to the MOHLTC a detailed plan within 14 days as to how and when the FHT will take corrective action.	This is a new requirement, but one that is aligned with other government funding agreements.
11.7 Confidentiality	The FHT has to keep all non-financial records relating to the MOHLTC, funding or Service Plan confidential.	This is a new requirement.
11.8 Privacy Practices	The FHT must have and implement information management protocols, including those relating to personal health information and protecting patient confidentiality, consistent with applicable law.	This is a new requirement.
11.9 Staff Privacy Training	The FHT must ensure that staff and independent contractors are fully aware of their privacy obligations under the <i>Personal Health Information Protection Act, 2004</i> (“PHIPA”).	This is a new requirement.
12.1 Tendering for Goods and Services	The FHT must conduct: <ul style="list-style-type: none"> • an invitational procurement process (with quotes from at least 3 vendors) for goods or services between \$10K and 	The previous funding agreement was much less prescriptive. These procurement requirements bring the FHTs in line with the procurement requirements of the broader health sector. Please note that any FHT with funding of \$10M or more must comply with the

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	<p>\$100K</p> <ul style="list-style-type: none"> • an open competitive procurement process for goods or services over \$100K 	<p>Broader Public Sector Procurement Directive.</p>
<p>13.0 Limitation of Liability</p>	<p>This provision is similar to the previous funding agreement, which generally ensures that the MOHLTC is not liable for the operations of the FHT.</p>	<p>There is helpful new language that expressly states that the FHT is not liable for the acts or omissions of the physician services provided by Affiliated Physicians.</p>
<p>14.1 Indemnity</p>	<p>This indemnity is the other side of the “Limitation of Liability” coin, requiring the FHT to indemnify and save harmless the MOHLTC from any claims (broadly defined) relating to the FHT operations, Service Plan or this agreement.</p>	<p>There are two important changes to this section from the previous funding agreement:</p> <ol style="list-style-type: none"> 1. Positive: There is a carve-out from the indemnity where the claims are solely caused by the negligence or willful misconduct of the MOHLTC or an Affiliated Physician providing physician services. 2. Negative: The previous funding agreement capped the FHT’s liability by limiting the FHT’s obligation to the MOHLTC to its insurance proceeds. There is no cap in this agreement. <p>Recommendation: The previous cap was a comfort to the FHT directors that the MOHLTC would not attempt to pursue directors personally when FHT funds were exhausted. I would recommend asking for a return of the cap or, alternatively, a commitment that the MOHLTC not seek recourse against a FHT director as long as the FHT director complied with his/her obligations under this agreement (e.g., declared conflicts, acted in the best interests of the FHT).</p>
<p>15.1(d) Insurance</p>	<p>The FHT must have at least \$2M in cyber insurance.</p>	<p>This is a new requirement. It is a prudent requirement, provided the insurance is not prohibitively expensive.</p> <p>Recommendation:</p> <ol style="list-style-type: none"> 1. Each FHT should contact its

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		<p>insurer to determine whether cyber liability insurance is part of its existing coverage or whether an additional rider with additional premiums is required.</p> <p>2. AFHTO should advocate that any additional costs for the cyber liability insurance be added to the FHT funding allocation.</p>
15.2 Insurance	<p>The FHT must have professional liability insurance for itself and its staff (excluding any independent contractors) in the amount of not less than \$5M per occurrence for bodily injury, inclusive of personal injury, death and damage to property including loss of use thereof.</p>	<p>This is a new requirement.</p>
17.1 Compliance with Laws	<p>The FHT must operate the Service Plan in compliance with all laws.</p>	<p>This is a new requirement, but not unexpected.</p>
18.1 & 18.3 Termination for Convenience	<p>Either party may terminate on 90 days' written notice to the other.</p> <p>The MOHLTC and FHT will jointly assess the state of the services and agree to a plan and budget that allows for the "reasonable and orderly wind-down of the Service Plan until the end of the notice period."</p> <p>If no agreement is reached, the MOHLTC will prepare the wind-down plan and budget.</p>	<p>There are three key differences from the previous funding agreement:</p> <ol style="list-style-type: none"> 1. The previous notice period was 60 days. 90 days is better (longer is better to allow for the wind-down). 2. I prefer the language in the previous funding agreement that committed the MOHLTC to "compensate the FHT for any amounts required by the FHT to terminate the obligations it has entered into pursuant to this Agreement". <p>Recommendation: I would prefer that 18.3 instead read: "reasonable and orderly wind-down of the Service Plan until the end of the notice period, which includes any amounts required by</p>

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		<p><i>the Recipient to terminate the obligations it has entered into pursuant to this Agreement.”</i></p> <p>3. The previous agreement made it very clear that the compensation of the FHT on wind-down applied regardless of whether the agreement was wound down voluntarily or due to breach. This agreement is ambiguous.</p> <p>Recommendation: Section 18.3 should be revised to state that it applies whether notice to terminate is given under section 18.1 (voluntarily) or under section 19.0 (termination for cause).</p>
19.1 Termination by MOHLTC for Cause	Paragraph (e) makes it a breach of the agreement where the FHT has an employed physician and that physician no longer has a Physician Services Contract in effect, which can lead to termination.	<p>This language applies to only those limited number of FHTs that employ physicians. I am concerned that it triggers breach and termination if only one physician leaves and the others remain. This would give tremendous leverage to the employed physicians, who could threaten to leave the FHT, which decision could be fatal to the FHT corporation as a whole.</p> <p>Recommendation: I would recommend that the trigger for breach to be when an employed physician leaves and there is no longer a critical mass of physicians to serve the FHT patient population.</p>
19.2 Termination by MOHLTC for Cause	In the discretion of the MOHLTC, the MOHLTC may determine a breach can be remedied and give the FHT the opportunity to remedy the breach.	<p>In the previous agreement, the MOHLTC gave 30 days to the FHT to remedy the breach. In this agreement, the language is simply “an opportunity” with no fixed remedial window.</p> <p>This is not unusual with government funding agreements.</p> <p>Recommendation: I would prefer the window to remedy the breach to be at least 30 days.</p>
20.5 Funding Upon	The MOHLTC reserves the right to demand interest on	This is a new requirement, but not uncommon.

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Termination	any amount owing by the FHT on termination.	
21.1 Accountability for Funding	The FHT agrees that any unused funds belong to the MOHLTC and shall be returned to the MOHLTC upon request.	This is a new requirement, but not uncommon.
22.1 Representations and Warranties	<ul style="list-style-type: none"> • All FHT personnel who are regulated health professionals must have the required experience, expertise, professional designations, and credentials to perform their responsibilities in a competent and professional manner • For permitted non-employees, they must carry necessary and appropriate insurance including commercial general liability and professional liability insurance (this appears to apply to administrative staff as well as interdisciplinary staff) • Contracted staff cannot be paid at different levels than FHT salary levels • There is a requirement that “no FHT-funded service provided by an IHP shall be eligible for delegated service billing” 	<p>These are new requirements, but reasonable.</p> <p>I am not sure what the final requirement means (“no FHT-funded service provided by an IHP shall be eligible for delegated service billing”).</p>
31.1 Survival	This section lists the sections that survive termination or expiration of the agreement.	This section refers to sections that do not exist – I suspect it has not been updated. This list needs to be updated before

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		finalization.
34.2 Amendment	This provision says that the agreement may be modified by written agreement of the parties.	<p>This conflicts with:</p> <ul style="list-style-type: none"> • section 7.7, which allows the MOHLTC to unilaterally alter the Schedules • section 9.1, which allows the MOHLTC to unilaterally add terms to this agreement <p>Recommendation: Refer to these sections in section 34.2: “Except as contemplated in sections 7.7 and 9.1, ...”</p>
Schedule A – Appendix 1	<p>In addition to the written governance documentation previously discussed, this Appendix also requires the FHT to:</p> <ul style="list-style-type: none"> • use best efforts to address the linguistic and cultural needs of the population served • use best efforts to advance health equity through efforts to reduce health disparities related to language, indigenous origin and newcomer status • have a dispute resolution mechanism in place 	The first bullet is a new requirement, the second and third are not.

Please let me know if you would like to discuss this summary or my recommendations.

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