



**Memo**

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

**From:** Kathy O'Brien

**Date:** March 22, 2018

**Re:** OMA Concerns about FHT Funding Agreement

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This memo provides my comments in response to the issues raised by the OMA in the OMA's March 14 legal opinion about the 2018 FHT Funding Agreement.

**Background**

By way of background, government funding agreements are always one-sided, in favour of the government. This has been my experience over more than 20 years advising the health sector. Funding agreements typically give the government wide powers to cease or suspend funding. The government often has the ability to unilaterally change Schedules.

This Funding Agreement is no more onerous than those signed by others in the Ontario health sector, including hospitals. In the case of this particular FHT Funding Agreement, the Funding Agreement is more balanced than most. I note that:

- There is an obligation for the Ministry to consult with the FHT before unilaterally changing Schedules.
- There is a cap on the FHT's exposure under the indemnity provision (limited to collected insurance proceeds), which is rare.
- There is assurance that, on termination of the Funding Agreement, the Recipient will be allowed reasonable wind-down costs.

As I have mentioned on the AFHTO webinars about the Funding Agreement, this Funding Agreement may be terminated on 90 days' notice by either party. I am of the view that it is preferable for the Ministry to have the ability to alter Schedules with consultation, rather than threatening to terminate the Funding Agreement as a lever to incent a FHT to agree to Schedule changes. Continuity of funding is the priority to ensure continued patient care and continued funding of FHT staff.

## Review of OMA Concerns

Section of FHT Funding Agreement	OMA's Concern	DDO Comments
3.1 Composition of the FHT	The risk of uncertainty arising out of the Ministry's ability to unilaterally make changes to a FHT's Service Plan (Schedule A), which sets out the obligations that a FHT is to fulfill in order to receive funding.	<p>Acknowledged this is not ideal for FHTs and creates potential uncertainty.</p> <p>However, it is common for the provider of public funds (in this case, the Ministry) to hold the right to make unilateral changes to a funding agreement.</p> <p>The Funding Agreement does give the FHT the reasonable expectation that the Ministry will first make non-binding recommendations before launching into unilateral action. This allows for a discussion.</p>
6.0 Conflict of Interest	<p>The use of the term "perceived" in connection with the conflict of interest rules in section 6.0 of the Funding Agreement is vague and subjective; the section should be limited to conduct that creates an actual or potential conflict of interest.</p> <p>The uncertainty resulting from the Ministry's unilateral ability to impose additional terms and conditions on the FHT following the FHT's disclosure to the Ministry of a conflict of interest.</p>	<p>The word "perceived" has its plain English meaning: something that can be discerned or envisioned. Much of this section is not new to the Funding Agreement.</p> <p>In Section 6.2, the Ministry has narrowed the definition of a "conflict of interest" to:</p> <p>"any situation in which an unqualified person associated with the FHT or any unqualified member of his or her family could, or could be seen to, benefit financially from his or her involvement in the FHT."</p> <p>There is also a requirement in Section 6.3 that any transactions between the Recipient and its Members and their family members must be based on fair market value and appropriately disclosed to the Ministry.</p> <p>Both of these clauses require the FHT to ensure that it is receiving fair value for the public funds received and that no one is inappropriately benefiting from public funds.</p> <p>In our interpretation, the need to notify the Ministry and the Ministry's ability to impose terms and conditions on the FHT as a result of such notification is limited to this narrow definition of "conflict of interest" – where there is an element of financial benefit involved (whether such benefit is actually obtained, can potentially be obtained, or there is a perception that it can be obtained).</p>

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7.2 Funding and Budget	The Ministry's ability to suspend or adjust funds to the FHT in proportion to the FHT's breach of the Funding Agreement; it is unclear how proportionality will be determined by the Ministry.	<p>Many contractual terms are not precisely or prescriptively defined; for instance, extremely common terms such as "material" or "reasonable".</p> <p>It would be difficult for the Ministry to set out in the Funding Agreement exactly how it will determine proportionality for the purposes of this Section 7.2.</p> <p>The Ministry would be expected to carry out the terms of the Funding Agreement in good faith, and therefore that would include its determination of an adjustment or suspension of funds that is in proportion to the FHT's breach of the Funding Agreement.</p> <p>The Ministry's right to suspend funding is not new to this Funding Agreement.</p>
7.7 Funding And Budget	The Ministry's ability to make unilateral changes to the Schedules to the Funding Agreement can be exercised "at any time" therefore, creating risk and uncertainty for the FHTs.	Yes, but there is a requirement for consultation with the Recipient. No change will come without prior discussion and an opportunity for feedback.
9.0 Consent by Ministry and Compliance by FHT	When the FHT requests the Ministry's consent as required by the Funding Agreement, the Ministry may unilaterally impose terms and conditions for the FHT to comply with when granting such consent. Again, the unilateral ability of the Ministry to impose terms and conditions creates risk and uncertainty of FHTs.	<p>Yes. It is important to note that these additional terms and conditions which the Ministry may impose on the FHT arise when the FHT requests the Ministry's consent to the FHT taking a certain action or avoiding a certain obligation under the Agreement.</p> <p>If the FHT requests the Ministry's consent, and the FHT does not approve of the terms and conditions imposed by the Ministry along with the granting of such consent, the FHT can decide not to take that certain action or avoid that certain obligation for which it initially sought the Ministry's consent.</p>
11.0 Reports, Record Retention and Information Management	In Section 11.1(b), the Ministry may request certain reports from time to time; such reports should be related to the Service Plan or	<p>We do not agree with this OMA concern.</p> <p>Section 11.1(b) provides that the FHT will: "<u>submit to the Ministry any other reports <i>related to the Service Plan, Funding or both</i> as may be <i>reasonably</i> requested by the Ministry in</u></p>

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	the funding under the Funding Agreement.	<p>accordance with the timelines and content requirements specified by the Ministry.” <i>(emphasis added)</i>.</p> <p>Additionally, the Ministry is obligated to act reasonably when enforcing this right to require additional reports from the FHTs.</p>
Section 11.0 Audits	<p>Where the Ministry conducts an audit as permitted by section 11.6, and the Ministry discovers non-compliance, it may make recommendations to the FHT on how the FHT may achieve compliance, following which the FHT will have to submit to the Ministry a detailed plan specifying how and when the FHT will take corrective action.</p> <p>It is unclear whether the Recipient's corrective plan must include the Ministry's recommendations, and if such is the case, the Ministry recommendations could go beyond simply correcting the FHT's breach of the agreement.</p>	<p>This is not a new provision.</p> <p>The Ministry's right to require corrective action only arises when the FHT is non-compliant with the Agreement. It is only reasonable for the Ministry to have powers to require compliance and to expect its recommendations to be incorporated in the corrective plan.</p> <p>We agree with the OMA that it is possible that the Ministry's recommendations may go beyond simply correcting the Recipient's breach of the Agreement – this may be appropriate where the Recipient has been demonstrated to be non-compliant with the Agreement. For example, the Ministry may require more frequent reporting from a non-compliant Recipient in order to permit more rigorous monitoring of the FHT.</p>
Section 33.2 Assignment	The Ministry may assign the Funding Agreement to another Ministry or Agency of the Government of Ontario without the consent of the FHT. While Section 19(3) of the <i>Local Health System Integration Act</i> permits such assignment to a LHIN, the inclusion of the right of assignment in the Funding Agreement precludes the FHT from arguing that an assignment to a LHIN is void or unlawful because the FHT	<p>We do not agree with the OMA's concern with this section of the Funding Agreement.</p> <p>The right of the Ministry to assign the Funding Agreement to a LHIN without the FHT's consent is already permitted by statute. Whether the assignment clauses is included or not, the Ministry has the power to assign to the LHIN.</p> <p>This assignment clause would allow the Ministry to assign the Funding Agreement to a government ministry or agency other than the LHIN.</p> <p>Note that the existing Funding Agreement is silent as to the ability of the Ministry to assign the Funding Agreement. At law there is a presumption of assignability, which would mean that the</p>

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	has contractually agreed to such an assignment.	Ministry has the right under the existing Funding Agreement to make an assignment to anyone.
Schedule A – Service Plan – Item 3 (Digital Health Requirements)	The Ministry is requiring FHTs to make reasonable efforts to ensure that the option of email communication is made available to patients. The “reasonableness” standard is ambiguous and there is uncertainty as to what the Ministry may expect a FHT to do to implement such a system.	<p>The Ministry’s decision to apply a “reasonable efforts” standard as opposed to a “best efforts” standard should provide some comfort to FHTs, the latter being a more onerous standard to meet.</p> <p>If a FHT is concerned about the ambiguity around the Ministry’s expectations for this section, the FHT should have a conversation with their respective Ministry representative to obtain better guidance.</p> <p>In our view, the “reasonable efforts” standard requires the FHT to give serious consideration to how email communications may work, taking into account available resources, privacy protections and similar risk factors.</p>
Schedule A – Appendix 1 – Governance Requirements – Item A	This section sets out certain matters that must be addressed by the FHT’s written governance structure; many of which relate to operational considerations, rather than to governance matters. Each FHT should ensure that its governance structure addresses such matters.	While it may be true that certain requirements in this Section A are more operational in nature than relating to governance, it is not surprising that the Ministry, as the distributor of public funds to the FHTs, is requiring that FHTs have certain written rules around their operations.
Other Schedules and Appendices	Certain Schedules and Appendices to the Agreement are blank and require the FHT to make certain proposals in order for them to be populated. Despite the OMAs request that the Ministry provide guidance as to the criteria that will be used to evaluate such proposals, further guidance was not provided.	The OMA reviewed a template agreement, which did not have completed Schedules. All FHTs should review the Schedules to ensure they are customized for that FHT.
Other Terms	The Ministry has verbally advised that the requirement of FHTs to use best efforts to	Agreed.

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	ensure that their Boards possess certain skills will not be enforced until April 1, 2019. This extension is not memorialized in the Funding Agreement.	<p>However, the memo from Phil Graham, Director, Primary Health Care Branch, that accompanied the Funding Agreement gives written comfort to the FHTs of this promise.</p> <p>The Ministry representatives on the AFHTO webinars also verbally reiterated that the skills based board requirements would not be enforced for a year.</p>

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