

CLINIC FUNDING COMMITTEE
THE ONTARIO LEGAL AID PLAN

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To: THE CHAIRPERSON OF THE BOARD OF DIRECTORS
OF COMMUNITY CLINICS/DEAN OF THE FACULTY OF LAW

A few months ago, the Clinic Funding Committee circulated a draft policy paper on Committee procedures and requested comments from community clinics. The Committee received comments from several clinics and will be commencing an assessment of the comments in the near future.

The Clinic Funding Committee had indicated its intention to circulate the draft policy papers to clinics on other topics. However, the pressure of other work has prevented the Committee from completing its task of preparing draft policy papers.

The Clinic Funding Committee has now decided to forward the enclosed discussion paper, prepared for the Committee by the clinic funding staff in September, 1979, and is requesting written comments from clinics. Please note that the enclosed paper is not a draft policy paper of the Clinic Funding Committee, but merely a discussion paper prepared by the clinic funding staff. The Clinic Funding Committee has not yet had an opportunity to consider this discussion paper and will consider it in the future in light of comments received from clinics.

If your clinic wishes to make comments on this discussion paper, please submit them to the Committee before May 30, 1980. Comments may be forwarded to the Committee in care of the Clinic Funding Manager.

With best wishes.

Yours truly,

P. Tobias per J.M.

Peter Tobias
Chairman
Clinic Funding Committee

PT*sa
Encl.

DISCUSSION PAPER

APPEALS, REFERENCES AND OTHER HEARINGS

The new Regulation on clinic funding provides for the Clinic Funding Committee to function as an appellate tribunal. The functions are set out in s.148 and include:

- (i) S.148(1)(c) (reviewing and recommending initial decisions of the clinic funding staff);
- (ii) S.148(1)(e) (hearing appeals from initial funding decisions);
- (iii) S.148 (1)(f) and s.149(3)(b) (entertaining references from the staff);
- (iv) S.148(1)(g) (hearing and resolving other disputes between a clinic and the clinic funding staff); and
- (v) S.150(4) (providing for the Committee on its own motion to hold a hearing and to review the initial decision of the staff in relation to any application for funding).

All of these functions require procedures to ensure that the Committee can act as an impartial appellate tribunal.

Mr. Justice Grange considered that the Committee and the staff should act independently in relation to funding decisions; he stated:

"The staff should make all the funding and defunding decisions in the first instance. If, for any reason, the staff wish to consult with the Committee upon a funding problem with a clinic before making a decision, it should do so only on notice to the clinics and the problem should be resolved in a hearing. Otherwise, all funding and defunding decisions should be taken by the staff after negotiations, if it sees fit, with the clinic concerned. Thereafter, the clinic may appeal the decision to the Committee or seek leave to appeal as hereafter described".

The recommendations of Mr. Justice Grange have been kept in mind in evolving the following procedures pursuant to the Regulation:

1. Reviewing and Recommending Initial Funding Decisions (s.148(1)(c))

S.148(1)(c) directs the Committee to review the initial decision made by the staff and to make a recommendation to Convocation. Prior to making its decision, the clinic funding staff will have conferred with the clinic pursuant to s.149(3)(a). The clinic will have indicated in writing its acceptance of this decision prior to its being forwarded for review and recommendation. Thus, the clinic funding staff will forward an initial decision to the Clinic Funding Committee only where the clinic is in agreement with the staff's decision.

However, s.148(1)(c) permits the Clinic Funding Committee to impose additional terms and conditions of funding at the time of its review. This power presents a dilemma in the sense that a term or condition may be imposed by the Committee which has not been considered by the clinic funding staff or by the clinic, and about which the Clinic Funding Manager, at the stage of the Committee's review, may be unable to offer any factual information. As a result, the Clinic Funding Committee will be deciding to impose terms or conditions of funding without adequate information or advice either from the clinic concerned or from the clinic funding staff.

In this situation it is appropriate for the Clinic Funding Committee to defer its decision to fund, and to forward a letter to the clinic, indicating the Committee's wish to impose terms and conditions of funding other than those agreed upon between the clinic funding staff and the clinic. A copy of the letter to the clinic should be forwarded to the clinic

*Good point
also, clinic will
have no
opportunity to
present its
position or
these
conditions*

reasons for conditions

what are
specified
periods of
time?

funding staff, and the letter should indicate that the clinic must inform the clinic funding staff, within a specified period of time, whether it is prepared to accept the terms and conditions of funding as suggested by the Clinic Funding Committee. In the event that the clinic decides to accept the proposed terms and conditions within the specified period, it will inform the Clinic Funding Manager who will then present the proposal for funding to the Clinic Funding Committee for its review and recommendation subject to the new terms and conditions.

redundant
work
should be
deleted

In the event that the clinic does not agree with the Committee's proposed terms and conditions, it may present written submissions to the Clinic Funding Committee within the specified period, indicating its reluctance with reasons to accept the terms and conditions as proposed. A copy of the letter to the Committee should be forwarded to the Clinic Funding Manager, and the clinic funding staff should submit, within a similar period of time, its written recommendations in relation to the clinic's submission, with a copy to the clinic. After considering these written submissions, the Committee may decide whether to recommend funding and impose its terms and conditions. In the case of those clinics entitled

Why no
hearing
here?

as of right to an appeal in s.150(2), the Clinic Funding Committee should afford an opportunity for a full hearing prior to imposing the terms and conditions, simply because the clinic would have been entitled to an appeal if it had not agreed with the staff's initial decision. In all other cases, the Clinic Funding Committee may decide whether to impose terms and conditions on the basis of written submissions. The Clinic Funding Committee should forward its recommendations for funding to Convocation at the conclusion of its determinations.

s.150(2) relates
only to
decrease in
funding, not
terms and
conditions, so
is inapplicable
here

what about
leave to
appeal after
terms & cond'ns
are issued?
affect policy
(s.150(3))

allow
over
hearing
automatically
here?
are they
first to
JC & C

2. Appeals from Initial Funding Decisions (s.148(1)(e))

S.148(1)(e) of the Regulation on clinic funding provides for the Committee to hear appeals from initial funding decisions made by the staff. S.150 of the Regulation sets out the circumstances in which appeals may be heard. In particular, s.150(2) provides that an initial decision made by the staff that funding for an "established clinic" be refused or reduced from the amount paid to the clinic in the previous year, requires the staff to give notice of the decision to the clinic with written reasons, and that an appeal lies from that decision to the Committee. In addition, s.150(3) provides that where the staff makes an initial decision other than that in s.150(2) or a decision to recommend funding as requested by a clinic, the staff must give notice of the decision to the clinic with written reasons, and the clinic may appeal to the Committee with leave.

It is necessary for the clinic funding staff to provide written details of its decision with reasons, to the clinic concerned. The letter forwarded from the clinic funding staff to the clinic should also contain information about appeal procedures. Since an "established" clinic is defined by the Regulation in s.146(1)(f) to mean a clinic which has been funded under the Regulation for at least 24 successive months, the wording of the letter to be sent to a clinic will depend upon whether it comes within the definition. S.150(2) permits a right of appeal to an "established" clinic where the decision of the staff effectively refuses funding to the clinic or reduces the amount of its funding relative to the previous year. Therefore, a clinic whose funding is not reduced from the amount in the previous year, even though it is not funded according to its request, is not entitled to an appeal as of right pursuant to s.150(2). Taking into

account the fact that the costs of running clinics will increase from year to year, it is obvious that the inflation factor will generally mean that even an established clinic will receive more funds in each successive year. As a result, it will only be a significant decision to reduce funds below the level of the previous year, which will entitle a clinic to a right of appeal.

crucial timing

Since most appeals will occur during the annual funding cycle which takes place during a reasonably short period of time in the months of January, February and March, the timing involved is crucial. At the present time, clinic requests must be submitted by January 15 in each year. Between that date and April 1, it is necessary for the clinic funding staff to confer with clinics and to make all initial decisions and for the Clinic Funding Committee to review them, report to the Legal Aid Committee, and make recommendations to Convocation. Only after all of this is completed can funds be provided for the new fiscal year. As a result, it is clear that any appeal process must be expeditious.

The clinic funding staff has considered the nature of the workload and the above constraints in the context of the application process to be undertaken in January, February and March, 1980 in respect of the 1980/81 fiscal year. It is proposed that the initial consideration of requests and conferring with clinics by the clinic funding staff should occur between January 15 and February 26; by the latter date all letters confirming the initial decisions will be sent to clinics. Each clinic will be advised that its acceptance of the initial decision or its notice that it intends to appeal or seek leave to appeal must be received by the clinic funding staff within 10 days. Thus, all clinic responses to the initial decisions

Some periods of today's, some 14-17 should all be less confusing, 14-17 gives more time for out of town clinics

mail, out of town clinics → too short, ...

Dec 15 - date for applications

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should be received at the latest by March 7. The Clinic Funding Committee can then meet to review the acceptances on March 10 and 11, in order that a report can be presented to the Legal Aid Committee on March 12 and forwarded for approval to Convocation on March 21. Thus, clinics which agree with the initial decisions will all be able to receive funding by April 1.

Where the clinic is not satisfied with the initial decision of the clinic funding staff, it should proceed as follows:

- a. In the case of an appeal pursuant to s.150(2) (funding for an established clinic is refused or reduced), the clinic must submit and the clinic funding staff must receive a Statement of Position, setting out the grounds of the appeal and the issues to be considered within 14 days after notifying the clinic funding staff of its intention to appeal. The clinic funding staff must then respond with its Statement of Position which must be received by the clinic within 14 days. Upon the request of the clinic or the clinic funding staff, the Clinic Funding Committee will make arrangements for an oral hearing, which should take place in the latter part of March. In this way, the Clinic Funding Committee may make appeal decisions which would be ready for the Legal Aid Committee on April 10 and Convocation on April 18.

Automatic hearing should be asg nsh

In the past, when funding approval by Convocation has not been obtained by April 1, funds have been made available to clinics for the interim period at the rate

approved for the previous fiscal year, although there is no specific authority in the Regulation for such an arrangement. The new Regulation provides in s.151(6) that the Director may issue a "back-dated" certificate but does not specifically authorize funds for an interim period. However, in order to avoid inhibiting clinics from pursuing appeals, it will probably be necessary to continue this practice.

- b. In the case of a clinic which may request leave to appeal pursuant to s.150(3), the clinic must submit and the clinic funding staff must receive a written Request for Leave to Appeal with reasons within 14 days after the clinic has notified the clinic funding staff of its intention to request leave to appeal. The clinic funding staff must then submit its response, and the clinic must receive the response within 14 days. The Clinic Funding Committee should consider these written submissions and decide whether to hold an oral hearing. In the event that the Committee decides not to conduct a hearing, the Committee shall decide whether to grant leave to appeal, and there shall be no further appeal from this decision. Otherwise, after an oral hearing, the Committee shall decide and there shall be no further appeal. Where the Committee decides to grant leave to appeal, the procedures shall be as stated above. In all cases, the oral presentation by the clinic

This should happen with clinics that are being defunded -> continue funding at old rate until appeals exhausted must be formalized

is oral hearing leave to appeal hearing or appeal hearing?

is there 2 hearings (leave to appeal & appeal) or are they simultaneous

Should be not

and the clinic funding staff should be confined to the ^{issues} material contained in written submissions.

The Clinic Funding Committee should exercise a consistent policy in deciding whether to grant leave to appeal. If leave is granted on a regular basis, it will probably weaken the ability of the clinic funding staff to make informed initial decisions because a clinic may be unlikely to participate in negotiations with a view to reaching an agreement acceptable to both parties. However, the Clinic Funding Committee, as a policy-making body, should grant leave to appeal in any circumstance where an absence of policy or an ambiguous interpretation of policy by the clinic funding staff is at issue. As a result, it is essential that the written Request for Leave to Appeal should set out specifically the issues of policy raised by the staff's initial decision, and the arguments during any oral hearing should be confined solely to these issues. Where the staff's initial decision was made as a result of funding criteria contained in the Regulation, or on a policy matter particularly respecting funding priorities, which has been adopted by the Clinic Funding Committee, no leave to appeal should be granted.

The Committee should ensure that the presentations at an oral hearing of the clinics and the clinic funding staff should be confined to the ^{issues raised in} written submissions. Further to this, the actual length of time for the hearing should not exceed a definite period except in unusual situations; a limit of one-half hour is suggested for each party to the proceedings. The Committee may permit the clinic to reply, ^{and} ~~but~~ ^{also} direct it to respond to specific aspects of the clinic funding staff's position. The Board of the clinic will obviously have standing before the Committee, but the Board

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*too narrow →
Should believe
if alleged that
staff decision
is clearly
wrong but
no routine
leave to appeal*

*Just too
consider
problem of
funding
priorities or
policies that
conflict.*

*no time
limits
this could
really
be bad
should be able
to keep it
never happens
in except is
leave to
appeal*

argue

*provide
conflicting
interpretation
of policies*

this is prerogative of Bd

can't require this

-9-

may direct one member of its staff to present its position so long as the Board is represented at the hearing. The clinic funding staff also has standing, and the Clinic Funding Manager will direct one member of staff to present its position. In its discretion, the Committee may arrange for the recording of the proceedings. After the hearing, the Clinic Funding Committee shall decide the appeal and shall notify the parties in writing with reasons.

3a) References Pursuant to s.149(3)(b)

Pursuant to s.149(3)(b), the clinic funding staff may refer any application for funding to the Committee, giving notice of referral to the clinic together with its reasons. Thereafter, it is the right of a clinic to request a hearing. *and obtain a hearing.*

It would seem that s.149(3)(b) exists in the Regulation to permit the clinic funding staff to obtain direction from the Committee in circumstances where the staff is unable otherwise to make an initial decision pursuant to the procedures outlined in s.149(3)(a). Such a situation would exist where no policy directive is applicable to the particular set of circumstances. In this situation the procedure should be that the clinic funding staff refers the policy issue to the Clinic Funding Committee for directions. At the same time, the clinic funding staff must notify the clinic of the reference with its reasons, indicating the perceived absence of policy which would allow an initial determination to be made. The clinic should be notified of its right to request a hearing, such request to be received by the clinic funding staff within 10 days.

Should be broader

namely also conflicting policy directives or part of staff

does this request include reasons

At the hearing, the clinic and the clinic funding staff will be able

- clinic should receive staff's submissions in advance, as in appeals

Adair's better

/....

to appear and offer submissions relating to the specific policy issued

The Clinic Funding Committee will then make a policy determination in

relation to the specific application and refer the determination back to

the clinic funding staff. ^{for implementation} With this new policy directive, ^{has been established} the clinic

funding staff shall proceed to make its initial decision with respect

to the clinic's application for funding, and where the clinic and staff

reach agreement, the initial decision will be forwarded to the Clinic

Funding Committee for review and recommendation. In the event that the

clinic does not agree with the staff's initial decision it may appeal

pursuant to s.150(2) or (3), whichever is applicable, as set out above.

It is clear that such an arrangement allows a reference only in

relation to a policy issue rather than an actual application. To this

extent, s.149(3) (b) may be misleading in the sense that the section appears

to suggest that the Committee would deal with the application as a whole.

However, if the Committee has dealt with an initial decision, it will be

unable to hear an appeal, thereby effectively depriving that clinic from

an appeal to which it would otherwise have been entitled. In addition,

the Committee would be required to spend an inordinate amount of time

on application details. For these reasons, it is more appropriate for a

reference to concern itself with only that part of the application for

which there exists no policy direction.

It may be preferable to confine the use of the reference provision

generally to applications which are considered other than during January,

February and March of any year. During these months; it may be more

appropriate for the staff to make an initial decision and for the Committee

or other matter

this is staffs interp.

this could function as an appeal

misinterpreted
? this makes sense not necessarily

this is bad Jan-Mar is when all these funding ?'s will come up

gives policy making authority to staff in effect

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to deal with the issue of policy by way of appeal to expedite the entire decision-making process. However, it is important to recognize that only a very few of these clinics will be entitled to a right of appeal pursuant to s.150(2), placing those clinics who must seek leave to appeal in a precarious position unless the Committee decides to grant leave routinely wherever the absence of policy or ambiguity in policy interpretation is at issue, as recommended above.

S.149(3) (b) directs the Clinic Funding Committee to grant a hearing on request by the clinic. There is no provision giving the same right to request a hearing to the clinic funding staff, although it may desire a reference itself. As the Clinic Funding Committee has the power under s.148(1) (h) to determine its own practice and procedure in relation to hearings and appeals, it is suggested that it grant a hearing in a reference situation whenever requested by the clinic funding staff also.

A general notification of a reference to the Committee may be made to all clinics where they may all be affected by a policy directive; however, only the clinic whose application is under consideration should have standing before the Committee. The general notification may assist that particular clinic in organizing its presentation for such a hearing.

3b) References Pursuant to s.148(1) (f)

Pursuant to s.148(1) (f) the Clinic Funding Committee can entertain a reference from the staff on any funding matter. This section appears to be drafted more broadly than s.149(3) (b) so that it would permit the clinic funding staff to refer any matter for direction to the Clinic Funding Committee regardless of whether or not a specific application exists.

*probably
s.150(2) not
involved, as
this affects
policy, not
amt of \$*

*What does
this apply
to?
does CFC
have staff*

*not
appropriate
on basis
clinic to
view others
might be conflict*

*allow
leave to
appeal
not rel
I have CFC
make decision
on my- itself*

In these cases, the clinic funding staff should request direction from the Clinic Funding Committee in writing, after submitting a background paper concerning the policy decision to be made. To date, the Clinic Funding Committee has circulated its draft policies to clinics for their comments prior to making final policy decisions. In the event that clinics apply to be heard orally on policy issues, the Committee may, in its discretion, conduct such hearings as are appropriate to the policy issue under consideration.

S.148(1)(f) provides for a reference to the Committee from the staff.

It is also suggested that clinics should be afforded the opportunity to make references for policy-making purposes to the Clinic Funding Committee, although there is no provision for this in the Regulation. Under s.148(1)(h) the Committee is able to make a policy directing the clinic funding staff, on the request of any clinic, to refer a matter for policy direction

to the Committee. To keep this policy workable, however, it is suggested that the staff be required to refer an issue only in a case where at least two-thirds of the clinics make the request. The clinic funding staff may, however, refer any matter to the Committee at the request of any clinic or clinics at any time.

4. Hearings to Resolve Disputes Between Clinics and the Clinic Funding Staff (s.148(1)(g))

S.148(1)(g) provides that the Committee will hear and resolve disputes (other than those under s.149) between a clinic and the clinic funding staff which the Committee considers it "appropriate to hear". The clinic shall forward such a dispute, in writing, outlining the nature of the problem directly to the Clinic Funding Committee. The letter from the clinic should be addressed to the Chairman of the Clinic Funding Committee with a

clinics should be able to make submissions here as well

Should continue to do so

8 staff has standing under 148(1)(b) clinics should under 148(1)(f)

power to determine own practice procedure

this totally kills the effect of that provision also how does clinic bring about need for reference to attention of Committee

Give very broad discretion to staff to determine what policy issues go to the committee? severely limits ability of clinics to speak to policy issues

notation on the outside of the envelope to the effect that it is a dispute. Such correspondence will be forwarded to the Clinic Funding Committee without being opened by the Clinic Funding Manager, and the Chairman of the Clinic Funding Committee will place the dispute on the agenda for discussion at the next meeting of the Committee, at which time the Committee shall request the Manager to withdraw.

This section provides that the Committee will decide disputes "where it considers it appropriate". Therefore, the Committee must decide initially, on the basis of the written submission from the clinic, whether to proceed to determine the dispute. In some circumstances, the Committee may decide not to hear the dispute and the Chairman should forward a letter to the clinic to that effect with reasons.

If the Clinic Funding Committee decides to hear the dispute, it shall write to the clinic indicating its intention, and shall forward copies of the letters of the clinic and the Committee to the clinic funding staff. Prior to deciding the dispute, the Clinic Funding Committee shall provide an opportunity for submission of positions by both the clinic and the clinic funding staff. Generally, these submissions should be in writing, although on request of either the clinic or the clinic funding staff the Committee may decide to hold an oral hearing. After making a decision, the Committee shall notify the clinic and the clinic funding staff, and shall make any directions appropriate to implement its decision.

The Clinic Funding Committee may establish time periods and specific procedures in relation to particular disputes, and shall so inform the clinic and the clinic funding staff in relation to each dispute.

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*Minimum
agendas?
should be
standard
procedure*

5. Hearings Initiated by the Clinic Funding Committee (s.150(4))

S.150(4) provides that the Committee may, on its own motion, hold a hearing to review the initial decision of staff in relation to any application for funding. The guidelines for reviewing initial decisions of the staff on its own motion must be considered in the context of the review and recommendation power of the Committee pursuant to s.148(1)(c).

There are two main situations in which the Committee may decide to hold a hearing in order to review the staff's initial decision. First, in situations where the clinic funding staff has made an initial decision with which the clinic has agreed in writing, the clinic funding staff forwards its decision to the Committee for review and recommendation. In circumstances where the Committee decides to conduct a hearing in the process of reviewing this initial determination, the Clinic Funding Committee should give notice of this intention with written reasons to the clinic and the clinic funding staff, and request written submissions from them on the matter. Where either the clinic or the clinic funding staff requests an oral hearing, the Committee shall set a date, at which time both parties will make oral presentations consistent with but not exceeding their written submissions. Once the Committee has decided the matter and the clinic has indicated its acceptance in writing, the Committee shall forward its recommendation to Convocation.

The second situation may occur where the clinic funding staff has informed a clinic of its initial decision and the clinic is not satisfied. In some circumstances the clinic may request an appeal or leave to appeal and may be so entitled. However, in some circumstances, the appeal period may have expired before a clinic can request one, and, in these cases, the

clinic funding staff will routinely make reports to the Committee on its negative determinations. The Clinic Funding Committee may then invoke s.150(4) to conduct a hearing into the staff's determinations although it is under no obligation to do so. At the request of either the clinic or the clinic funding staff, the Committee may, in its discretion, hold a hearing and review the decision of the clinic funding staff.

6. Notes on Procedures

In general, in all matters other than those falling within s.148(1)(e) (and s.150(2) and (3)), the Clinic Funding Committee should request written submissions within 14 days from the clinic and, upon their receipt, the clinic funding staff should have a further 14 days to make its own submissions. These general provisions may be enlarged or abridged by consent in writing of the clinic and the clinic funding staff or, in the alternative, by direction of the Committee in the absence of consent. In relation to the 14-day period, it is suggested that the civil litigation provisions should apply so that service of such documents will be effected on the fourth day following the date when a letter is sent (and notice of these provisions for counting days of service should be set out all in letters relating to procedures about appeal periods). Of course, where letters are hand-delivered, the day of service will be the date of delivery; it may be necessary, particularly in the annual funding process, for hand-delivery of letters by both the clinic funding staff and the clinic.

It is also important for the Clinic Funding Committee to impress upon the clinic Boards the time constraints of the annual funding process during January, February and March in order to ensure their availability.

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*Toronto
Isolationist
- unclear to
out of town
clinics.
requiring
hand delivery
to meet
procedure*

The Committee should ascertain the time-frame for the decisions by the staff and by the Committee, and should notify the clinics well in advance so that the application process can work smoothly and efficiently.