

## Streamline fair hearings for APPs, but don't cut corners

The fair hearing process for medical staff members outlined in the Health Care Quality Improvement Act (HCQIA) is pretty cut-and-dried, but what about fair hearings for advanced practice professionals (APP)? Details for medical staffs tend to get a little hazy when it comes to determining what constitutes a fair hearing for APPs. Although these practitioners are credentialed and privileged through the medical staff, the majority of APPs are not technically medical staff members. This means they often aren't granted the same hearing rights as physicians, and that can lead to medical staffs getting dragged into court for charges of discrimination or antitrust.

CPRLI talked to several experts to help you avoid a court appearance based on these charges.

### What is the APP's relationship to the medical staff?

Before jumping into the ins and outs of the fair hearing process for APPs, it is important to understand these practitioners' relationship to the medical staff. According to The Greeley Company's *Advanced Practice Professionals Manual*, APPs are credentialed and privileged through the medical staff, but they are generally not eligible for medical staff membership (some states allow nonphysician practitioners to be medical staff members, but many do not). Psychologists, physician assistants, and advanced practice RNs, including nurse-midwives, nurse practitioners, nurse anesthetists, and clinical nurse specialists, are all considered APPs.

Whether fair hearings occur for APPs depends on their relationship to the hospital. APPs may be independent practitioners, employees of the hospital, employees of a physician on the medical staff, or employees contracted through a medical group.

Generally, employed or contracted APPs are not granted the right to a fair hearing at all, or they are not granted the same kind of hearing as that granted to medical staff members, says **Michael R. Callahan, Esq.**, an

attorney at Katten Muchin Rosenman, LLP, in Chicago. This is because most contracts between hospitals or physicians and APPs specify that an APP does not have the right to a fair hearing if his or her employment is terminated because the APP is not a member of the medical staff, explains Callahan.

However, independent APPs, although a minority, are usually granted fair hearing rights under medical staff bylaws because The Joint Commission (formerly JCAHO) requires some type of review process for independent practitioners. Even if your facility is not Joint Commission-accredited, medical staffs should do this out of fairness and to protect themselves from accusations of discrimination or anti-trust.

### What triggers a fair hearing for APPs?

The answer to that question will depend on what is outlined in your medical staff bylaws. But as a general rule, the same events that trigger fair hearings for physicians trigger fair hearings for APPs. These may include quality-of-care concerns and violations of medical staff bylaws or hospital procedures.

The sample bylaws language on p. 6 is developed by The Greeley Company and will help you determine when a fair hearing for an APP should be triggered.

### What fair hearing rights are afforded to APPs?

Joint Commission standard MS.10.01.01, element of performance 1, states that the medical staff must develop a fair hearing and appeals process that may differ for members and nonmembers of the medical staff. Medical staffs are left to decide how the process will differ, but they should always include four key rights, Callahan says. Medical staffs should:

- Give the APP written notice that corrective action is being taken against him or her. This notice should also detail the reasons the medical staff has decided to recommend corrective action.

> continued on p. 6

## APPs

< continued from p. 5

- Provide the APP with documents that support the medical staff's recommendation to take corrective action, such as meeting minutes and performance reports.
- Provide an opportunity for the APP to defend himself or herself (in other words, provide a fair hearing).
- Allow the APP to hear feedback from the individuals who have spoken up against him or her during the hearing.

"There is no magic formula, but these are the key features in order to be fair and less susceptible to challenge," says Callahan.

Although some medical staffs choose to offer APPs the same fair hearing rights as physicians, others offer far fewer. They may choose to eliminate the following:

- The right to have counsel present during the hearing
- The right to have a fair hearing officer present

- The right to directly examine and cross-examine witnesses

Although no law precludes medical staffs from giving APPs these rights, many choose not to in an effort to streamline the fair hearing process, Callahan says.

### Who is involved in a fair hearing for an APP?

Many medical staffs scale down the number of people involved in an APP hearing to simplify the process. A fair hearing for a physician typically involves the physician in question, a fair hearing committee made up of a handful of individuals, a hearing officer, the hospital's legal counsel, and the physician's counsel.

"For APPs, the fair hearing might just involve the department chair and a couple of members of the medical executive committee," says **Mary Hoppa, MD, MBA, CMSL**, senior consultant at The Greeley Company, a division of HCPro, Inc., in Marblehead, MA.

### Sample bylaws language: Fair hearings for APPs

Whenever the activities or professional conduct of an advanced practice professional (APP) adversely affect or are reasonably likely to affect patient safety or the delivery of quality patient care, or are disruptive to the organization's operations, the matter may be referred to the credentials committee (or other appropriate committee), which shall review the matter or designate an ad hoc or existing peer review body to perform the review. The matter may also be handled by the employing organization as described in organization-specific policies and procedures (applicable to hospital-employed APPs only). External third parties may be used by the credentials committee to conduct all or part of the review or to provide information to the review body. The review may involve an interview of the APP involved, his or her supervising physician, and other individuals or groups.

Source: *The Greeley Company.*

### Who makes the final decision?

When deciding who will hear the case and make a recommendation or decision regarding the APP's privileges, remember that committees made up of multiple members often make more balanced recommendations or decisions than a single individual, says **George Indest, Esq., MPA, LLM**, managing partner at The Health Law Firm in Orlando, FL.

"To me, having a committee involved is always more preferential to having an individual making a decision. With a committee, you are far more likely to have a comprehensive evaluation of the underlying facts and, therefore, more likely to have a correct decision," says Indest.

However, some medical staffs simply do not have enough medical staff leaders to form a fair hearing committee, or the leaders available may pose a conflict of interest. These organizations may choose to have a single individual oversee the hearing.

Whether you choose an individual or a committee, consider selecting individuals who practice in the same or similar specialty as the APP. This often means that the chair of the department in which the APP practices oversees the hearing. If a committee is involved, the committee likely includes physicians from that department as well.

However, committee participation from within the same department may cause real or perceived conflicts of interest. It is important to build some flexibility in your fair hearing process by allowing other specialties to participate, says Callahan.

For example, if a nurse-midwife has been summoned for a fair hearing due to legitimate quality concerns, having the chair of the obstetrics department oversee the fair hearing may not pose a conflict of interest. However, if the midwife believes that the complaints against her are made with the intent to drive her out of the hospital, having the chair of the obstetrics department oversee the hearing would appear to pose a conflict of interest. In such a case, the medical staff may decide to have the chair of the surgery department oversee the case. The surgery chair should be familiar enough with OB/GYN procedures to determine whether the midwife's performance was appropriate, but he or she should be far enough removed from any conflict of interest to remain objective.

Another way to build flexibility (and legal protection) into the process is to give final decision-making power to the board of directors or the hospital's CEO. If the department chair or committee overseeing the fair hearing makes the final decision, and the APP alleges a conflict of interest, "that could arguably raise discrimination or anti-trust issues," says Callahan.

Leaving the last word up to a higher administrator can help legally protect the physicians. "If you get the hospital's blessing, either in the form of an appeal or review, that has the effect of insulating the physicians from legal action [by the APP]," Callahan says.

### **Do hospitals have to report APPs to the NPDB?**

Hospitals are not obligated to report APPs who have had actions taken against their privileges to the National

Practitioner Data Bank (NPDB), so many of them don't, says Callahan.

However, many state medical boards have reporting requirements, usually regarding impaired practitioners. Check with your state's medical board to ensure that your organization is in compliance.

"The reporting obligations may, in part, drive your process because you are trying to gain certain legal protections or there may be a mandated process," Callahan says.

### **What laws govern the fair hearing process for APPs?**

As mentioned earlier, HCQIA is a federal statute that specifies the fair hearing process for physicians. Although guidelines for APPs are not mentioned specifically in the statute, it's a good idea to use it as a blueprint for developing a fair hearing process for APPs, says Indest.

Individual states also have laws regarding the fair hearing process. Visit your state's medical board's Web site to obtain a copy. And don't forget that following medical staff bylaws is the primary defense against being taken to court by disgruntled practitioners.

"There is possible civil liability on the part of the hospital and the individuals involved in the process if you do not follow what is in your medical staff bylaws or what is required by state law or the federal Health Care Quality Improvement Act," says Indest.

Although many medical staffs provide APPs with a pared-down hearing process to save time and expense, Indest says anyone involved in the fair hearing process at the medical staff or hospital level should strive to provide APPs with a hearing process similar to that provided to physicians.

However, Hoppa says that medical staffs need to closely consider how far they want to delve into the fair hearing process. "We want to be fair and stay within regulatory constraints, but we don't want the process to get any more burdensome and time-consuming than it needs to be," she says. "Using a less burdensome process while remaining fair to the APP seems to offer the best of both worlds." ■