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Exceptional Children’s Division

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**Contracting: Issues to Consider Regarding Related Services & Medicaid**

***Adapted from PT Magazine Deborah Shefrin, PT, JD; July 2006***

***Kathy Lewis, PT, JD; October 2006 & January 2007***

In order to successfully provide related services to students with disabilities, a local education agency (LEA) must maintain stable, competent, and content staff. This requires strong leadership, an inclusive work culture, and a clear understanding of job responsibilities and expectations from both parties.

LEAs may directly employ and/or contract therapists. A myriad of federal and state laws and regulations are relevant in the administration and management of related service personnel, including: Americans with Disabilities Act, IDEA, national board certification, state licensure, state and local educational policies, tax law, equal employment opportunities, Medicaid policy and labor laws.

Taking the time to develop an understanding of employment contracts will ensure a clear understanding by both parties when employing directly or contracting.

**Must It Be in Writing?**

Putting contracts in writing is rarely required by law. However, it is a good and wise business practice to record all contracts in writing. Even when both parties have had detailed discussions and have verbally agreed on specific terms, an employer should offer a written contract. The process of writing a contract allows misunderstandings regarding specific provisions and responsibilities to occur during negotiation and be clarified to each party. It also leaves less room for interpretation, disagreement and argument about the provisions to which the contracting parties agreed. Your goal when drafting a contract is to create a clear, concise, and complete description of the agreement.

* Terms of the contract must be precise, mutually understood and legally enforceable.
* An outsider should be able to clearly understand the contract (e.g. what the parties agreed to) by reading the contract.
* Terms of the contract should be spelled out in writing. If a term is important enough to discuss, it is important enough to be included in the written contract.
* If you use a template, perhaps downloaded from the Internet, do so with caution, as one size does not fit all. Contract templates available on the Internet can serve as helpful resources for identifying issues to consider, but they usually are not comprehensive and are unlikely to be tailored to your specific needs. A template may not reflect current law and/or the laws applicable to your state. Consider consulting your LEA’s attorney and/or DPI’s related service consultants prior to finalizing any contracts.

**Contracting 101**

The goal of creating an employment contract is to neutralize risk for both employer and employee. Creating a contract should ensure the needs of the employer match with the abilities and skills of the prospective employee, clarify points of confusion, and, ultimately, negotiate the specific terms of employment.

An employment contract should include fundamental components such as:

* The parties’ legal names,
* The employee’s profession and credentials (e.g., therapy licensure and certifications)
	+ LEAs can require, in the employment contract or an attachment to the contract, that the employee maintain all appropriate licenses, obtain a National Provider Identifier, and meet all legal and professional standards. If requirements are specified in an attachment, the contract should reference the attachment and permit revisions to the attachments without rewriting the contract. Some employers prefer to have sole authority to make changes, while others opt to require both the employer and employee to sign off on and date any changes to the attachment.
	+ The incorporation in employment or independent contractor agreements of clauses requiring compliance with billing procedures and policies and regular review of records can minimize the potential for fraud and abuse that could cause financial distress, criminal penalties, and disciplinary actions. Given an increase in fraud and abuse enforcement, it is more important than ever that billings are completely accurate and comply with all regulations.
	+ To ensure employer awareness of detrimental information about the employee or independent contractor that could adversely affect the practice, the employment contract or independent contractor agreement could require the staff person to inform the employer about such developments as disciplinary actions related to licensure, felony convictions, charges of moral turpitude, and material changes in professional credentials. Specific events that the employee or independent contractor must report should be listed in the contract, lest a court find the clause vague and thus unenforceable.
* The roles and responsibilities for both employer and employee (reflecting all applicable professional and legal standards),
* The employment relationship’s specific nature (e.g., traditional employment or independent contractor) and
* The complete compensation package, including the amount and payment frequency of a fixed salary and such benefits as insurance coverage, parking or travel reimbursement, payment of licensure or professional association fees, allowances provided for continuing education and professional development, attainment of special certifications, professional liability insurance, vacation and sick leave.
	+ Compensation varies with each contract. Some negotiate a flat rate for service, some have varying levels of hourly compensation for different tasks (i.e. service delivery or evaluation vs. time for meetings or documentation).
	+ Check the NC Occupational Employment and Wages website for competitive salary information: <http://eslmi23.esc.state.nc.us/oeswage/>
* LEAs also should consider including details regarding limiting liability in both employment contracts and independent contractor agreements. Providers, whether employed directly or contracted, need to fully understand how they are protected and liable in relationship with the LEA. Contracts should specify whether the employee or contractor will be named specifically as an insured on the employer’s liability policies, the limits of that liability coverage, and the staff person’s obligation to immediately notify the employer when he or she learns of any situation in which professional liability may be incurred.
	+ If staff are required to have individual liability insurance, the employment contract or independent contractor agreement should include such specifics as which party is to pay for the policy, the limits of liability, the type of policy (occurrence or claims-made), the need for timely proof of policy renewal, and, should a claims-made policy be needed, which party is responsible for tail coverage upon the relationship’s termination. (Tail coverage is optional protection that allows the reporting of claims after a policy has ended for alleged injuries that occurred while the policy was in force.)
* Severance provisions may be included in employment contracts to protect the employer from liability for wrongful termination, unpaid wages, unpaid commissions, unlawful harassment, and other legal claims. In order to be enforceable, however, such clauses must be in compliance with federal and state employment law and the jurisdiction’s contract law.

A contract is an agreement that can be enforced legally. In order to ensure legal standing contracts generally include a set of basic elements, including:

* mutual assent,
* an offer,
* acceptance of the offer,
* consideration and
* capacity of both parties to understand the terms, consequences, and legal purpose of the agreement.

**Is Escape Possible?**

A party may escape obligations set forth in a contract for one of the following reasons:

* A mutual or unilateral mistake negates a basic assumption upon which the contract was based.
* A misrepresentation of the facts induced one of the parties to enter into the contract. For instance, an OT indicates they have a current license to practice in NC and they do not.
* One of the parties entered into the contract under duress, implying that one party had inequitable leverage over the other.
* The contract is deemed "unconscionable," meaning that the terms and conditions of the contract are so unfair, unreasonable, or unjust that no reasonable or informed individual would agree to them.
* The contract violates public policy. Contracts that conflict with or violate public policy of the state or country will not be enforced by courts.
* Fulfillment of the terms is rendered extremely difficult or impossible by events occurring after entering into the contract. For example, a hurricane strikes the school making it impossible to provide therapy services by a certain date.
* The contract's purpose is rendered moot or irrelevant by virtue of events occurring after its formation. For example, the LEA does not have any students who require OT or PT services.

The basic contract elements outlined here apply in most situations. It's important to understand and capture the nuances and needs indicated by each contract's type, party needs and/or subject.

**Additional Clauses to Consider**

Additional clauses that are common in employment contracts and may have legal implications that may not readily be apparent include:

**Exclusive agreement**. An exclusive agreement clause prevents the employee from providing services for another employer. This clause generally precludes the employee from moonlighting at another job, providing services for the employer outside of the employee’s work hours, consulting, publishing, and/or teaching. Depending on how the clause is written, specified activities may be exempted altogether, or the employee may be permitted to pursue certain external sources of income after providing written notice and gaining the employer’s written approval. If the employee contemplates being involved in volunteer activities, the contract should address whether the employer has a right to approve or reject such involvement. These discussions are critical when the provider is one of a few or the only provider in the area. Potential conflicts of interest can be avoided with a clear statement of expectations included in a contract.

**Indemnification (aka hold-harmless)**. This clause holds the employee contractually responsible for any liability the employer might incur as a result of the employee’s acts or omissions. Such clauses are loaded with potential risks. They may be overly broad, for example, holding the employee liable for negligent acts committed by personnel who are not under the employee’s control or direction.

The prudent prospective employee should consult with his or her professional liability insurer and an attorney before agreeing to any type of indemnification clause-—for two reasons. First, under the legal doctrine of *respondeat superior*, employers generally are held accountable for employee negligence that occurs within the course and scope of employment. Employers typically know this, so if they include an indemnification clause it is likely they are hoping the prospective employee is unaware of this doctrine. Second, most professional liability policies exclude coverage for liabilities that have been contractually assumed. This means that an employee likely will be uninsured against liability assumed under an employment contract.

**Liquidated damages**. This clause specifies the extent to which parties to the contract are responsible for financial damages associated with actions that adversely affect one of the parties. It is not a penalty, but rather a financial safety net for parties who may suffer financial loss. As a rule of thumb, the damage amount must be reasonable and relative to the adverse event; some states have statutes specifying limits. It is essential to consult with an attorney who is knowledgeable and experienced about liquidated damages in order to avoid signing a contract that contains unreasonable or illegal liquidated damages.

**Restrictive covenants (aka non-compete clauses)**. The purpose of such covenants is to protect the employer’s business investment by prohibiting the employee from leaving and practicing in a certain geographical area for a specified time period. These restrictions tend not to be favored by courts because they restrain free trade. Many jurisdictions will enforce them, however, if the court deems the terms reasonable as to geographical area, duration, and pertinence to the employment contract.

Other considerations of courts when determining enforceability of these covenants include availability and costs of the health care specialty in question (e.g., therapy) and the state of the employment market. If competitors are cherry picking employees and referral resources, the courts may decide some protection is in order.

A few states have statutes that limit or prohibit the inclusion of non-compete clauses, but such statutes don’t always apply to every profession. For example, a Delaware statute is specific to physicians and the practice of medicine and does not include protections for therapists and the practice of therapy. It is important for prospective employees to understand that even in jurisdictions in which similar statutes are in place that are applicable to contracts, some employers still will include a restrictive covenant because they guess that their potential employees will not seek legal advice and will think the clause is legal and enforceable. Too often, these employers guess right.

**Term, renewal and termination**. Employment contracts generally are considered to be terminable by either party “at will” unless a commencement date and term are specified. A contract may specify that a staff member is an at-will employee. This means that either party may terminate the relationship at any time, with or without cause. An “at will” employment relationship, thus, can be unstable for both the employer and employee.

To provide a more stable relationship, the contract should specify a fixed term of employment, with specific beginning and ending dates. Continuing the relationship beyond the termination date can be accomplished by including a renewal clause that describes how the relationship can be extended. To protect both parties, a provision should be included in this section that allows either party to terminate the relationship with or without cause if written notice is given within a specified number of days.

Causes for termination should be listed. They typically include such transgressions as breech of employment terms, licensure suspension, conviction of a crime, actions that place patients/clients in imminent danger, and failure to perform duties as measured by performance review criteria.

**Independent Contractor Agreements**

LEAs are well-advised to enter into independent contractor agreements with vigilance.

A therapist may opt to be an independent contractor rather than an employee because of the freedom such status confers to accept or reject work, and because independent contractors can deduct their business expenses on their tax returns. An LEA may prefer to hire an independent contractor rather than paying an employee to fill the same role because the independent contractor has no claim to most employee benefits, is not subject to withholding requirements, and does not require employer payment of Social Security, Medicare, and unemployment taxes.

It may, however, be more difficult for the employer to monitor work of an independent contractor therapist and ensure efficiency. Consistency and attention to detail are paramount; if the employer later characterizes the independent contractor as an employee, the employer may be subjected to significant taxes and penalties.

Further, employers must understand that the label “independent contractor” in a written employment contract is not binding to courts or government agencies. Often government agencies and courts use different criteria to determine whether an individual’s relationship to an employer is that of an independent contractor or an employee. For example, decisions about unemployment benefits typically are made by a state’s department of employment, decisions about workers’ compensation are made by a state workers’ compensation agency, and decisions about income tax are made by the Internal Revenue Service and state income tax agencies. Decisions generally are made on a case-by-case basis and divide the facts into three categories: behavior control, financial control, and type of relationship.

For these reasons, independent contractor agreements should not be signed without advice from legal counsel. That written, therapy employers should keep the following important points in mind:

1. Include substantive clauses that make clear that “independent contractor” is the status intended by both parties.

2. Be certain that all subsequent actions and responsibilities are representative of an independent contractor/employer relationship rather than of an employee/employer relationship. For example, the independent contractor should have control over the means and methods of completing his or her work, and the employer’s right to control should be limited to the results of the work. (For additional examples and guidelines, refer to Internal Revenue Service Publication 15-A, *Employer’s Supplemental Tax Guide*.4)

3. Should a work-related injury or event occur that might lead to conferring of employee-type benefits (such as paid leave or workers’ compensation) to the independent contractor, promptly file all necessary paperwork. Remember that courts and agencies make decisions on a case-by-case basis and will look for facts beyond the written agreement to determine actual working relationships and whether benefits should be awarded. A decision made in one jurisdiction, by one agency, with one set of facts may be different from one made by a different agency within the same jurisdiction because each agency has its own specific criteria. And workers’ compensation boards in some jurisdictions—but not others—have awarded benefits to injured workers labeled independent contractors.

**Strongly recommended:**

* Review contract/job performance at least annually
* Clearly state that all documentation/work product (e.g. daily treatment notes) completed by contracted personnel is the property of the LEA and shall remain in the LEA. LEAs are encouraged to establish a system/time-line for collecting and archiving documentation/work product completed by contracted personnel
* Private therapy services should not be provided at school due to issues with least restrictive environment and liability
* Ensure appropriate supervision of contracted assistants according to licensure board standards for related service providers. LEAs should make every effort to contract therapy assistants and supervising therapists from the same agency.
* Caseload limitations, as outlined in DPI EC policy apply to contracted therapists as well as directly hired therapists
* Documentation of current licensure for contracted personnel must be provided to the LEA annually
* Clearly state roles/duties of contracted personnel (attending IEP meetings, staff training, duties outside of school hours/work sites)
* Consider requiring continuing education hours focused on school-based practice
* LEAs should verify that contracted personnel contact the relevant DPI Consultant (OT/PT/SLP) at least once
* Remember you are paying for their services (even if you are desperate to have them), negotiate for what you require

**Medicaid cost recovery considerations:**

Best practice suggests that service providers, whether contracted or directly hired:

* be blinded to a student’s Medicaid eligibility
* have workload assignment based on logistics or provider strengths
* Clearly state whether the LEA or contracting agency will be submitting claims to Medicaid for services rendered by contracted personnel
* If the contracting agency is submitting claims to Medicaid for school services, then there should be little, if any, additional rate paid by the LEA for those services
* If you are having a personnel shortage, make sure coverage is not provided only to Medicaid-eligible students
* Medicaid eligibility should NEVER influence decisions about eligibility for special education, evaluation, service delivery or discharging a service. Be aware that there may be financial incentives for decision makers/IEP team members and have appropriate safe guards in place
* Decisions about service delivery, type or model of service and location are dictated individually by the IEP team, NOT Medicaid policy
* LEAs may consider contracting with an external group to perform selected services (such as billing and accounting) on a contract basis. Tight checks and balances are needed in either case to avoid loss of control, ensure data security and privacy, and prevent unexpected liabilities.
* Due diligence must be taken. When contracting with management or billing services, LEAs should review companies’ performance benchmarks and have a clear understanding of the companies’ procedures. LEAs must also understand that Medicaid holds their recognized provider as accountable not their contracted company.

A good employment contract clearly delineates the responsibilities of both parties and anticipates that things may go wrong. While it’s true that even the best-drafted contract doesn’t ensure that a mutually rewarding long-term relationship will result; such a contract can help establish and nurture a foundation of understanding, respect and integrity.