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Exceptional Children 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 must be precise, mutually understood and legally enforceable.
- Terms 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. A template may not reflect current law and/or the laws applicable to your state.

Contracting 101

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.
- Compliance with billing procedures and policies and regular review of records.

- Disclosure of information that could adversely affect the practice, the employment contract or independent contractor agreement such as disciplinary actions related to licensure, felony convictions, charges of moral turpitude, and material changes in professional credentials.
- 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 or if staff are required to have individual liability insurance. 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.
- 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.

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.