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MEMORANDUM

TO: Vermont Superintendents, Special Education Directors, and Business Managers
FROM: Clare O'Shaughnessy, Staff Attorney
Cassandra Ryan, Fiscal and Regulatory Compliance Coordinator
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SUBJECT: Contracting for Special Education and Related Services
DATE: June 6, 2019

Contracting for Special Education and Related Services

In response to requests from Supervisory Unions and Supervisory Districts (SU/SDs) for contracting support and insights gained from AOE's FY2019 Special Education Fiscal Monitoring Review, the Agency is issuing this memo to articulate contracting requirements as well as best practices that should be considered when developing local procurement and contract management processes. Contracting is a key business process to mitigating risk, controlling costs, and ensuring the quality of services received. Contracts are also used as a basis for programmatic and fiscal monitoring and assessing allowable costs. If there is no contract, or the contract is of poor quality, this could result in disallowed costs, or worse, the failure of students to receive services to which they are entitled.

Special Education Focus and Background

While many concepts outlined in this memo are relevant to contracting best practices broadly, the focus of this communication is on contracting for special education and related services. This includes (1) out of district student placements (public or private), (2) services provided to special education students placed within district, as well as (3) state-placed student contracts.

Per SBE Rule 2360.2.12, special education is "specially designed instruction that ...`adapting, as appropriate, to the needs of an eligible child, the content, methodology, or delivery of instruction: (a) To address the unique needs of the child that result from the child's disability; and (b) To ensure access of the child to the general curriculum, so that he or she can meet the educational standards ...that apply to all children." This definition is an important cornerstone to understanding what makes a good contract in the provision of special education, the key being special education services as access to the general education curriculum. Furthermore, without the provision of general education, there can be no provision of allowable special education services.

While special education contracted services may be provided by a variety of qualified private and public providers, general education can only be provided by an approved entity: (1) a public school, (2) an approved independent school, (3) a SBE approved tutorial program, or (4) a SBE approved other education program, as defined in 16 VSA §§ 11a(27), 165, 828, 906.

Contract Content

A contract is a legally-binding agreement between two or more parties that recognizes the rights and duties of those party to the agreement and typically involves the exchange of goods, services, money, or promises of any of those. For the purposes of contracting for special education services when using state or federal funds, to be enforceable and to prove a “special education expenditure”, the contract must contain (but not limited to) the following components:

1. **The Scope of work** accurately details the deliverables of the work product (what service you are buying and how you are measuring that that service was provided). The overall “work product” should reflect the student’s entire scope of education including general education and special education components. Furthermore, it is necessary to show which parties are providing what aspect of the student’s education, which services are included, and the location of such service provision. This allows for all parties to understand their roles and responsibilities in the provision of FAPE to each student, and for tying back to services required per the student’s IEP. Specifically, the scope of work should break out (1) general education portion of tuition¹ (2) special education portion of tuition and what services are included and (3) any excess costs, including related services required to implement the student’s IEP and provision of FAPE. AOE will provide policy guidance on the definitions of general versus special education tuition and excess costs as the Agency works to redefine the rate setting process for schools that serve only students with disabilities. The scope of work associated with tuition will be defined in terms of the most current IEP, so will already reflect any increase or decrease in services associated with tuition. The only time an amendment to the scope of work is needed is if the value of the contract changes as a result of additional excess costs.
2. **Payment terms and invoicing requirements** that provide sufficient detail against which invoices can be matched and validated, and shall reflect the scope of work. For special education and related services, this shall include but is not limited to:
 - a. Child count number or student name
 - b. Date(s) of service(s)
 - c. Services and associated payment terms that tie back to deliverables outlined in the scope of work
 - i. General Education Portion of Tuition
 - ii. Special Education Services included in Special Education Tuition

¹ See SBE 2366.2.1 (g) Tuition and all reasonable and necessary costs of placement, as defined in Rule 2366.2.5 , excluding any general education tuition in an independent school approved for the purpose of providing special education in accordance with 16 VSA § 2958(e) and SBE Rule 2228, et seq.: SBE Rule 2366.2.5 Costs of Placement in Independent Schools: “Subject to (b), reasonable and necessary costs, required by a student’s IEP, excluding general education tuition, of a placement in an independent school...”

- iii. Excess Costs of Special Education Services (excluded from Special Education Tuition)
 - d. Service delivery confirmation supporting documentation (e.g. attendance records, service logs etc.)
3. **A termination clause**, specifying the conditions under which the contract may or will cease to be in effect. While this is a requirement for federal and state grants, a termination clause is always a good idea when procuring goods and services using public money as it protects tax payers from unlimited exposure. Furthermore, per 2 CFR Part 200 Appendix II, depending on the contract value, any contract using federal funds, “must address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate... [and] must address termination for cause and for convenience by the non-Federal entity including the manner by which it will be effected and the basis for settlement.” The AOE has also adopted this standard for contracts using funds that flow through/from the Agency. It is important that LEAs do not overcommit to the requirements of a contract beyond their responsibility for a particular student, when a student moves into or out of an LEA. Per SBE Rule 2363.11 when a student’s LEA of residence changes, the receiving LEA can either adopt the IEP written by the former LEA, or may elect to write a new IEP. This will require a new contract, changing the LEA identified as responsible for FAPE and contract payment, and may or may not require changes referencing the party or parties responsible for service delivery.
4. **An approval clause**², indicating that the entity is approved for a student’s particular disability or disabilities, that it intends to maintain appropriate levels of qualified staffing, and should any staffing changes occur, that the SU/SD will be notified within 48 hours. For entities approved for general education, the clause must state that the entity must maintain SBE approval status through the term of the contract, or shall notify the SU/SD and parents of students within 48 hours if approval is revoked. Approved independent schools are to notify the Secretary of Education within 7 days of student’s termination of enrollment. Applicable state laws include 16 VSA §§ 166 and 828. In addition to including these clauses, LEAs are responsible to verify SBE approval status of the approved entity and the secretary’s approved rate. The most up to date list of SBE approvals can be found here:
<https://education.vermont.gov/documents/list-independent-schools-approved-serve-students-with-disabilities>

² That an independent school be approved to serve the categories of disabilities for students placed by responsible agencies is a Vermont requirement. See SBE Rule 2228.2(1).

5. **Other clauses**³. The contractor must agree to comply with FERPA and state and federal law regarding education records. The AOE also recommends including terms for the following: (1) Amendment – how and when contracts require amendment, including notification of IEP changes affecting the scope of work; (2) Right to audit – proof of implementation, and may include records related to attendance, scheduling, grades, service logs, etc.; (3) IEP implementation – a clause indicating that the independent school or entity approved to provide general/special education must implement the IEP as written by the LEA, and amendments to the IEP can only be made by the IEP team for reasons solely based on student need, and NOT based on independent school program need or staffing availability; and (4) Dispute resolution – a clause indicating what law is to govern and how disputes will be handled when there is disagreement between contractor and LEA.
6. **Agreement**⁴. A clause explicitly stating agreement by all parties to the terms of the contract, which may entail multiple signatures and to be legally enforceable should be executed (signed by all obligated parties) prior to performance of duties under the contract.
7. **What clauses NOT to include in a contract**. Nowhere in a contract should an SU/SD obfuscate its right to hold vendors accountable for failure to provide services, especially when those services are critical to the provision of FAPE. A contract should never suggest that a student’s IEP be altered at the request of a contractor to reflect the contractor’s business model, staffing requirements or otherwise. Contracts using state or federal funds shall never include conditions of prepayment or installment payments. Alternatively, progress payments may be acceptable.

Procurement and Contract Management Processes/Procedures

A contract is only as good as the terms negotiated within it, and the processes used to ensure its execution following signature. In this section, we outline key procurement and contract

³ Both the SEA and the LEA are required to comply with FERPA as recipients of federal funds, this requirement includes a school district taking measures to prevent unauthorized disclosure of student records. The only way an SEA or LEA and prevent unauthorized disclosure by a contractor working on behalf of an SEA or LEA is to make such requirement a term of the contract.

⁴ When procuring goods or services using public funds, the contract must be signed (executed) by an individual with authority to bind the public entity. In Vermont, school boards are required to “establish and maintain a system for receipt, deposit, disbursement, accounting, control and reporting...that ensures that all payments are lawful and in accordance with a budget adopted or amended by the school board.” 16 VSA 563 ((8). Generally speaking, a school board may only spend funds approved by the voters (through the budget) for the purposes authorized by the expenditure of public funds. Superintendents are charged to carry out the policies adopted by the school board for the education and *business affairs* of the school district. 16 VSA 242 (1); Superintendents (or designees) are required to complete and provide to the SU board and all member district boards a copy of the document regarding internal financial controls made available by the Auditor of Accounts pursuant to 32 VSA 163(11); SU boards are required by law to conduct annual audits of the financial statements of the SU and member districts. 16 VSA 323.

management processes and procedures and best practices, to help you and your SU/SD build strong local business processes, more likely to result in benefits to your SU/SD, your students, and Vermont tax payers.

1. **Procurement Method**⁵. Please ensure that you are following procurement guidance based on whether or not you are using state or federal funds. If you are using both, please use the most restrictive requirements.
2. **Contract Development**. The AOE is developing an approved contract template for allowable special education expenditures. Beyond the template, the LEA can negotiate additional contract terms with the contractor or approved entity but, best practice is to consult your local attorney if a contract or a term in a contract may subject the LEA to additional risk. For general contracting questions, the AOE is willing to consult with the LEA, but AOE highly recommends working with your local attorney and/or VSBIT.
3. **Contract Execution**. Determine who has the authority to sign the contract (superintendent, school board, or officially delegated individual(s)) and ensure the contract is signed by all responsible parties before services are started and any payments are made, with the exception of an emergency placement per SBE rule 2228.4.1, which provides 30 days for signature.
4. **Post Execution**. Responsibility of the LEA does not stop with contract signing. It is imperative that the LEA continue to monitor that services are being provided in order to validate invoices and ensure implementation of the IEP and the delivery of FAPE. This may include randomly sampled service monitoring or auditing of contractor records, alternatively, service delivery documentation (attendance, services logs etc.) can be included as an invoice term requirement up front. Only invoices that match the contract's scope of work and invoicing requirements shall be paid, and only a person of knowledge shall sign the invoice to certify that work has occurred. If an invoice fails to meet contract requirements, it can be returned to the contractor, and payment can be withheld until compliant.

Future Work

The agency is currently reevaluating its rate setting processes and will ensure that the new process will support guidance provided in this memo, namely the breakout of tuition in terms of general and special education costs. AOE will also be developing standardized contract completes and providing associated training on their use. If you have any questions, please do not hesitate to contact Clare O'Shaughnessy (Legal) Clare.OShaughnessy@vermont.gov, Cassandra Ryan (Fiscal and Regulatory Compliance Coordinator) Cassandra.Ryan@vermont.gov, or Alena Berube (Special Education Fiscal).

⁵ Federal procurement standards can be found in 2 CFR §200.318 and state public bid requirements are found in 16 VSA §559.