

Writing and Managing MOU's and Contracts

What Do I Need to Know?

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Disclaimers

- ▶ Presentation not intended to provide legal advice or legal counsel
 - Seek legal counsel for review of contracts and MOU's as needed

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This presentation is not endorsed by Health Resources Services Administration (HRSA) or Bureau of Primary Health Care (BPHC)

Not employed by MSCG or BPHC

Independent Consultant who is contracted to do Operational Site Visits (OSV)s and Technical Assistance (TA)

Objectives

- ▶ Understanding contracts/MOU requirements required for health centers
- ▶ Utilizing best practices to improve contracts/MOUs
- ▶ Using case studies to further understand what is required within contracts/MOU

Memorandum of Understanding (MOU) vs Contracts

- ▶ Differences between the two types
- ▶ Contract–Legally enforceable agreement between two or more parties that creates an obligation to do a service
 - Enforceable terms
 - Outlined terms (who, what, where, when, how)
- ▶ MOU–Agreement between two or more parties establishes an important public statement of cooperation, but it does not constitute a legally enforceable obligation.
 - May outline the terms of an agreement but state that each party's responsibilities are only enforceable "in the event that the parties' governing boards decide to enter a joint use agreement."
 - Define expectations and responsibilities of each party
- ▶ Key: Focus on whether entities intend to be legally bound by the terms of the agreement

Health Centers and Contracts/MOUs

▶ [HRSA Form 5A Column Descriptors](#)

Column II	Column III
Formal Written Contract/Agreement ¹ (Health Center Pays)	Formal Written Referral Arrangement ² (Health Center Does NOT Pay)
These are services provided on behalf of the health center by another entity via a formal written contract/agreement, where the health center is accountable for paying and/or billing for the direct care provided via the agreement (generally a contract).	These are services provided by an entity other than the health center, with which the health center has a <u>formal written referral arrangement</u> (e.g., memorandum of understanding (MOU), memorandum of agreement (MOA) or other formal written arrangement). The actual <u>service is provided and paid/billed for by the other entity (the referral provider)</u> .

HRSA Compliance Manual Chapters

- ▶ Contracts/MOUs affect the following:
- Chapter 4– Required and Additional Services
 - Chapter 5–Clinical Staffing
 - Chapter 7–Coverage for Medical Emergencies during and after hours
 - Chapter 8–Continuity of Care and Hospital Admitting
 - Chapter 9–Sliding Fee Discount Program
 - Chapter 11–Key Management Staff (as applicable)
 - Chapter 12–Contracts and Subawards
 - Chapter 13– Conflict of Interest
 - Chapter 17–Board Authority (as applicable–subrecipients)

Where Does A Health Center Start?

- ▶ Determine the need
 - What can I provide in-house versus what do I need to out-source?
 - Looking at your service area (duplication of services?)
 - “Cost-efficient” versus “cost draining”
- ▶ Form 5A
 - How to provide the service?



Where Does A Health Center Start?

- ▶ How to provide the service?
 - Health Center Directly (W-2; NHSC)
 - Health Center Pays (Contract Agreement, 1099)
 - Health Center Refers (MOU/MOA, no money)
- ▶ Contract Hot Spots
 - Locums Tenens
 - Transportation
 - After Hours
 - Pharmacy
 - Tele-health (dependent on mode of delivery)
 - **Additional services listed on Form 5A, must follow HRSA requirements**

Column II–Health Center Pays

- ▶ **Must have's in a contract (HRSA Requirement)**
 - List of two parties (entities involved)
 - List of services to be provided (description of services)
 - If its auxiliary/enabling services–list services (ex. nutrition)
 - How the health center will pay for these services?
 - Monthly? Quarterly, will there be an invoice? What is the amount?
 - How will the service be documented in the patient's record?
 - Will there be a referral? Will the contractor send treatment plan? Will it be scanned in the system? Will the contractor use the health center's EHR? Receipt of treatment plan?

Column II–Health Center Pays

- **Credentialing & Privileging**

f. If the health center has [contracts](#) with provider organizations (for example, group practices, locum tenens staffing agencies, training programs) or formal, written referral agreements with other provider organizations that provide services within its scope of project, the health center ensures⁷ that such providers are:

- Licensed, certified, or registered as verified through a credentialing process, in accordance with applicable Federal, state, and local laws; and
- Competent and fit to perform the contracted or referred services, as assessed through a privileging process.

- **Assure that contracted providers are credentialed and privileged to see patients**

11. Was the health center able to ensure through provisions in contracts or through other means (e.g., health center review of the contracted organizations' credentialing and privileging processes) that contracted services (Form 5A, Column II) are provided by organizations that:

- Verify provider licensure, certification, or registration through a credentialing process?
 YES NO NOT APPLICABLE
- Verify providers are competent and fit to perform the contracted service(s) through a privileging process?
 YES NO NOT APPLICABLE

Column II–Health Center Pays

- ▶ Professional Qualifications
 - “Referral Provider agrees to provide Health Center with assurances that, during the term of this referral agreement, it and, as applicable, its individual healthcare practitioners furnishing the Referral Services to health center patients are and will remain: 1) duly licensed, certified and/or otherwise qualified to provide services hereunder, with appropriate training, education and experience in their particular field; 2) appropriately credentialed and privileged; and 3) eligible to participate in federal health care programs including Medicaid and Medicare”

Column II–Health Center Pays

- Sliding Fee Discount Program (SFDP)
 - Discounts are provided in a manner that meets all Health Center Program requirements (ex. health center applies its own sliding fee discount to amounts owed by eligible patients; contract contains specific sliding fee provisions; contracted services are provided by another health center which applies a sliding fee discount that meets structural requirements)
- Structural Requirements (patients at or below 100% FPG)
 - Full Discount
 - Nominal charge
 - Less than what would be paid by patients in the first class above 100% of FPG
 - Graduation levels between 100–200% of FPG
 - Above 200% of FPG patients not eligible for sliding fee discount
- [SVP–Sliding Fee Discount Program–Element i](#)

Column II–Health Center Pays

- Monitoring contractor performance?
 - How will you ensure that the contract is being carried out? What documents will be requested? What happens if there is an issue with the service provided? How will it be addressed?
- Data reporting expectations and intervals?
 - Will you receive a monthly/quarterly? What data will be provided to know the contract is going well? (ex. Referral tracking tool, invoices paid, number of treatment plans received back in a certain period)
- Provisions for record retention and access, audit and property management?
 - Who owns the medical records? How long do you have to keep the records who has access?

Column III–Health Center Refers (MOU/MOA)

- List of two parties (entities involved)
- List of goods/services and activities to be provided
- A process for making, tracking, and managing referrals for these services with the referral provider(s)
 - (ex. process for tracking whether patient presented at the referral provider or the outcomes of the referral visit)
- Documentation in the patient record of appropriate follow-up care and information that resulted from these referrals
 - Is there an exchange of record information, are the results in the EHR? Appropriate documentation?

Column III–Health Center Refers (MOU/MOA)

◦ Credentialing & Privileging

- f. If the health center has [contracts](#) with provider organizations (for example, group practices, locum tenens staffing agencies, training programs) or formal, written referral agreements with other provider organizations that provide services within its scope of project, the health center ensures⁷ that such providers are:
- Licensed, certified, or registered as verified through a credentialing process, in accordance with applicable Federal, state, and local laws; and
 - Competent and fit to perform the contracted or referred services, as assessed through a privileging process.

◦ Assure that referring providers are credentialed and privileged to see patients

12. Was the health center able to ensure through provisions in written referral arrangements or through other means (e.g., health center review of the credentialing and privileging processes of the referral organization(s)) that referred services (Form 5A, Column III) are provided by organizations that:

- Verify provider licensure, certification, or registration through a credentialing process?
 YES NO NOT APPLICABLE
- Verify providers are competent and fit to perform the referred service(s) through a privileging process?
 YES NO NOT APPLICABLE

Column III–Health Center Refers (MOU/MOA)

◦ Sliding Fee Discount Program

22. For patients receiving service through these referral arrangements, has the health center ensured that sliding fee discounts are EITHER provided in a manner that meets the structural requirements noted in element “c” OR discounted in a manner such that:

- Individuals and families with incomes above 100 percent of the current FPG and at or below 200 percent of the FPG receive an equal or greater discount for these services than if the health center’s SFDS were applied to the referral provider’s fee schedule (e.g., health center has a referral arrangement with organizations that charge no fee at all for patients at or below 200 percent of the FPG); and
- Individuals and families at or below 100 percent of the FPG receive a full discount or a nominal charge for these services?
 YES NO NOT APPLICABLE

◦ If the referral provider has their own “charity program” or sliding fee, attach it to the MOU/MOA

- E.g. hospitals, other specialty providers, surgery centers

Column III–Health Center Refers (MOU/MOA)

- Monitoring contractor performance?
 - How will you ensure that the contract is being carried out? What documents will be requested? What happens if there is an issue with the service provided? How will it be addressed?
- Data reporting expectations and intervals?
 - Will you receive a monthly/quarterly? What data will be provided to know the contract is going well? (ex. Referral tracking tool, invoices paid, number of treatment plans received back in a certain period)
- Provisions for record retention and access, audit and property management?
 - Who owns the medical records? How long do you have to keep the records who has access?

Other Considerations?

- ▶ Exclusions/Debarment (Federal Programs, Medicare/Medicaid etc.)
 - Unable to utilize federal dollars/program income to pay for services
 - Clause in the contract that there would be notification/termination if entity is found on exclusion/debarment list from OIG

14. **No Exclusions/Debarment.** Each party warrants that neither it nor its principals or employees are, or have been, excluded, debarred, suspended, proposed for debarment, or declared ineligible from participation in any federally funded program ("Exclusion"). Each party shall immediately notify the other of any threatened or actual Exclusion. If a party is so debarred, suspended, or excluded, this Agreement shall immediately and automatically terminate.

- <https://exclusions.oig.hhs.gov/>
 - Best practice: Search upon new contract and then yearly
 - For all employees, contractors, vendors, agents etc.

Other Considerations?

- ▶ Anti-Trust laws (confer with legal)
 - Federal and State laws that regulate the way organizations conduct business
 - Ensures competition exists in an open and fair way
 - Important for health centers to understand when completing construction projects or purchasing items
 - (Price Fixing, Competition in Marketplace, Anti-poaching agreements)
- ▶ Two FQHCS agree on prices to depress market and control it, so there is no competition and patients are unable to “shop” around
- ▶ Three FQHCs in the area decide not to poach staff or providers

Other Considerations?

- ▶ Anti-Kickback & Anti-Stark laws (confer with legal)
 - Prohibits the knowing and willful payment of "remuneration" to induce or reward patient referrals or the generation of business involving any item or service payable by the Federal health care programs (e.g., drugs, supplies, or health care services for Medicare or Medicaid patients)
 - Anti-Kickback (non-clinician)
 - Anti-Stark (clinician which also includes dentists)

Other Considerations?

- ▶ Anti-Kickback & Anti-Stark laws (confer with legal)
 - E.g.
 - Jenn gets paid \$10 per patient that she sends to her favorite FQHC
 - For every CBC that Dr. Smith refers to lab company, Dr. Smith gets a paid trip to Bermuda
 - Dr. Smith owns a private practice with 40% Commercial and 30% Medicare. FQHC tells Dr. Smith that they'll pay a salary of \$450,000 which is way over market salary for his specialty (Gerontologist/FP market \$240,000) and he agrees to bring ALL patients with him

Other Considerations?

- ▶ Evergreen Contracts
 - Contracts or agreements that continue with no expiration
 - Not a best practice
 - Have term clauses if needed with specific "outs"
 - Performance
 - Unreasonable price increases
 - Loss of funding

Other Considerations?

- ▶ Confidential Information
 - Especially when dealing with patient records or sensitive records
 - Do not want health center “business” all over town
 - Ensure clause that contractor etc. will keep matters confidential, not disclose trade secrets
 - Ensure clause of what will happen if confidentiality is broken (what are the consequences)

Other Considerations?

- ▶ Confidential Information

§. **Confidential Information.** Genua Consulting understands that Client possesses Confidential Information which is important to its business and that this Agreement creates a relationship of confidence and trust between Genua Consulting and Client with regard to Confidential Information. For purposes of this Agreement, “Confidential Information” shall mean information that was or will be created, developed or discovered by or on behalf of Client, or is created, developed or discovered by Genua Consulting while performing Services under this Agreement, or which became or will become known by, or was or is conveyed to Client which has commercial value in Client’s business. Confidential Information includes, but is not limited to, trade secrets, know-how, works of authorship, technology, source and object code, computer programs, proprietary software, inventions (whether patentable or not), improvements, developments, processes, procedures, methods, discoveries, ideas, algorithms, data, records, medical records, patients, patient lists, patient information, personnel information, terms of compensation and performance levels of employees, business and product development plans, other information concerning Client’s actual or anticipated business, research or development, or information which is received in confidence by or for Client from any other person. Genua Consulting agrees that all Confidential Information shall at all times be and remain the sole and exclusive property of Client, and shall be kept in confidence. Genua Consulting shall not, at any time, without Client’s prior written permission, either during Genua Consulting’s provision of Services to Genua Consulting or indefinitely thereafter, directly or indirectly, disclose any Confidential Information to anyone outside of Client, or use or permit to be used any Confidential Information for any purpose other than in a manner which is consistent with Genua Consulting’s performance of Services and which directly benefits Genua Consulting. Genua Consulting shall not be deemed in breach of Genua Consulting’s obligations hereunder if Genua Consulting produces or discloses Confidential Information pursuant to court order or other legal or judicial process, or as otherwise required by law, provided that Genua Consulting gives written notice as soon as practicable of any such order or process to Client and reasonably cooperates with Client in all lawful action to seek a protective order or otherwise prohibit or limit disclosure of such Confidential Information to third parties. Upon termination of Genua Consulting’s independent contractor relationship with Client, Genua Consulting shall promptly deliver to Client all copies of Confidential Information in Genua Consulting’s possession, custody or control, whether prepared by Genua Consulting or others.

Other Considerations?

- ▶ Conflict of Interest
 - HRSA Program Requirement

The health center has and implements written standards of conduct that apply, at a minimum, to its procurements paid for in whole or in part by the Federal award. Such standards:

- Apply to all health center employees, officers, board members and agents¹ involved in the selection, award, or administration of such contracts;
- Require written disclosure of real or apparent conflicts of interest²;
- Prohibit individuals with real or apparent conflicts of interest with a given contract from participating in the selection, award, or administration of such contract;³
- Restrict health center employees, officers, board members and agents involved in the selection, award, or administration of contracts from soliciting or accepting gratuities, favors, or anything of monetary value for private financial gain from such contractors or parties to sub-agreements (including [subrecipients](#) or affiliate organizations);⁴ and
- Enforce disciplinary actions on health center employees, officers, board members, and agents for violating these standards.

Best Practices When Writing Contracts/MOUs

- ▶ Consult with legal counsel on all contractual/MOU legal language
- ▶ Standardize when possible so you'll have all required information required by HRSA and other Federal/State laws
- ▶ Review contracts on a yearly basis and keep a record of when they expire, and if services change)
- ▶ Keep drafts/changes and number them, so you know what has changed
- ▶ Make sure addendums are clear. If addendums are added, provide the entire contract (including addendums to ensure compliance with site visits)

Contracts—What Do We Think?

Dr. XXX DDS agrees to bill FQHC on a monthly basis for those patients who presented with a Dental Voucher from FQHC Sliding Fee Program signed by a FQHC Medical Provider and dated within ninety (90) days of the services provided. The bill/invoice sent by Dr. XXX shall list the patient's name, date of service(s), the CDT codes, and price of services. Also, the bill shall denote any discounts/adjustments Dr. XXX is making for FQHC patients with the Dental Voucher for Sliding Fee Discount Program. FQHC will remit to Dr. XXX the amount of the bill within two (2) weeks of receipt of invoice. FQHC will not pay for more than \$150 per year per patient as part of their Dental Voucher Sliding Fee Discount Program.

- ▶ Thoughts on this contract language?
- ▶ Does it meet the Sliding Fee Discount Program Language?
- ▶ What other considerations should be considered?

Contracts—What Do We Think?

EMPLOYEE LEASE AGREEMENT

THIS EMPLOYEE LEASE AGREEMENT ("Agreement") is made and entered into effective on the date last signed by the parties hereto ("Effective Date") by and between XXXX ("Hospital") and _____ ("Clinic").

RECITALS

- A. Hospital employs individuals trained and specialized in Diabetes Education.
- B. Clinic desires to lease from Hospital certain employees who are qualified and able to provide diabetes education services for Clinic.

- ▶ What is missing from this part of the contract?
- ▶ Are there any other considerations?

Contracts—What Do We Think?

BUSINESS LEASE AGREEMENT

This Business Rental Agreement ("Agreement") is entered into by and between _____ ("Landlord"), Landlord and Tenant are collectively referred to in this Agreement as the "Parties". This Agreement shall be effective as of the date executed by Landlord, as set forth below.

For the covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

- PREMISES:** The leased premises shall be comprised of that certain personal residence (including both the house and the land) located at _____ ("Premises"). Landlord leases the Premises to Tenant and Tenant leases the Premises from Landlord on the terms and conditions set forth herein.
- TERM:** The term of this Agreement shall be a period of one (1) year, beginning on _____, and ending on _____. Any holding over after the expiration or earlier termination of the term without Landlord's prior written consent shall be a default of this Agreement and shall not be construed to be a tenancy from month to month, unless Tenant pays and Landlord accepts payment of rent for the next full calendar month (plus, if the term ends on a day other than the last day of the month, rent for the remainder of the month during which the term ends). If such payment of rent is so paid and accepted, this Agreement will automatically renew on a month to month basis, and will continue as such until terminated by either party in accordance with the following: written notice of termination is to be given by either party at least thirty (30) days before the designated date of termination, and the designated date of termination shall be the last day of a calendar month. If notice of termination is given, this Agreement shall terminate on the date for which notice is properly given. Except as otherwise set forth in this Agreement, all of the terms and conditions of this Agreement shall apply during any month to month tenancy.
- MONTHLY RENT:** The rent to be paid by Tenant to Landlord throughout the term of this Agreement is \$ _____ per month and shall be due on the 1st day of each month. Tenant shall pay a \$50.00 late fee for any rent not received by Landlord by the fifth (5th) day of the month. Tenant shall pay any returned check fees. All delinquent rents or other expenses due from Tenant shall accrue interest at the rate of 15% per year until paid. All interest shall be deemed additional rents. Rent for the first month (or, if applicable, partial month) of the term shall be paid to Landlord at the time this Agreement is executed. Rent for any partial month shall be prorated. Tenant shall not deduct or offset against rent unless expressly permitted by applicable law. Tenant assures that it will not see more than a percentage of insured patients as stated in Attachment A. Tenant will also not put any signage to market services to uninsured patients

Contract—What Do We Think?

RECITALS

WHEREAS, St. Francis provides outpatient ancillary diagnostic testing services for and is qualified, and desires, to provide the services contemplated by this Agreement under the terms and conditions herein;

WHEREAS, Facility desires to obtain outpatient ancillary diagnostic testing services of St. Francis for its patients as set forth in this Agreement; and

NOW THEREFORE, in consideration of the mutual promises contained herein, the parties agree as follows:

- ▶ What would make this contract clearer?

Contracts—What Do We Think?

ARTICLE 6 ETHICAL AND RELIGIOUS DIRECTIVES

Landlord acknowledges that Tenant is subject to the official teachings of the Roman Catholic Church and the Ethical and Religious Directives. Any provision contain in this Lease to the contrary notwithstanding, in no event shall Tenant be required to engage in any conduct, or provide or perform any services, in connection with its obligations under this Lease, in contravention of the Ethical and Religious Directives. In the event that, during the Term of this Lease, Tenant shall be asked to engage in any conduct, or provide or perform any services, the conduct of which or the provision or performance of which shall be determined by Tenant, in the exercise of its absolute discretion, to be in violation of the Ethical and Religious Directives, Tenant may refuse to engage in any such conduct, or provide or perform any such services; provided, however, that, in any such event, Tenant shall work cooperatively and in good faith with Landlord, to the end that any such services shall be provided or performed by Landlord, or shall be provided or performed by one or more other healthcare providers who Landlord shall select for such purpose.

- ▶ Thoughts on this clause in the lease agreement?

Resources

- ▶ [HRSA Form 5A Column Descriptors](#)
- ▶ [HRSA Program Compliance Manual](#)
- ▶ [Change Solutions—Contracts and MOUs](#)
- ▶ [OIG Compliance](#)

Contact Information

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