



Department of Health

ANDREW M. CUOMO
Governor

HOWARD A. ZUCKER, M.D., J.D.
Commissioner

SALLY DRESLIN, M.S., R.N.
Executive Deputy Commissioner

December 13, 2016

Dear Interested Parties:

The New York State Department of Health has implemented a new policy and related procedures for submission of service contracts required to be reviewed and approved by the Department. This policy applies to all contracts that are required to be submitted -- and reviewed and approved by the Department -- in conjunction with a project requiring approval through the New York State Certificate of Need (CON) Process. The policy will provide increased uniformity, ensure compliance with all applicable regulations, and significantly expedite the Department's review and approval of service contracts submitted in association with CON Projects.

Contracts subject to this policy include, but may not be limited to, administrative service agreements (ASAs), consulting services contracts/agreements (CSAs), consulting and administrative service agreements (CASAs), contracts for professional and clinical services, and employment contracts with key management employees, including Medical Director Agreements (MDAs) and facility administrators.

Providers are not required to obtain the Department's approval of service contracts listed above that are developed outside of the CON process. However, as always, providers are responsible for ensuring these contracts do not create an illegal delegation of authority between the established operator and the contractor. Providers may use the template language provided in the new policy to ensure compliance.

This policy does not apply to Hospital Management Contracts as defined in 10NYCRR 405.3(f). It is also important to note that the Department's long-standing policy prohibiting management contracts, of any kind, in all diagnostic and treatment centers is not changed, or impacted, by this policy.

It is anticipated that the new policy will significantly reduce the review time needed by the Department. The Department has streamlined its review process such that there will no longer be both a legal review and a program review. The Bureau of Health Facility Planning and Development, within the Division of Legal Affairs, will now have responsibility for reviewing and approving service contracts. The Director of the Bureau is attorney Mark Furnish. CON applicants with service contracts currently under review by the Department have received an additional, separate correspondence providing guidance as to how to proceed.

Attached is a document entitled "New York State Department of Health Policy on Development of Service Contracts for Article 28 Facilities" to assist you in understanding the new requirements. A webinar will be conducted by the Department on December 14th at

11:00am. The webinar includes a Q&A session to provide further guidance on the new requirements. Information about how to access the webinar is available at the following link:

<https://meetny2.webex.com/meetny2/e.php?MTID=m5fc5f5ee559be4b4b4380653cd196d41>.

Additionally, a link to Q&A section on the Department's website will be sent out in the near future. In the interim, questions regarding the new policy and related requirements, should be directed to the Department of Legal Affairs, Bureau of Health Facility Planning and Development at (518) 473-3303. The Department looks forward to working together as we implement this new and improved process.

Sincerely,

A handwritten signature in cursive script that reads "Ruth Leslie".

Ruth Leslie
Director
Division of Hospitals and Diagnostic &
Treatment Centers

Attachment

NEW YORK STATE DEPARTMENT OF HEALTH
POLICY ON DEVELOPMENT OF SERVICE CONTRACTS
FOR ARTICLE 28 FACILITIES
December 13, 2016

I. OVERVIEW

The New York State Department of Health must review service contracts that are required to be submitted as part of a Certificate of Need (CON) application to insure that the Established Operator of Article 28 facility does not delegate key powers to a non-established entity. The Department has developed this policy as a means to standardize protocols for service contracts to insure quick, efficient and legally sound review during the Department's CON review.

10NYCRR 405.3(f)(1)(iii) defines activities that cannot be delegated by the established operator of a facility. In this policy, the Department is applying this criteria to all Article 28 facilities and shall mean that the operator's governing body must maintain:

- Direct independent authority to appoint and discharge any facility employee as described in II A. below;
- Maintain and control the books and records of the facility;
- Authority over the disposition of assets and authority to incur any liability on behalf of the facility; and
- Independent adoption and enforcement of policies regarding the operation of the facility.

II. POLICY

To insure that there are no illegal delegations of authority in service contracts, while giving providers flexibility in the models they implement, and to streamline the Department's review by insuring uniformity in contract framework, all service contracts are now required to have the following:

A ***Reserve Powers Clause*** in which the Established Operator of an Article 28 facility states:

- The Established Operator will retain direct, independent authority over the appointment and/or dismissal, in its sole discretion, of the facility's management level employees (including but not limited to, the Facility/Service Administrator/Director. The Medical Director, the Director of Nursing, the Chief Executive Officer, the Chief Financial Officer and the Chief Operating Officer) and all licensed or certified health care staff.

- The Established Operator must retain the right to adopt and approve, at its sole discretion, the facility's operating and capital budgets.
- The Established Operator must retain independent control over and physical possession of the facility's books and records.
- The Established Operator must retain independent control over and physical possession of the facility's operating policies and procedures.
- The Established Operator must retain full authority and responsibility for, and control over, the operations and management of the facility.
- The Established Operator must retain the right and authority to independently adopt and approve and enforce, in its sole discretion, policies affecting the facility's delivery of health care services.
- The Established Operator must retain the right to independently adopt, approve and enforce, at its sole discretion, the disposition of assets and authority to incur debts.
- The Established Operator must retain the right to approve, at its sole discretion, contracts for management and/or clinical services.
- The Established Operator must retain the right to approve, at its sole discretion, any facility debt.
- The Established Operator must retain the right to approve, at its sole discretion, settlements of administrative proceeding or litigation to which the facility is a party.
- No powers specifically reserved to the Established Operator may be delegated, or shared by, the Contractor or any other person.

Conflicts Clause: In conjunction with the *Reserved Powers Clause*, all service contracts must have a *Conflicts Clause* provision clearly stating that when there is any disagreement between parties in the service agreement regarding control between the Established Operator and a contracted third party, the *Reserved Powers Clause* is the controlling provision.

Notwithstanding Clause: Each service contract must have a *Notwithstanding Clause* stating that notwithstanding any provision in the contract, the Established Operator remains responsible for ensuring that any service provided pursuant to this contract complies with all pertinent provisions of Federal, State and local statutes, rules and regulations.

Attestation: In addition to the *Reserved Powers*, *Conflict* and *Notwithstanding* clauses in each service contract, an applicant who submits a CON application for review must sign an **attestation (attached)** -- -- providing specific assurances and stating that the applicant understands and acknowledges that there are powers that must not be delegated, the applicant

will not willfully engage in any illegal delegation and understands that the Department will hold the applicant accountable. The Department will work with the applicant to correct any deficiencies in the proposed contract that are related to delegation of authority. The Department will not initiate an adverse action against the applicant provider or the individual who signs the attestation on behalf of the applicant provider if such deficiencies are identified, absent the presence of evidence of a willful intent to deceive the Department.

III. PROCESS

Once the Department determines that these requirements have been completed – and deems it acceptable – the service contract will be approved.

These steps will insure the prevention of an illegal delegation of authority while at the same time allowing flexibility for the applicant to use their own lawful business models.

ATTESTATION FOR SERVICE AGREEMENTS

I hereby certify under penalty of perjury, that I am duly authorized to subscribe and submit this service agreement on behalf of the applicant.

I further certify that the applicant understands and acknowledges that there are statutory and regulatory requirements that cannot be delegated to a third party and that the applicant will not engage in any illegal delegations of authority. The applicant further acknowledges that the New York State Department of Health must notified of any material changes to a service agreement and that the Department of Health must approve any material change.

I further certify that the written service agreement, as submitted, constitutes the entire agreement, fully details each party's responsibilities, functions, objectives, in addition to all financial arrangements and charges, that there are no side letters, unwritten understandings, promises, or commitments, and that no non-established entity, including the service contractor, participates in the revenue stream of the facility.

Signature _____

Title _____

Date _____

Requirements for service agreements are outlined in attached policy