



STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
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CONSUMER HOTLINE
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December 1, 1989

Joe W. Hatfield, Executive Director
West Virginia Housing Development Fund
814 Virginia Street, East
Charleston, West Virginia 25301

Dear Mr. Hatfield:

You have requested our opinion regarding various legal questions raised by bond counsel concerning the proposed Community Provider Financing Program.

We have reviewed the proposed program guidelines, the form contract between the state Division of Health and community behavioral health centers (a copy of which is enclosed for your reference), and correspondence from the Division of Health regarding assignment of payments under these contracts. We have also discussed these questions with representatives of your agency, the Division of Health, and the Department of Health and Human Resources.

Based upon the information provided, our answers to your questions are as follows:

"1. With respect to the consolidated loan pool concept, can the Department [now Division] of Health make payments directly to the trustee of the West Virginia Housing Development Fund for the purpose of paying the debt service on the bonds issued by the West Virginia Housing Development Fund?"

The above-referenced "payments" are those due from the Division of Health under contracts which they have entered into with various community mental health centers. These community mental health centers are also the proposed recipients of loans from the West Virginia Housing Development Fund under the Community Provider Financing Program. Paragraph II.E. of the current contracts would permit assignment by the provider for performance of services under the contract. This assignment, however, can only be made with the prior written consent of the

Division of Health. Generally, such language would also permit the assignment of "payments only" to another party. Under the facts you have presented here, an assignment of the payment would be to the Fund's trustee.

Currently, payments may be made under a state contract to more than one vendor, provided that the purpose and amount of each payment is clearly spelled out in the agreement. However, we are advised that the Health Division contracts may involve federal funds that cannot be assigned. If that is the case, a partial assignment of payments would not be possible.

If federal funds are involved, however, we are of the opinion that a new contract could be executed by the Division of Health with any provider seeking a loan under the financing program which contains express language allowing for the assignment of payments thereunder from state funds only to the trustee. Once such an assignment was made, the Division of Health could make payments directly to the trustee of the West Virginia Housing Development Fund.

A separate contract could then be executed with each provider for the remaining services not covered by the first agreement, and those payable from federal funds that contain restrictions on assignment. Payments under those contracts would go directly to the provider. Of course, these new contracts would require the consent and cooperation of the Division of Health.

"2. Are the contracts between the [Division] of Health, 501(c)(3) Corporation and the contract between the [Division] of Health and the West Virginia Housing Development Fund and the 501(c)(3) Corporation of a long term nature subject only to annual appropriation or are they short term in nature subject to renegotiation and reappropriation each year?"

As we understand the proposed financing arrangement, the Division of Health will not be a party to any of the loan agreements between the Housing Development Fund and the 501(c)(3) corporations (the health providers). The contracts between the Division of Health and the health providers are limited in duration to one (1) fiscal year (July 1 through June 30), subject to annual renegotiation and reappropriation. See Paragraphs I, III.A. and VIII.

"3. Does each service contract survive the bankruptcy or insolvency of each non-for-profit [sic] corporation, and are these contracts assumable and if so to whom?"

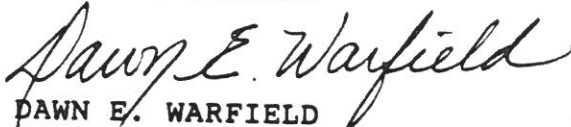
These contracts do not survive, nor are they assumable. Should a health provider go out of business or otherwise fail to perform the services required under the contract, the contract would be cancelled pursuant to Paragraph IV. If a new provider were found to perform those services, the Division of Health would have to enter into a new contract with that provider.

In addition to the above, the Division of Health has expressed several concerns that we believe you should take into consideration in planning this program:

- 1) Although the contracts specify an amount to be paid by the Division of Health to each provider, this figure represents an estimated budget for the entire fiscal year. Payments under the contract are in arrears, based upon invoices for services rendered during the preceding month. There is no fixed monthly payment. If no services are invoiced, no payment will be made.
- 2) Because the Division's budget is subject to the same fiscal constraints imposed upon other state agencies, there is no guarantee that the contract amounts will not be reduced in the event that there is a delay or reduction in State or Federally allocated funds, as provided by Paragraphs III.A. and IV.E. All state contracts are subject to appropriation of funds by the Legislature, as provided in Paragraph III.A.
- 3) Although many contracts are renegotiated with the same provider in succeeding years, there is no guarantee that any provider will be awarded a new contract at the end of the current fiscal year.
- 4) Due to problems beyond the control of the agency, such as delays in processing paperwork or in the receipt of funds for programs, the Division cannot guarantee that payments will be made within a specified period of time (e.g., 30 days).

Very truly yours,

ROGER W. TOMPKINS
ATTORNEY GENERAL

By 
DAWN E. WARFIELD
DEPUTY ATTORNEY GENERAL
OPINIONS AND CONTRACT REVIEW

DEW/dw
Enclosure

CONTRACT

- I. THIS CONTRACT, hereinafter referred to as the Contract, effective July 1, 1988 through June 30, 1989 between the State of West Virginia, Department of Health, hereinafter referred to as the Department, and _____, hereinafter referred to as the Provider, is as follows:

WHEREAS, the West Virginia State Legislature has made appropriations to the Department and the Governor has approved the budget for the purchase of behavioral health services; and

WHEREAS, the Provider has made application to the Department and accordingly, has been approved and/or licensed for provision of services pursuant to Chapter 27, Article 9, of the West Virginia Code, 1931, as amended; and

NOW, THEREFORE, in consideration of the mutual understanding and agreements hereinafter set forth, the Department and Provider agree as follows.

II. OBLIGATIONS OF THE PROVIDER

A. Service Requirements

1. The Provider shall use funds referred to in Section III.A. and administered by the Department to provide behavioral health services as specified in the Service Plan which upon approval shall be incorporated as part of the Contract and to provide services in compliance with State and Federal laws, rules and regulations.
2. The Provider will take all necessary steps to generate additional funds which complement funds provided by the Department to the Provider for the approved Service Plan. Both parties agree that any funds so billed and received by the Provider will be used in a manner that supports services in the approved Service Plan.

These additional funds may also be used by the Provider to support the development and maintenance of other behavioral health services in the Provider's Service Area.

- f. The Provider assures that all individuals providing services purchased by this Contract are appropriately qualified by education and/or training and experience to provide these services.
- g. This Contract is accompanied by the 1988-89 Service Plan which is hereby incorporated into and made a part of this Contract.

2. Specific Provisions

- a. A Provider shall work closely with the _____ which has been designated as the _____ for service area _____ of Behavioral Health Region _____.
- b. The Provider shall enter into a written agreement with the designated program listed in a. above, for the purposes of defining roles, services, and linkage provisions within the service area cited in a. above.
- c. The Provider shall provide the services checked below in accordance with the 1988-1989 Service Plan, which shall contain a statement of the Provider's intent and capacity to provide each of these services as defined and described in the resource materials. Nothing in this Agreement shall restrict a Provider from providing services which exceed the definitions and descriptions in the said service materials in addition to providing the services described therein.

	MI	SA	MR/DD
1. Case Management	()	()	()
2. Program Planning	()	()	()
3. Diagnostic Evaluation Without Testing	()	()	()
4. Diagnostic Evaluation DD	()	()	()
5. Diagnostic Evaluation Comprehensive	()	()	()
6. Crisis Intervention	()	()	()
7. Community-Based Crisis Care	()	()	()
8. Local Hospital Crisis Care	()	()	()
9. Chemotherapy	()	()	()
10. General Medical	()	()	()
11. Individual Psychotherapy	()	()	()

specify how Department allocated and administered funds are projected to be spent. The Service Plan, reflecting the services funded in whole or in part with Department funds provided for in Section III.A., must be reviewed and approved by the Department. Approval of the Service Plan will be based upon the extent to which the Provider meets the standards, definitions, intent and descriptions set forth in the Resource Materials for the 1988-89 Service Plan.

The Department shall have thirty (30) calendar days from the receipt of a signed Contract and Service Plan to approve or disapprove the Service Plan. If the Provider has not received written notice of disapproval of the Service Plan within this thirty (30) calendar day period, the Service Plan shall be deemed approved.

Upon notification by the Department of problems or inconsistencies in the Service Plan, the Provider shall have thirty (30) calendar days to make changes in the Service Plan. If the Provider fails to correct the problems or inconsistencies in the Service Plan in the time period specified, the Department shall disapprove the Service Plan, and may deal with such failure to take corrective action through the provisions of Section IV.B.3.

2. The Provider may make budgetary changes from time to time without the Department's approval to any State supported line item as described on the Service Plan approved by the Department, provided the total of any such increase or decrease does not exceed 10% in any State supported line item during the fiscal year (salary and wages, employee benefits, contracted services, transportation, and other). The above provision is applicable unless otherwise restricted by categorical funding requirements.
3. The Provider shall comply with the standards developed by the Department for accounting and auditing. These standards are published in the document "Manual of Compliance Requirements," which the Department will provide to the Provider upon request.
4. The Provider may request an advance payment of funds authorized under this Contract subject to the requirements set forth in West Virginia Code 16-1-12 and the procedures specified in Administrative Instruction Number 6, Advance Payments, dated August 1, 1983.

D. Reporting Requirements

1. The Provider shall submit the following reports as applicable to the Department according to the timelines noted. Extensions of these timelines will be permitted subject to prior notification to the Department by the Provider and obtaining written approval thereof from the Department.

E. Subcontracting or Assignment

The Provider shall not enter into any subcontract or assignment for performance of any service checked in Section II.B.2.c., funded in whole or part under this Contract to any other agency, firm or corporation without the prior written approval of the Department.

F. Discrimination

The Provider shall abide by provisions of Title VI of the Civil Rights Act of 1964, all relevant rules, regulations and orders of the U.S. Secretary of Labor, and Section 504 of the Rehabilitation Act of 1973, as amended, and 45 CFR Parts 80, 81, 84 and 90.

G. Legal Requirements

This Contract and all disputes arising thereunder are governed by the laws of the State of West Virginia. This Contract is subject to the laws of the State of West Virginia; Board of Health's Legislative Rule entitled "Licensure of Behavioral Health Centers" (Chapter 27-9 Series II 1987); Public Law 97-35-12 (Omnibus Budget Reconciliation Act), Part B, Title XIX, as amended by Public Law 98-509 (Alcohol Abuse, Drug Abuse, and Mental Health Amendments of 1984); Public Law 98-527, Developmental Disabilities Act; 45 CFR Parts 16, 74, and 96, Federal Block Grant Programs, Final Rules; P.L. 98-502, Single Audit Act, and any relevant provisions of State and Federal laws, rules and regulations not specified herein that are or may become applicable hereafter. The Department and the Provider shall consult and negotiate any changes to this Contract to reflect changes in resources needed, programs, or the Service Plan which result from changes during the course of this Contract period in applicable laws, rules or regulations, or court orders or other consent decrees.

H. Monitoring and Review

1. The Provider shall allow that a review of its records, programs, and facilities may be conducted at any reasonable time by the Department, any other persons duly authorized by the Department, and those agencies of Federal government or its designees providing funding through this Contract.
2. The Provider shall retain all fiscal (3 years after resolution of audit), clinical and service documents relating to this Contract and the performance thereof in conformity with the West Virginia Department of Health's Retention Schedule (1982) pursuant to the Records Management and Preservation of Essential Records Act, Chapter 5, Article 8 of the Code of West Virginia, 1931, as amended. State auditors, the Department, persons duly authorized by the Department, those agencies of Federal government or its

IV. CANCELLATION AND COMPLIANCE

A. This Contract may be cancelled by either party for cause, as of the end of any calendar month, upon not less than sixty (60) calendar days written notice to the other party. In the event of a termination of this Contract at any time, the Provider shall be entitled to compensation for any unreimbursed expenses reasonably and necessarily incurred in the performance of this Contract up to the effective date of cancellation. Nothing herein contained, however, shall be interpreted as relieving the Provider of liability to the Department for any funds payable hereunder which have been improperly used under the terms of this Contract.

B. BREACH OF CONTRACT

1. Upon establishing probable cause that a requirement of this Contract has been breached, the party claiming the breach shall send by certified mail a Notice of Contract Violation to the other party describing the violation and the date by which corrective action must be taken.
2. Upon receipt of the Notice of Contract Violation, the party in alleged breach shall, within the time period specified, provide the other party with evidence that no breach has occurred or provide evidence that corrective action has been taken.
3. If the alleged breaching party is the Provider and if the Provider fails to take corrective action within the required time period or fails to provide the Department with evidence that no breach has occurred, or if the corrective action taken by the Provider is unacceptable to the Department, the Department shall provide written notification that one or more sanctions, including but not limited to the following, are being imposed:
 - a. Compensatory services to be provided by the agency to the affected client or group of clients;
 - b. Direct provision of a consultant by the Department, or a requirement that the Provider employ a consultant, to provide technical assistance or oversight to correcting the alleged breach;
 - c. Withholding or recoupment of funds in amounts commensurate with the cost of services not provided or not provided adequately;
 - d. Withholding or recoupment of funds in an amount sufficient for the Department to provide the deficient service directly or secure the service in a timely fashion from alternate service providers;

1. The Department will notify the Provider of reduction in State or Federal funds which will effect the reimbursement amount specified in Section III.A.;
2. The Provider and/or the Department will determine whether such reduced funding will necessitate a reduction in the quantity or quality of service in the Service Plan;
3. If needed, the Provider will submit a modified Service Plan within time frames specified by the Department;
4. If needed, the Department will approve or disapprove the modified Service Plan within five (5) working days;
5. If no agreement can be reached on a modified Service Plan, negotiations shall move immediately to the hearing process described in Section VII.E. below.

V. LIABILITY

A. The Provider shall indemnify and save the Department harmless from and against any loss, damage or liability occasioned by, growing out of, or arising or resulting from any act, acts of omissions on the part of the Provider, its agents or employees and will maintain liability insurance sufficient to indemnify the Department of any such liability in the amount as follows:

1. Minimum coverage for bodily injury \$500,000 to \$1,000,000; and,
2. Minimum coverage for property damage \$500,000.

Proof of such insurance shall be submitted to the Department with this Contract for verification.

VI. COOPERATION AND COMMUNICATION

A. The Department and Provider shall cooperate and maintain communication at the local, regional, and State levels of operation by means of liaison representatives, periodic meetings, task forces, study groups, and other measures as necessary in order to develop plans, training programs, and detailed policies and procedures to guarantee continuity of the working relationship and delivery of behavioral health services.

VII. MISCELLANEOUS

A. Publicity

All informational pamphlets, press releases, research reports and other public notices prepared by the Provider relating to the services checked in Section II.B.2.g. or 3.c., funded in whole or part under this Contract shall include the notification that: "Services provided by this program are funded in part by the West Virginia Department of Health and will not be denied to persons because of age, race, sex, handicap or inability to pay."

7. Within five (5) calendar days of receipt of documentation, including that received at the Provider-Director meeting, the Health Director shall either affirm, reverse or modify in whole or in part the appealed action. This decision of the Health Director constitutes the final decision of the West Virginia Department of Health on this matter.
8. This administrative appeal process must be exhausted prior to the Provider seeking review of this matter in a Court of Law.