

**TO:**  Members, Champaign County Mental Health Board (CCMHB) and

Champaign County Developmental Disabilities Board (CCDDB) and

Representatives of Funded Agencies

**FROM:** Lynn Canfield, Executive Director

**DATE:** February 22, 2023

**RE:** Risks of Loss Noted in Funding Requirements and Contracts

# **Purpose:**

To manage and account for the funds overseen by the CCDDB and CCMHB, some considerations which are important to Board and staff members should be clarified for our partners who receive the funding and for others with a stake in the local systems of services and supports. These considerations fall into four categories:

* **Distinction between Independent Contractor and Employee**
* **Unexpended Revenue and Payer of Last Resort**
* **Supplanting of State or Federal Funds**
* **Supplementation of Medicaid**

Rules and procedures for compliance are referenced in Funding Requirements and Guidelines, most recently revised during public meetings of each Board in 2021. Many are echoed in application forms and standard contract provisions. All relate to protecting against loss, especially in our community’s service capacity. As CCDDB and CCMHB members and staff request information from contracted agencies, to affirm that expectations are met and the public trust funds used appropriately, further explanation might be most useful in one memo.

These explanations are meant to clarify some CCDDB and CCMHB processes and requirements, especially as they relate to State and Federal laws. We are sensitive to the challenges government funding poses for non-profit agencies. Incorporating public and agency input and what we learn through state and national associations, our staff and board members seek to improve processes and policies where we have the authority to do so. Publicly funded systems are framed by regulations which may be less than perfect. Even indirect limits on flexibility can negatively impact those non-profit organizations best suited to deliver the social impact.

# **Additional Context:**

The Boards’ missions are like those of funded organizations and depend on them:

“*The mission of the CCMHB is the promotion of a local system of services for the prevention and treatment of mental or emotional, intellectual or developmental, and substance use disorders, in accordance with the assessed priorities of the citizens of Champaign County.”*

*“The mission of the Champaign County Board for Care and Treatment of Persons with a Developmental Disability (CCDDB) is the advancement of a local system of programs and services for the treatment of people with intellectual and/or developmental disabilities, in accordance with the assessed priorities of the citizens of Champaign County.”*

To review the statutes governing the two Boards and forming the bases of their current funding requirements and guidelines, refer to:

<https://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=1499>

<https://www.co.champaign.il.us/mhbddb/PDFS/MHB_Funding_Guidelines_122021_FINAL.pdf>

<https://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=3834&ChapterID=11>

<https://www.co.champaign.il.us/mhbddb/PDFS/DDB_Funding_Guidelines_122021_FINAL.pdf>

For archived recordings, board packets, and CCMHB and CCDDB schedules:

<https://www.co.champaign.il.us/MHBDDB/MHBMeetingDocs.php>

<https://www.co.champaign.il.us/mhbddb/DDBMeetingDocs.php>

Other public documents and items of interest to agencies and board members are on the public page of the application/reporting website at:

<https://ccmhddbrds.org>

It is also important that **agency board members** understand that they share liability for financial loss. Concerns related to agency boards and policies are addressed in this and similar sites:

<https://www.501c3.org/avoiding-conflicts-of-interest/>

For newer and/or smaller organizations, this toolkit from the federal Substance Abuse and Mental Health Services Administration (SAMSHA) provides guidance for establishing standard operating procedures and practices for long-term success:

<https://suicideprevention.nv.gov/uploadedFiles/suicidepreventionnvgov/content/SP/SAMHSAtoolkitCommunityFaith.pdf>

This SAMSHA toolkit is relevant because Champaign County and the CCMHB and CCDDB share an interest in ‘grassroots,’ locally-driven non-profit organizations, which are well-suited to address local concerns quickly and effectively and to mobilize local assets.

A further aspiration of the CCDDB and CCMHB and their staff has been that, with support from local taxes, some agencies will expand and sustain their operations with funding from larger sources such as state and federal agencies. However, the newer and/or smaller non-profit agencies tend to operate on limited budgets or without sufficient business office and legal services to safeguard against the kind of risks discussed here, adding to any other ‘growing pains.’

# **Distinction between Independent Contractor and Employee:**

Funded organizations are required to provide the CCDDB/CCMHB staff with copies of all subcontracts related to the services to be paid for (in part or in full) through contracts with the Boards. These should affirm that all parties understand subcontractors are subject to the provisions of the CCDDB or CCMHB contract.

Agencies should avoid such contractual arrangements when employment would be appropriate, whether to fulfill a contract’s service deliverables or to support the agency’s operations. One risk of loss, when employment would have been appropriate but was not used, is an IRS penalty for unpaid payroll taxes. Such surprise costs can be high, jeopardizing an agency’s financial standing and reputation and depleting funds which could have supported services.

Guidance regarding Independent Contractor status under the Fair Labor Standards Act has changed in recent years:

<https://www.lawandtheworkplace.com/2022/10/dols-new-independent-contractor-rule-a-return-to-2020/#:~:text=In%20March%202021%2C%20the%20Biden,was%20unlawful%2C%20and%20restored%20it>

The reliance on contractual arrangements rather than employees may be seen as a cost-saving strategy among non-profits and others, and more recently the practice may have helped fill growing workforce gaps. However, diligence is necessary, and the links below may be helpful in determining when a contractual arrangement is appropriate and permitted.

<https://www.irs.gov/pub/irs-pdf/p1779.pdf>

<https://www.thebalancesmb.com/how-the-irs-determines-independent-contractor-status-398618>

<https://www.stoketalent.com/blog/irs-20-factor-test/#What-is-the-IRS-20-Factor-Test>

<https://www.dominionsystems.com/blog/employee-misclassification-what-happens-when-you-mistake-an-employee-for-an-independent-contractor>

<https://bench.co/blog/accounting/independent-contractor-vs-employee/>

<https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee>

<https://www.irs.gov/newsroom/understanding-employee-vs-contractor-designation>

<https://www.cpajournal.com/2019/02/11/employee-versus-independent-contractor/>

# **Unexpended Revenue and Payer of Last Resort:**

In recent years, the Boards have allocated more to agency contracts than was projected to be available for a given funding cycle. This strategy is meant to ensure service capacity to meet rising needs, and it anticipates the eventual return of excess (unexpended) revenue. In a perfect year, agencies have enough resources to meet the service needs and to provide all services as contracted. Unfortunately, just as service needs are not always matched with adequate funding, adequate funding is not always matched with full staffing, leading to unexpended revenue. Since 2020, some agencies have received additional funding for services, increasing their total program revenues, but have not been able to fully staff and implement programs, decreasing actual expenses. The latter circumstance was the case prior to 2020, and agencies routinely return unexpended revenue after the contract year. It is then used for the following year’s agency allocations, allowing us to continue maximizing what is available for services.

Most non-profit human service providers are not used to surprise additional revenue. When it happens, it is a good thing, as it might stabilize services and expand their reach to more people. The circumstances around unexpended revenue are considered case-by-case, with attention to the terms of the other funding agreements. In some cases, unspent funds are owed to the Boards after the contract year because CCDDB and CCMHB funding should be used only after all other resources which can be applied to the contracted services have been exhausted.

*“The Board shall be the Payer of Last Resort… Providers shall coordinate their services, seek and utilize payment from other revenue sources prior to Board funding, thus making the Board payer of last resort. Payments to the Provider under this agreement shall constitute payment in full. Any payments received by the Provider from other sources shall be shown as a credit and deducted from the Provider’s charges.”* - Section C. 4 of contracts with agencies

Because “payer of last resort” provisions may be present in other public funding agreements, a similar rule in a contract with the State (e.g.) complicates the issue. The rationale for using local tax funds *last* is that Champaign County residents also contribute to Federal and State tax funds, so to use local funds where Federal or State funds are available to cover the cost of a service is to charge the people of Champaign County twice for one service. If State funds are available and also to be treated as payer of last resort, the state can recover the unexpended revenue. This not only causes Champaign County residents to pay twice but also benefits the State with no gain at all for the agency.

If an agency receives more funding from other sources than anticipated when the application budget forms were submitted and then incorporated into a contract, this can create the appearance of excess revenue unless there is also a plan to spend those funds fully. Adjustments to revenue or expenditures during the contract year may warrant revision of the application/contract forms, to describe the total agency, total program, and contract-specific financial plans more accurately. This is done through a contract amendment. Depending on the scope of services contracted with other funders, the revised forms might better reflect distinct service deliverables, for purposes not described in the CCDDB or CCMHB contract.

*“An approved provider plan indicating projected levels of expenses and revenues is required… funds are restricted for use in the program(s) described in the contract(s) concerning obligation of funding. [CCDDB or CCMHB] funds in excess of actual reimbursable expenses by the program are subject to recovery upon completion of an independent audit, financial review, or compilation, as required… The same costs shall not be claimed and reported for more than one [CCDDB or CCMHB] contract or programs funded by other funding sources…”*

- From Funding Guidelines (pages 5-6)

Review of the agreements associated with other funding for the program or other programs run by the agency can clarify whether unexpended total program revenue will be owed back to the Board.

*“…when the Provider submits grant applications to any local, state, or federal government funding source during the term of this contract, the Provider shall submit in writing what government entity the application was made to, the type, the amount and the focus of the application. Per 405 ILCS 20/3e (1) (j), the Board reserves the right to request a full copy of the application…”*

- Section C. 26 g. of the contract

*“The provider will be expected to… Make available for inspection by the [CCDDB or CCMHB] copies of any request/application for new or adjusted funding in any program within the agency funded in whole or part by the [CCDDB or CCMHB]; Make available for annual inspection by the [CCDDB or CCMHB] copies of all agency budget applications, provider plan forms, program service and funding plans, service agreements and fiscal reports prepared for the Department of Human Services, United Way, Department of Children and Family Services, or any other funding authority…” -* From Funding Guidelines (pages 3-4)

*“The provider shall not use [CCDDB or CCMHB] funds to establish or add to a reserve fund… Providers shall notify the [CCDDB or CCMHB] of any applications for funding submitted to other public and private funding organizations for services funded by the [CCDDB or CCMHB], especially those that result in a funding overlap.”*

- From Funding Guidelines (pages 10-11)

# **Supplanting State or Federal Funds:**

Avoiding supplantation of other public funding limits the potential risk of taxing Champaign County residents unnecessarily and compels us to advocate at state and federal levels on behalf of this community and the people who desire services. Where the larger service delivery and funding systems fall short, we should seek solutions, such as through rule change and adequate state appropriations. While filling gaps in care is a unique and ethical opportunity offered by CCDDB and CCMHB funds, they should not repair other systems’ flaws permanently.

An example of supplanting of other funding is the explicit exclusion from use of CCDDB funds for any service or support described in the School Code Article 14. A school district might even document that they do not provide a service an agency might offer, but if this service is covered under the school code, the agency cannot use CCDDB funding to cover the cost of that service.

When CCDDB or CCMHB funds are used to pay for services funded by other taxing bodies, including services delivered directly by those units of government, extra attention may be necessary to avoid such risks as: duplication of funding for the same service; exhaustion of other sources of funding; supporting the use of institutional settings which do not connect people to community-based care; and services not available to all Champaign County residents who would qualify under our rules.

CCDDB and CCMHB funds can be very helpful in filling service gaps, but when those gaps result from flaws in other systems, care should be taken to guard against loss of local funds where other funding would apply.

*“The following expenses are non-allowable… Supplanting funding from another revenue stream… Supplementation of state or federal funds and/or payments subject to the coordination of benefits…” -* From Funding Guidelines (pages 6-7)

# **Supplementation of Medicaid:**

Federal rule prohibits the supplementation of Medicaid payments by a third-party amount. Penalties can include recovery by the State of the third-party payment amount, at times an extrapolation of error across all billings, which can result in loss of agency/service capacity. This is not common, but Medicaid fraud allegations destroyed community-based behavioral health in New Mexico in 2013 - <https://www.healthfinancejournal.com/index.php/johcf/article/view/261>

A former Home and Community Based Services administrator from Center for Medicare and Medicaid Services told me that there tends to be confusion about the anti-supplementation rule in states where the systems are bifurcated, such as is the case in Illinois, with the separate Health and Family Services and Department of Human Services. A few years ago, a pamphlet was being distributed by IDHS to service provider agencies, explicitly advising them to seek supplemental funds to fill the gap between Medicaid rates and actual cost. This contradicts the federal rule and calls for advocacy to reform the rates and/or the rule, so that service provider agencies can operate and even expand their capacity to meet demand. In the meantime, care is taken to avoid using these local funds to supplement Medicaid rates and to support the important work in other ways.

# **Final Notes:**

Illinois local authorities such as the CCDDB and CCMHB must operate within the broader system. The statutes which allow communities to create such boards were established during a time when federal support for community-based services might have been more robust if it had been fully implemented. In any case, it was recognized that community-based care had the potential to offer a humane and cost-effective alternative to institutional care.

The CCDDB and CCMHB are local authorities and trustees of a public trust fund designed to expand community-based care which is responsive to the preferences of the local community. The principal and interest monies of a public trust fund are for the benefit of the public rather than an individual or company. This is the context in which we plan and monitor within the intent of the law and under the authority of the trustees (board members).

An organization must decide whether they have the desire and capacity to operate within these terms. We rely on each to contemplate these issues prior to submitting an application for funding and then prior to committing to a contract. Each newly registered agency attests to having read and understood the Funding Requirements and Guidelines. This is repeated at submission of a request for funding. The document is incorporated in each contract for services. While it is very dry reading (not unlike this memorandum), it begins with this understanding:

*“This policy should be reviewed by all agency staff responsible for contract management, including those who prepare applications for funding as well as those who record and report on contract activities, deliverables, and financials. This document offers guidance for contract compliance and clarification of expectations for fiscal accountability and financial management systems... Acceptance of [CCDDB or CCMHB] funding establishes a legal obligation on the part of the contracted agency to use the funding in full accordance with the provisions, terms, and conditions of the contract. The funded agency assumes full responsibility for the conduct of project activities and deliverables and is responsible for meeting [CCDDB or CCMHB] compliance standards for financial management, internal controls, audits, and periodic reporting.”*

*-* From Funding Guidelines (page 1)