

# PART 4

## COMMISSIONED AGENTS AND NACAC'S GUIDE TO ETHICAL PRACTICE SERIES CONTRACTS

This paper is the fourth in a series of NACAC resources designed to guide member institutions in the implementation of the revised *Guide to Ethical Practice in College Admission*, approved by the association's Assembly in September 2020.

This installment focuses on the elements of a contract, stakeholder protections, and contract management. It is organized into five sections: 1) contract considerations, 2) framework for constructing a contract, 3) stipulations of a contract, 4) certificate of representation, and 5) sample contracts.

Contracts are critical for proper oversight of and accountability for relationships with international student recruitment agencies. A contract provides a legal foundation upon which a partnership can develop—one that should be built on mutual understanding, trust, and respect. Well-constructed contracts and efficient contract management can help ensure that institutions achieve compliance with NACAC's *Guide to Ethical Practice* and maximize the possibility of a productive relationship with the international recruiting agency.

Institutions should require agencies to enter into a contractual relationship as a condition of partnership. By creating clear expectations, a contract provides protection for the institution, the agency, and, by extension, the students. Although institutions are understandably concerned with the protection contracts provide for them, they should be cognizant of the fact that agencies seek the same protections.

### 1. Contract Considerations

When contracting with an agency, the institution as a whole—not merely the campus unit(s) responsible for day-to-day agency interactions—enters into a legal relationship. As such, it is essential to engage your institution's legal department or external legal counsel to form a standard contract for agency partners and establish a protocol for future modifications. It may also be wise to consult with risk management officials at the onset of contract development and negotiation. It is vital to confirm which campus

officials possess signatory authority, the procedure for executing the contract, and who will be responsible for ongoing oversight of agency adherence to contractual terms.

Some public higher education institutions or systems may have relatively little flexibility in contracting procedures. Their regulations may require competitive bidding of contracts; thus, individuals involved in the contracting process should seek information about such requirements. Additionally, many schools have existing contracts with other commercial partners that include standard clauses and other protections that are universally applicable. Relevant language should be incorporated into contracts with international student recruitment agencies.

In developing the contract, institutions should aim for clarity, consistency, and comprehensiveness. It is also important to avoid using terms that can be interpreted differently, such as "prompt delivery." Some contracts may include a glossary of terms. Additionally, be clear with the agency about when,

exactly, a contract has been officially executed and thus takes effect. Is it only after the contract has all necessary institutional signatures and is transmitted to the agency? If the institution does not ensure that this timing is understood and the agency commences recruitment activity on its behalf prematurely, it risks receiving claims for compensation prior to the execution of the contract. It is also important to reject requests to retroactively date contracts. Establishing a precedent wherein a contract is backdated to justify a commission payment is fraught with risk.

The agency contract is sometimes referred to as an "agency agreement." In parts of the world where the rule of law is not well-established, agencies may attribute less authority to the contract, or agreement, than in fact exists. Make certain the agency



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understands the legal implications of executing a contract and that its provisions are clear and well understood by the agency, especially those portions that are written in legal terms.

## 2. Framework for Constructing a Contract

Institutional contracts vary considerably in format and wording, as the content of the contracts referenced at the end of this document indicates. Most institutions have templates they follow or boilerplate language they include in most contracts. Drawing upon a variety of actual institutional contracts, the framework below provides a listing of possible contract sections. The following two sections of this document suggest specific provisions that can be included within the categories below or structured according to institutional templates and preferences.

- Purpose of Contract
- Ethical Practice (referring to NACAC's *Guide to Ethical Practice*)
- Responsibilities of Institution
- Responsibilities of Agent
- Provision of Additional Services by Agent to Prospective Students
- Fee Structure and Payment Process
- Terms of the Agreement
- Relationship Between Parties
- Indemnification
- Nondiscrimination
- Governing Law
- Indemnity
- Dispute Resolution
- Confidentiality
- Intellectual Property
- Conflict of Interest

## 3. Stipulations of a Contract

The following is a list of sample contract content and stipulations for institutions to consider including in their agency contract. Excluded elements can be accounted for in formal operational protocols and communicated to the agency in writing, such as via guidelines or training materials. Contractual content may be broadly divided into two categories: institutional protections and student protections.

### Institutional Protections

To help ensure institutional protection in an agency contract, consider including the following stipulations:

- **Operate in accordance with NACAC's *Guide to Ethical Practice in College Admission*.** This document advises that institutions using agents ensure that commissioned agents employ ethical business practices. This requirement should be set out early and prominently in the contract.
- **Non-exclusive representation:** Specify that the agency is granted non-exclusive permission to represent your institution.



- **Governance and interpretation of the contract:** Specify that the contract shall be governed and interpreted pursuant to the laws of the jurisdiction of the institution, and specify this jurisdiction.
- **Adjudication of disputes:** Cite the specific protocols to be followed regarding institution, agency, or student complaints.
- **Contract modification and renewal procedures:** Outline how contract modifications can be made and approved, as well as the criteria and process for renewing the contract.
- **Penalties for contract violations:** Clearly articulate how a breach of contract will be handled and the resulting penalties, up to and including termination. As institutions are accountable for the behavior of their agent partners, per US and other countries' laws, a strong compliance policy will help protect the institution.
- **Termination conditions:** A common termination stipulation will allow either party to legally end the contract subject to furnishing advance written notice of a specified period (e.g., 30 days). Detail how existing obligations are to be discharged during and/or after that period.
- **Duration of the partnership:** Include a clear end date. Many international student recruitment agency contracts run anywhere from one to three years. Note, however, that one year may not be enough time for an agency relationship in a new market to develop and yield results.

- **Scope of the agency's authority to represent the institution:** In most cases, institutions grant recruitment agencies very limited representative authority. Typically this authority will be limited to providing unbiased information about the institution and supporting students in assembling—not creating or materially altering—application materials. This may include applications for accommodations and pre-departure orientation. Also, consider specifying the country, countries, or municipalities in which the agency is authorized to represent the institution. State that under no circumstances is the institution obligated to formally hire individuals serving as its agents.



- **Clear outline and division of responsibilities:** Determine which responsibilities fall on the institution and which fall on the agency. Some common responsibilities of the contracting institution, drawn from sample contracts, are as follows:
  - Payment to the agent according to agreed-upon terms, such as payment of commission after the student attends the institution for a specified period. If the agent receives a percentage of first-year tuition, as is the case in many contracts, specify how the agency will be paid if the student does not complete the academic year.
  - Offering admission to students it deems qualified, retaining the sole right to make such decisions.
  - Providing the agency with the necessary information about the institution and its policies as well as recruiting materials for the agency to provide services.
  - Assisting the agency in helping a student obtain a visa by providing required documents, such as letters of acceptance and immigration forms.
  - Providing support services to admitted students.

Typical responsibilities of the agency may include:

- Agreement to be familiar with NACAC's *Guide to Ethical Practice in College Admission*. Consider attaching the *Guide to Ethical Practice* to the contract.
- Recruitment of students in a specific area, for specific institutional programs.
- Organizing publicity activities related to the recruitment of students.
- Screening of prospective students and ensuring that all students recommended to the institution meet the institution's admission standards.

- Taking reasonable measures to verify the veracity and completeness of the application.
- Regular reporting to the institution.
- Ensuring that students meet the visa requirements and that applications are completed.
- Submission of invoices to the institution including information such as amount claimed, student birth date, program start and end date, name of program, and program length.

- **Prohibition (or permission) to subcontract:** Take great care when deciding whether to permit the use of sub-agents. Delegation of the institution's representation to sub-agents with whom the institution may have infrequent—if any—contact is a high-risk decision. At a minimum, stipulate that such subcontracting is prohibited without prior written consent of the institution. Consider, too, the impact on students. If students are working with a sub-agent rather than the contracted agent, it may be difficult for the student to verify the sub-agent's authority to be working on behalf of the institution. US law and accreditation standards related to misrepresentation, as well as the laws of other countries, can hold the institution accountable for the actions of agents and sub-agents.

- **Confidentiality:** Institutions may want to stipulate that the terms of the contract between the institution and the agency are confidential. Stipulate that the agency will not release to third-parties any information, documents, or other material provided to the agent by the institution.

- **Privacy:** Require that the agency adhere to applicable provisions, such as FERPA in the US and GDPR in the EU, and not release any information about the student to third parties without the written permission of the student.

- **Ownership of intellectual property:** Stipulate that the materials provided to the agency by the university are the property of the university, and that the intellectual property rights associated with materials developed by the agency in the course of its provision of services to the university shall be assigned to the institution.

- **Stipulation concerning how the institution-agency relationship may be represented:** This includes the agency's use of the institution's name, logo, and/or likeness in marketing and advertising activities. Institutional pre-approval of all relevant promotional materials is typically required, and translations must fully and accurately reflect the meaning of the text in the original language. Clarify that the agency or agent is not an employee of the institution, and the extent of influence, if any, that the agency or agent has over admission decisions. Institutions typically do not grant authority to agents to render or influence admission decisions. However, should this authority be granted as part of the agreement, this must be clearly explained to and easily verified by students and parents. Stipulate that the agency must not misrepresent its authority.

- **Changes affecting the relationship and the process for informing the other party:** Changes might include location change of either party; advisory turnover at the agency; change of services offered by the agency and/or fees charged to students; change in academic or co-curricular programs offered by the institution; change in admission requirements; and change in tuition, fees, or refund deadlines.
- **Verifying the agency's role in the referral of applicants:** Require that each submitted student application be accompanied by a cover letter using the agency's letterhead, or for applications transmitted electronically, an email from a specified agency email account. This aims to preclude 1) an agency seeking credit for applicants it may have advised, but who subsequently applied independently, or 2) competing claims for compensation by more than one agency the applicant may have consulted. It also allows for the establishment of an audit trail, substantiating remuneration approvals. Institutions risk violating the Higher Education Act if their incentive compensation-based recruitment involves international students residing in the US.
- **Financial relationship and remuneration particulars:** Offer details about the processes and procedures governing the financial relationship between your institution and the agency. Consider adding language to:
  - Prohibit the agency from handling student tuition or fees that are payable to the institution. Mandate that students remit tuition and fee payments directly to the institution.
  - Restrict the agency's ability to incur expenses without the institution's prior authorization. Specify what expenditures, if any, are reimbursable.
  - Confirm that remuneration terms are fixed in the home currency of the institution—and specify the currency.
  - Detail invoicing requirements and payment procedures. Obtain information up front about the agency's financial account to which compensation from the institution will be sent. Any later changes to this information should be communicated by the agency in writing and pre-approved by appropriate campus officials prior to the issuance of new payments.
  - Detailed refund requirements.
- **Charging students in addition to receiving a commission from the institution:** If the institution prohibits agencies from charging students for advising and related services as a condition of a commission-based contractual relationship, stipulate this clearly in the contract. If an institution permits this practice, agents must provide to both their student/family clients and their postsecondary clients a written agreement that itemizes their services and charges.
- **Training requirements:** Indicate what initial and ongoing training is offered and required of agencies and agency staff.

- **Performance indicators:** These should address the quality and professionalism of the agency's work, in addition to more quantitative metrics, such as the number of students referred, percentage of applicants admitted, and the academic performance, persistence, and graduation of enrolled students.
- **Annual review process:** Describe the process used to review the contract and assess outcomes.

## Student Protections

To help ensure that students are not adversely impacted when they interact with a partner agency, consider including the following contractual elements:

- **Transparency about the institution-agency business relationship:** Require the agent to disclose the business relationship between it and the institution.
- **Student-agency contract:** Require a contract between the agency and individual student that details the student's rights and responsibilities, the services the agency will provide to the student, and any fees the agency will charge the student.



- **Student fees:** If the agency charges and/or collects student fees of any kind, require full, detailed and up-front disclosure of these. Prohibit the agency from taking any portion of scholarships or financial aid as fee-for-service.
- **Discriminatory practice:** Prohibit discrimination in the selection of clients and provision of services. Specify that this anti-discrimination stipulation pertains to gender, race, ethnicity, color, national origin, religion, sexual orientation, marital status, age, political views, and/or disability. Agencies must agree to institution policies that might not accord with cultural norms in the student's place of origin.

- **Involvement in the student’s application:** Outline acceptable and unacceptable involvement in the student’s application and related exams. Indicate that the application is the responsibility of the student. Prohibit the agency from handling and submitting student academic records; insist instead that authentic transcripts be transmitted directly by the student’s academic institution and/or trusted foreign credential evaluation organization. Stipulate that agencies sign a written agreement to accompany each application, attesting to the following:
  - the authenticity of the student’s signature
  - that the student fully understands the terms and conditions of engagement with the agent
  - that the agency has not in any way assisted or advised the student to submit falsified or embellished application documents
  - that the agency has taken reasonable steps to confirm the veracity, authenticity, and completeness of the application materials.
- **Admission decisions:** Inform agencies that they may not promise admission to the institution. However, if agencies are granted the authority to offer admission, this must be clearly stated and verifiable.



- **Admission eligibility:** Stipulate that students who approach the agency who meet the standards for direct admission to the institution must not be referred to an intensive English, bridge, or pathway program but, rather, to the school/college/university directly.
- **Artificial barriers to student transfer:** The agency should be prohibited from requiring students to forfeit their right to transfer from one institution or program to another once in the host country, and from charging students undue financial penalties for the same. Students should be free to transfer from one institution to another, provided they abide by the relevant student visa regulations.

- **Communication expectations:** Provide guidelines for institutional and agency communications with students during the application process, including submission of documents, fee invoices and receipts, and application receipt confirmation. Stipulate that the agency must promptly furnish students all documents issued by the school to the student, without exception. This will preclude the selective withholding of relevant information that the student has a right to know. Also, prohibit the agency from posing as the student via email or other communications, and from accessing students’ application accounts.

#### 4. Certificate of Representation

Newly contracted agencies may request a certificate of representation or formal letter of authorization on institutional letterhead to establish credibility among prospective students and their parents. If an institution chooses to supply any agency with this documentation, it should engage with the legal department or external counsel to formalize its content, including nomenclature used (e.g., “representative” and its alternative designations).

As with the agency contract, it is recommended that this documentation include an expiration date and a unique identifier to reduce the possibility of unauthorized alterations. Letters of authorization should also include clear language about the scope of the relationship, including approved and prohibited practices. The documentation may also include a dedicated email address, tied to the institutional domain, which students or parents may use to contact an institutional representative to verify any particulars communicated by the agency. In an effort to be fully transparent, this practice provides yet another way for students and families to verify business relationships. Suggested by NACAC’s *Guide to Ethical Practice in College Admission*, institutions should disclose that they have employed agents to recruit on their behalf.

#### 5. Sample Contracts/Agreements with Agencies

As much of the content within a contract is considered proprietary information, contracts are not often shared publicly. The following sample contracts, however, can serve as a basis for developing a contract for your university. Yet because each institution has unique legal and regulatory requirements, as well as different needs and expectations when it comes to working with agents, it is critical to develop contracts accordingly.

- [California State University Los Angeles Division of Extended Education](#)
- [Shoreline Community College](#) (WA)