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MEMORANDUM:

**SPEECH THERAPISTS AND COMPLIANCE WITH THE ETHICAL RULES OF THE
HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA**

AUGUST 2018

1. Introduction

We have been approached by Alison Dent, Ethics Chairperson of the South African Speech Language Hearing Association (SASLHA), who is acting on their behalf in this matter. We have been requested to highlight the issues which need to be considered by Speech Therapists regarding employment by schools or other entities, as well as issues such as remuneration, locums, itinerant practices and the problems pertaining to this.

2. Owning of a practice within which Speech Therapist services are rendered

2.1. Acceptable Business Practices

Speech Therapists cannot provide speech therapy services to their patients through any business models other than those specifically indicated by the HPCSA. Paragraph 2.1 of the Policy Document on Business Practices¹ ("the Policy") provides for only the following business practices as to be acceptable:

- Solus Practice
- Partnerships
- Associations (of independent practices, legal entities and/or solus practices)
- Personal liability companies (juristic persons/incorporated companies, authorized under section 54A of the Health Professions Act, 1974)
- Any of the above who outsourced their administration or established a company to manage the administration provided that the practitioner does not permit or allow the Administrators to operate in violation of the established ethical rules of Council.

This paragraph makes it clear that HCPs such as Speech Therapists can outsource certain non-patient related services to other legal entities, e.g. administration, receptionist services, billing services, financial services, etc.

¹ HPCSA Policy Document on Business Practices, dated 26 October 2016

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These entities then can act, in terms of an agreement, on behalf of the practice. Further discussion with regard to this could be found in paragraph 7 of this memorandum.

Of further importance here is Ethical Rule 8(1) of the Ethical Rules ²(“the Ethical Rules”) of the Health Professions Council of South Africa (HPCSA), which provides as follows:

“Partnership and juristic persons.—(1) A practitioner may practise in partnership or association with or employ only a practitioner who is registered under the Act and who is not prohibited under any of the annexures to these rules or any ethical rulings from entering into such partnership or association or being so employed: Provided that, in the case of employment, the practitioner so employed either provides a supportive health care service to complete or supplement the employing practitioner’s healthcare or treatment intervention or is in the same professional category as the employing practitioner.” (Emphasis provided by EKA).

2.2. Who can own a practice within which Speech Therapist services are rendered?

The Ethical Rules provides in Ethical Rule 8(3) that only persons registered in the same professional category of Health Care Practitioners (“HCPs”) registered at the HPCSA may be owners and co-owners of a practice, e.g. only persons registered in the category of Speech Therapists may be owners and co-owners of a Speech Therapy Practice. It is thus not possible for e.g. a medical practitioner, physiotherapist, or occupational therapist to be co-owners of such a practice.

Here it is important to take notice of Annexure 11 to the Ethical Rules, which sets out the rules of conduct pertaining specifically to the speech, language and hearing professions. Herein it stated that a speech and hearing correctionist, hearing community worker and speech and hearing assistant “*shall not conduct a private practice.*”

Ethical Rule 8 therefore has the effect that no corporate entities, e.g. hospitals, schools, rehabilitation centers, etc. may own practices of HCPs. Ownership entails that ultimate responsibility is taken for everything that happens in a business/practice. That is why the personal liability company (“incorporated company”) is the only corporate entity within which healthcare professionals registered at the HPCSA can practice.

2.3. Who can be employed by whom and who can practice with whom?

Ethical Rule 18 of the Ethical Rules relates to professional appointments. Professional appointments refer to instances where the person registered at the HPCSA is employed by - or render health care services within the scope of his/her registration with the HPCSA to another entity.

² GNR 717 of 4 August 2006: Ethical Rules of Conduct for Practitioners registered under the Health Professions Act, 1974 as amended.

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Paragraph 2.4. of the Policy provides for only the following to employ practitioners registered under the Health Professions Act, 1974 (“HPA”), namely:

- The Public Service
- Universities/Training Institutions (only limited for purposes of training and research)
- Mining companies & NPO’s/NGO’s (subject to approval of the relevant professional board)
- All registered persons within the HPCSA may also employ fellow registered practitioners in accordance with the Ethical Rules.

Furthermore, the practice of a Speech Therapist can only employ Speech Therapists. It is not allowed to employ other HCPs registered at the HPCSA, e.g. physiotherapists, general practitioners, occupational therapists, psychologists, etc. **The employer and the employee must fall in the same professional category.**

In addition to the above, Ethical Rule 8A of the HPCSA Ethical Rules states that *“A practitioner shall not share his or her rooms with a person or entity not registered in terms of the Act”*.

“Rooms” is defined in the Ethical Rules as *“a physical structure, with an exclusive entrance and walled all round for the privacy of patients, the preservation of their confidentiality and the safe keeping of records, where a practitioner conducts his or her practice.”* This has been interpreted to mean a totally physical, separated structure with its own entrance, own reception, etc. However, the various HCPs may share a building, but each practice is required to be completely separate from the next. Ethical Rule 21 requires of HCPs to ensure that all professional acts to be done under proper conditions and in appropriate surroundings.

HCPs registered with the HPCSA cannot be employed by entities such as schools, hospitals, etc. to render professional services. For such employments to be deemed ethical by the HPCSA, a joint application must be made by the entity and the Speech Therapist to obtain written permission for this, as provided for in paragraph 2.4 of the Policy. There is nothing though that precludes a Speech Therapist from having an **independent practice** at a school where s/he rents a facility from the school, but remain at all times completely independent and no employment relationship exists.

2.4. How many practices can a Speech Therapist own?

HCPs have to be present at their practices and be active in their practices, as their names and their duty to act professionally and ethically are being associated with the practice or practices. This means that patients would identify them as the person/s responsible for the care rendered in that practice. HCPs cannot practice by “remote control”, neither can they practice without having direct oversight over their employees. Over the years this has become a ground on which medical schemes undertake so-called “claw-backs” against professionals.

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It is also impossible to run a number of practices solely with employees and/or locums – the practice owner and employer must have direct control and oversight over staff. This would not only pose a risk of violation of the Ethical Rules, but also a labour law liability risk. HCPs carry the legal liability and responsibility for the actions of all staff (full-time – or part-time permanent or temporary (fixed-term) employees). Any action undertaken within the course and scope of such an engagement is taken on behalf of, and in the name of the practice. Ethical Rule 9 also prohibits the appointment of locums for periods of longer than six months.

With regard to the matter of locums, it is important to note that neither the Health Professions Act (“HPA”) nor the Ethical Rules prescribes how a locum should be appointed - **as an employee or an independent contractor**. It is up to the HCP registered with the HPCSA and the locum to determine the contents of the contract of employment. It is important to distinguish between an employee and an independent contractor, because the law attaches different consequences to either appointment.

If a locum is appointed as an employee, labour legislation (as the Basic Conditions of Employment Act, 1997 (“BCEA”) and the Labour Relations Act (“LRA”) will be applicable to the contract of employment, which will not be the case with appointment as an Independent contractor. Section 198A of the LRA provides that employment by a temporary employment service will be restricted for a period not exceeding three months:

“198A. Application of section 198 to employees earning below earnings threshold.—(1) In this section, a “temporary service” means work for a client by an employee—

(a)

for a period not exceeding three months: (emphasis provided)

(b)

as a substitute for an employee of the client who is temporarily absent;

Some practitioners do not conclude a contract with the locum and then the BCEA and LRA will not be applicable (the Ethical Rules then).

So it will be a matter then of how the locum was appointed, which will determine the locum period.

Ethical Rule 6 applies to HCPs that may be travelling (“itinerant”) practitioners (which practices in more than one geographical location, e.g. across provinces), requiring of such practitioners to ensure that they render services at the same level in all areas, as if they were to run a full-time practice in that area. If an HCP would be the owner of a number of practices, it would be virtually impossible to exercise the necessary control and be active in all the practices owned. One of the key concerns of the HPCSA in this regard is the availability of the HCP when s/he maybe needed by the patient, e.g. after hours or in days when the HCP is not ordinarily present in the practice.

3. Practice Names

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An HCP in a practice should be identifiable by the public. Ethical Rule 5 stipulates that such a practice may only be in the name of the HCP whose practice it is or in the name of other registered person/s with whom s/he practices. This would mean that the Speech Therapist cannot practice under the name of e.g. a school, or another catchy name, such as “Speakfree” or similar. S/he would rather be required to practice under their own name, e.g. “Ms Mabula” or Smith and Associates Speech Therapists Inc”.

Therefore, when services are rendered by the Speech Therapist to the patient, the services must be rendered in the name of the Speech Therapist and the Speech Therapist will be required to invoice the patient in his/her name.

It must be noted in this regard that where the owner did not render the services, but an employee did, medical scheme regulations require the name of the health care professional who rendered the services to be indicated next to the code and description of the services rendered.

This also further means that the Speech Therapist cannot be employed through a school, as the services would then essentially rendered by an employee of the school and as an employer the school would then be required to provide the patient with an invoice in the name of the school.

What must also be considered here, is the contents of the HPCSA Guidelines on Overservicing, Perverse Incentives and Related Matters concerning HCPs and more specifically paragraph 3.11, which relates to the sharing of fees. Herein it is stated that HCPs should not share fees *“with any person or health care professional who has not taken a commensurate part in the service for which the fees were charged.”* Ethical Rule 7(5) refers to the same principle. This means that a portion of the fees earned through professional activities cannot be shared by a corporate entity, e.g. an occupational health entity for whom the patient was seen or the school who has referred the child.

These rules have the effect that an entity like a school could not take any part of a fee charged by a Speech Therapist for services rendered by him/her to a patient. Simply put, if a Speech Therapist is employed by an entity like a school, s/he will be given a salary, which would be made up of the fees charged for the services rendered by him/her. The school will not pay the entire fee to the Speech Therapist, but would take a portion for themselves. This would amount to the sharing of fees, which is prohibited by the Ethical Rules.

4. Marketing of a practice

Ethical Rule 3 refers to advertising and canvassing or touting. In line with this Rule, HCPs are allowed to advertise their services provided that such advertising is not *“unprofessional, untruthful, deceptive or misleading or causes consumers unwarranted anxiety that they may be suffering from any health condition.”* (emphasis provided by EKA)

With regard to canvassing and touting, Ethical Rule 3(2) provides that this is not allowed to be done by HCPs.

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Canvassing is defined in the Ethical Rules as conduct by a HCP *“which draws attention, either verbally or by means of printed or electronic media, to one’s personal qualities, superior knowledge, quality of service, professional guarantees or best practice.”* This would be the case if a HCP refers to him-/herself as the best practitioner in a certain area.

Touting refers to conduct *“which draws attention, either verbally or by means of printed or electronic media, to one’s offers, guarantees or material benefits that do not fall in the categories of professional services or items, but are linked to the rendering of a professional service or designed to entice the public to the professional practice.”*

This would for example happens when an HCP informs patients that there are free Wi-Fi services at the rooms, because this falls outside the services of the HCP.

5. The relationship between Speech Therapists and other entities

Even when permission is granted by the HPCSA for the employment, or if there is only a contractual relationship between an entity, such as a school and a Speech Therapist, the following aspects merit consideration:

5.1. Confidentiality

The sharing of health information with a third party is strictly prohibited by the Ethical Rules, the National Health Act, 2003 (“NHA”) and the Constitution of South Africa, 1996. The Children’s Act, 2005 (“CA”) only allows disclosure of health information under a narrow set of circumstances, which would be applicable in circumstances where patients treated by the Speech Therapist would be minors under the age of 18 years. According to the Ethical Rules children from 12 and older has the right to confidentiality, i.e. they must provide written consent under the NHA before information can be shared with another person, even if that person is their parent.

The Protection of Personal Information Act, 2013 (“POPI Act”) is not yet in full force, but is also applicable here. POPI applies to the “processing” of all personal information of individuals, which would include the names, addresses, health information and the likes of individuals.

The Speech Therapist, as a person in the possession of a patient’s individual information, is responsible for how that information is used and is further responsible for ensuring the confidentiality of this information. In the event that a Speech Therapist is employed (with permission of the HPCSA), or, as an independent practitioner renders services at e.g. an entity like a school, the aspects relating to the confidentiality of patients’ information will be breached because the school as the employer would have unauthorised access to this confidential information.

5.2. Access to records

Together with the principle of confidentiality as discussed above, the access to health records is also an important matter. This access is allowed by the NHA under limited circumstances, such as when disclosure is “necessary”

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and “within the ordinary course and scope” of the duties of an HCP (section 15(1)). When practicing at for example a school, feedback to the school, or the school having access to information regarding the progress or assessment of a patient, would render both the Speech Therapist and the school open to legal liability under the stated legislative provisions.

It would also violate the fundamental ethical principle of trust between the Speech Therapist and the patient, as the patient would never be assured of any confidentiality as his/her information could at any stage be exposed into such documents. This is set out in paragraph 4.1 of the HPCSA Guidelines on Confidentiality: Protecting and Providing Information (September 2016).

5.3. Clinical Independence

In settings such as occupational or educational facilities, it may be tempting for teachers or employers, or even parents, to try to assist or intervene in the treatment of the patient. The Speech Therapist must at all times act in the best interest of the patient and respect patient confidentiality, choices regarding confidentiality and also dignity. This is outlined in Ethical Rule 27A. To act in the best interest of the patient also includes that no third party may interfere with the clinical independence of the Speech Therapist. An entity like a school is not authorised or competent to make assessments as to the appropriateness of the acts of the Speech Therapist.

Ethical Rule 11 deals with the principle that a patient must be allowed to exercise their choice regarding treatment of/by another HCP. This right to choose is also entrenched in the Consumer Protection Act, 2008 (“CPA”) section 13. A patient needs to make his/her own final decision regarding care to be received. This must be based on the options provided to him/her by the Speech Therapist. A patient also has the right to refuse referrals.

In the event that an employment relationship exists between an entity, e.g. school and a Speech Therapist, it is doubtful that the Speech Therapist will be able to maintain clinical independence taking into account the fact that the employment relationship by its very nature, would require the employee (the Speech Therapist) to take all reasonable and lawful instructions from the employer. This will have a negative impact on the clinical independence of the Speech Therapist.

6. Group Practices

HCPs from time to time considers the possibility of forming a “group practice”. The idea was that medical practitioners, occupational therapists, physiotherapists, psychologists, etc. could form one entity, a so-called “group practice” where they all would practice in the same legal entity.

There is no such thing as a “group practice” in law. It is very important that one must understand here that a “group practice” is a term that is not a legal term. It simply refers to the presence of more than one HPCSA-registered practitioner at a site. It does not mean they are in the same legal entity. The rise of the colloquial term “group

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practice' is truly unfortunate, as there is no legal construct like that. The only lawful "group" legal structures are those as discussed in paragraph 2.1. earlier in this memorandum.

7. Admissibility of Corporate Involvement in the practices of Speech Therapists

Corporate involvement refers to the provision of non-health related services to the practice of the Speech Therapist, e.g. financial, administration, legal, etc. services. Paragraph 2.1. of the Policy makes it clear that an HCP can outsource the management and administration of his/her practice to a legal entity, however that entity can have no say in the manner in which the health care services are offered or the actual offering of the services. The health services could only be done by the HCP, in this case the Speech Therapist. A corporate entity can therefore run parts of the practice of the Speech Therapist, provided that it stands separate from the practice, do not constitute

any professional act for which the practitioner must be registered and do not dictate to the practice or cause the practice to violate any of the Ethical Rules.

The Speech Therapist who has rendered the service to a patient, must bill for that service (also discussed under Ethical Rule 7 in paragraph 3). The service cannot be billed for by the Administration Company. The Administration Company can provide the infrastructure and the staff to do the billing, but the actual accounts must be in the name of the Speech Therapist practice or the Speech Therapist that rendered the service, paid into the bank account of the practice or the Speech Therapist. The monthly payment of a fixed amount to the Speech Therapist/Practitioner by an administrative entity is likely to be viewed as a *de facto* employment situation.

In order for an administration arrangement to occur, there must be an administration agreement in place between the administration company and the Speech Therapist. This agreement will:

- set out the terms of such relationship
- the manner in which both parties are required to conduct themselves
- the duties each party is responsible for performing
- the set fee (at market value and not a percentage of the income of the Speech Therapist) for which the Administration Company will be paid for the services which it renders to the practice of the Speech Therapist

Compliance with the Ethical Rules must be included in such an agreement.

A corporate entity can therefore run parts of the practice of the Speech Therapist, provided that it stands separate from the practice and do not dictate to the practice or cause the practice to violate any of the Ethical Rules.

8. Conclusion

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This Memorandum sets out the importance of Speech Therapists as HCPs to adhere at all times to the Ethical Rules and other applicable legislation as discussed in order to avoid disciplinary action by the HPCSA, which could have devastating and far reaching consequences for the Speech Therapist practice. It is advised that professional

support be obtained from a person knowledgeable in health law, and HPCSA matters, to set up legal structures, draft administrative agreements and contracts, etc. These documents must not only be lawful, but should consider the HPCSA rules and known interpretations and application thereof to specific situations.

Practitioners who are in business models, employment relationships or structures that may fall foul of the above legal and ethical rules, should seek assistance and without delay start processes to restructure such business models.