

## Memorandum

To: Maine Department of Education

From: Eric R. Herlan, Esq.

Re: Comments on Revisions to Draft Master Contractual Agreement

Date: February 3, 2025

I am writing to provide comments to the Draft Master Contractual Agreement as it was revised in January 2026. The document as revised now included a Draft for special purpose private schools and a draft for private schools educating students at public expense.

First, it seems important to have the two drafts, as the Department is now advancing, to address the unique circumstance in Maine of private schools serving students not only through contracts but also through “choice” funded by public school units that have no schools at that grade level. To the extent that private schools might contend that they should carry no IDEA duties for students in that situation, it would be a positive development for a Master Contract to make clear that the duties agreed upon through the Master Contract apply whenever the placements are publicly funded in those school units with no public school at that level.

I have no substantive comments on much of the remainder of these documents, and I believe that imposing conditions of the sort found in these agreements on private schools that are accepting public monies is a positive step forward. I do, however, have critical comments regarding Section 7 of both drafts addressing “Removal or discharge.”

The federal district court in Maine has signaled that IDEA standards, including standards on dismissal and the IDEA’s “stay put” provision, apply to private schools. *Spurwink Services, Inc. v. Doe et al.*, 2:25-cv-00026-JCN, 2025 WL 2402777 at \*8 (D. Me. Aug. 19, 2025). The court’s reasoning in this case is based on Maine’s current statutory and regulatory scheme, which permits the Commissioner to impose such obligations and then in fact imposes them through Maine law and rules.

Moreover, the court’s decision is in line with Maine DOE Administrative Letter 28, “IEP Requirements for Out-of-Unit Placements” issued on November 24, 2021, that states that private schools may not terminate student’s placements without going through the IEP team process, and are required to maintain stay put in the event of a dispute, citing both federal and state laws. See [ADMINISTRATIVE LETTER: IEP REQUIREMENTS FOR OUT-OF-UNIT PLACEMENTS – Maine DOE Newsroom](#).

In light of that legal ruling (and DOE guidance), setting forth the law in Maine until this court or a higher court concludes otherwise, it would seem that any Master Contract language would be invalid if it purports to withdraw those rights -- absent a change in the laws and rules upon which the court decision is based. The revised Draft Master Contractual Agreement has

just this problem. The drafts include a process for dismissal of a student that includes an IEP team discussion of the dismissal. But absent parent agreement on an alternative placement, the Master Contract would permit dismissal without any further process as early as two calendar weeks after the team meeting is held for discussion. See Draft 7(b)(v)(2). It disregards that the IEP team itself might conclude that the dismissal should not occur. And there is no obligation to respect the IDEA's stay put requirement if the IEP team does not agree that a dismissal should occur, or if one of the parties filed for a due process hearing. Thus, the Master Contract would permit dismissal with no regard to the IEP team decisions or to the IDEA's stay put provision. This falls a great distance short of what the IDEA requires for public schools, and it also appears to fall well short of the ruling entered by the Maine federal district court, as referenced above.

Beyond this, the language in the draft that permits an emergency termination appears to be much looser than language in the IDEA and MUSER permitting an emergency removal of a student into an interim placement. In the draft a student could be dismissed for inflicting "serious injury" that may require a hospital visit, rather than "serious bodily injury" as found in the IDEA for longer removals. Even more concerning is the authority that would be granted by the Master Contract for dismissal based on "criminal activity." This would permit dismissal for offenses as innocuous as stealing another child's pencil. Although it may seem unlikely that a private school would dismiss a child for that offence, there are published rulings in Maine making clear that private schools have dismissed students with disabilities for stealing sneakers. It is not that hard to imagine dismissal for pencil theft!

Whatever the process for emergency dismissal may be, that process should be limited to the circumstances justifying placement in an interim alternative educational setting under the IDEA, rather than the looser language now found in the drafts.

The District is also concerned about subsection iv in Section 7 on discharge/termination in nonemergency situations. This subsection would appear to grant discharge authority without regard to IEP team decisions or the stay put provision with only 30 days' notice. Draft 7(iv)(b)(4). A private school unable to dismiss through the emergency process could instead dismiss through this subsection, again without regard to IDEA rights, with only a slightly longer wait..

Granting private schools this authority would seem to violate Maine law and rules, in addition to the court ruling referenced above. This language should be removed and replaced with IDEA-consistent language, or the Draft Master Contract process should be put on hold until after the court proceedings referenced above have fully finished, establishing with finality the applicable legal standards in this area. The DOE should avoid developing through this Master Contract process any language that could later be used by private schools in the above-referenced litigation to argue that current law and regulations must mean something less IDEA-protective than what the Court has currently ruled.

Maine law and rules appear to grant IDEA rights to students attending publicly funded private schools. The portions of this Master Contract on student dismissal or tuition sharply undercut those rights. The Maine DOE should avoid taking this action, and permit the current judicial processes to answer with finality the issues discussed here.