Portland, ME
One Monument Square
Suite 201
Portland, ME 04101

(207) 477-7002 Tel
(207) 477-7003 Fax
Writer's Direct Dial:
(207) 477-7005
Writer's E-mail:
twalker@fisherphillips.com

November 15, 2025

Sarah Forster, Esq.
Assistant Attorney General
Maine Office of the Attorney General
6 State House Station
109 Sewall Street
Augusta, ME 04330

Erin Frazier
Director of Special Services and Inclusive Education
Maine Department of Education
23 State House Station
111 Sewall Street
Augusta, ME 04333-0023

Re: Response and Comments to Draft Master Services Agreement on behalf of Undersigned Special Purpose Private Schools

Dear Assistant Attorney General Forster & Director Frazier,

On behalf of the undersigned schools that provide services to students with disabilities in Maine, I am writing to provide comments and responses to the Department's draft Master Services Agreement (the "Master Agreement"), released on October 15, 2025. We address these concerns in the order they appear in the draft contract.

At the outset, we would like to request a clarification on the process. It was our understanding from discussions with the Department and Assistant Attorney General Forster, that by proposing these changes through a contract would allow a more iterative process by which the Department could consider feedback, issue a revised draft, and would take additional comments as appropriate. We would like to know, is that is still the Department's intention? We are providing feedback in this letter and many of the undersigned are also providing comments on behalf of our individual schools. We hope and look forward to continued dialogue with the Department on these very important issues.

1. **Sections 1-2 – Services Provided and Educational Settings Offered**

Our initial concern relates to Section 1, "Services Provided" and "Educational Settings" offered in the school. While there are a few schools that may be able to select boxes on the margins that it is totally ill-equipped to offer, most of these schools would not categorically determine whether it offers services on a school-wide basis given the potential legal and practical implications. It is our understanding that the Department intends to have private schools, including private agencies that operate facilities that exclusively service children with disabilities, or Special Purpose Private Schools ("SPPSs"), sign this Master Agreement one time, on behalf of every student that it educates. Thus, the SPPS would be required to "check" each selection in section one for services that it provides on a school-wide basis.

There is a concern that by limiting the special education and related services that the school provides (and does not provide), by checking boxes in Section 1 of the Agreement, there will be two inadvertent effects.

First, that this will likely further limit the available options for students with special needs in this state. One representative of an undersigned school noted that, based on the needs of their current school's population, there are not enough students to justify social work services and that therefore, they would leave that box "unchecked" in Section 1. However, the school recently admitted a student who needs social work services, and is making arrangements to contract with a provider to serve this individual student. If this situation occurred after the creation and implementation of the Master Agreement, for example, the same school expressed reservations about *either* "checking" the box for social work services (because it is not a service that the school is typically capable of or is regularly providing), and, if the box was not "checked," the school would be concerned about providing those services outside of the contract.

Other schools raised similar concerns that, while they might ordinarily "check" boxes next to physical therapy or occupational therapy, if a staff member departed, they would no longer be able to offer those services within their then-existing staff structure, and they would then be, in legal terms, "breaching" the Agreement. We do not have a clear understanding of the Department's purpose in eliciting this information.

Second, because the Master Agreement requests this programmatic information on a school-wide basis, the pre-selection of services risks a procedural violation of the Individuals with Disabilities Education Act ("IDEA") as a predetermination. For example, in *Deal v. Hamilton County Board of Ed.*, the U.S. Circuit Court of Appeals for the Sixth Circuit held that a school district's predetermination that it would not provide applied-behavioral-analysis services to a student with autism spectrum disorder violated the IDEA. 392 F.3d 840 (6th Cir. 2004). "The general rule is that placement should be based on the IEP." *Id*. at 859. Although the school in that case argued that it should have the ability to invest in a program and then seek to capitalize on the investment by using that program exclusively, "th[at] is precisely what it is *not* permitted to do, at least without fully considering the needs of each child." *Id.*

2. **Section 3 – Admissions**

While SPPSs (like most schools) have admissions policies, appropriately those policies do not provide *criteria* for admission such as the ability for the applicant to meet certain measurable metrics or a categorical exclusion for applicants with specified needs. Rather, these policies generally provide, consistent with the schools' nondiscrimination obligations, that the school will evaluate the needs of the student as identified in the student's IEP and determine whether it can provide services to appropriately meet those needs.

As above, we are not clear on the Department's purposes for requiring public admissions policies, and the schools do not generally pre-identify what educational settings or services it offers to *any* student. The undersigned schools are concerned that by pre-defining the services or any form of admissions criteria, they risk precisely the type of potential discriminatory implications under the Maine Human Rights Act the Department cites and seeks to avoid.

3. Section 5 – Attendance

Relatedly, there is one proposed requirement regarding early release of students over which the SPPSs may have no control. In "Attendance" section 5, the draft Agreement provides that the school shall maintain attendance records, including records of removal (even if non-disciplinary). While this may be feasible, the next sentence provides that "Early release from educational programming constitutes a removal." There is also no clarifying language regarding early release for inclement weather or an emergency-related closure.

Schools, including the undersigned SPPSs, commonly encounter IEP teams that seek to accommodate students in their current educational setting with an abbreviated day. Whether that abbreviated day constitutes a "removal," is a decision for the Department, but the undersigned schools do not want to be contractually liable for what is ultimately outside their control and within the full control of the IEP team.

4. Section 6 – Removal or Discharge.

The heart of this proposed Master Agreement is the process outlined for discharge or removal of students in Section 6. At the outset, we note a significant procedural concern with the legal framing of this agreement. While the undersigned schools understand and share the goals the draft Master Agreement provide clarity on the discontinuation process, ensure compliance with applicable law, and provide some procedural fairness to the parties involved, it also includes a substantial limitation on the discretion of private SPPSs to make determinations about student and staff safety with limited procedural protections.

A. The agreement lacks any mechanism to ensure compliance with requirements on Placing SAUs.

We understand the Department's premise in proffering this agreement is that, in exchange for the limitations on the SPPS's discretion and acceptance of additional risk, the placing school administrative units ("Placing SAUs") will be required to follow the processes and meet the goals

outlined in the Master Agreements. However, there is no mechanism in the Master Agreement or anywhere else in the law to implement and ensure that the requirements on Placing SAUs are actually carried out. For example,

- In Section 6(a), the Placing SAU is required to ensure that an IEP meeting is held "as soon as possible" after notice of intent to terminate is given by a private school and no later than ten (10) business days after the School's request;
- In Section 6(b)(i), the Placing SAU must issue a notice of a proposed change in placement if there is no consensus on a change;
- In Section 6(b)(i), the Placing SAU must begin the search for a successor placement if no consensus is reached;
- In Section 6(b)(ii), the Placing SAU must work together with the SPPS to conduct a functional behavioral analysis, implement or amend a behavioral support plan, use applicable "special circumstances" removals, and to ensure student, staff, and other students' safety pending the change in placement;
- In Section 6(b)(iii), the placing SAU must file proceedings to seek relief from stay put requirements if the SPPS informs them of an imminent risk to health or safety;
- In Section 6(b)(iv), the Placing Sau must develop an interim alternative educational plan, if such relief is sought; and
- In Section 6(b)(v), the Placing SAU shall ensure that the school has the opportunity to present testimony and evidence and offer legal arguments in the due process proceeding.

There is no mechanism to ensure compliance with the obligations that exist within the draft Master Agreement for the obligations on the Placing SAU. Nor do these obligations exist nowhere else in the law or regulation, or do any . There is no legal requirement to hold an IEP meeting within ten (10) days, to notice a successor placement, or to begin the search for a successor placement in these situations in any other enforceable document. Without any enforcement mechanisms, the Placing SAU can disregard its obligations without consequence. The private school, parents, and the student have no practical recourse if the Placing SAU fails to act.

An agreement with obligations but no enforcement mechanisms is, essentially, aspirational. It may look good on paper, but it cannot ensure commitments are actually fulfilled, undermining the actual reliability and predictability that this sort of placement agreement is meant to provide.

B. The agreement creates an indefinite requirement that students continue to attend private special purpose schools, creating an untenable safety concern for students and staff.

In Section 6(b)(ii), although the draft Master Agreement requires Placing SAUs to hold an IEP meeting within ten (10) days of receiving notice of an intent to terminate services, it contains no other timelines. There is no timeline for the school district to provide written notice of the change in placement, no timeline to begin the search for a successor placement, and, most critically, no timeline for the Placing SAU to assume responsibility for the student. Many of these schools themselves have long waitlists, and if they have determined they are no longer an appropriate or

safe placement for a student, the student could be forced to continue to attend the school (even if the parent consents to the change), for months, or even years, without any change in placement. The problem at the core of this dilemma is that the private schools are completely at the mercy of Placing SAUs to change the placement.

Every contractual provision does more than merely allocate responsibilities; it creates a system of incentives and disincentives that shape how the parties behave in practice. When drafting an agreement, it is critical to anticipate not just what the contract *requires* on paper, but how each party is likely to respond to those requirements, in addition to delays and risks once the agreement is in effect.

In this situation, the incentives for Placing SAUs are obvious. Especially where a parent may want the child to remain in the then-current placement, the incentives are: Delay a change in placement, keep the student in the last agreed-upon placement (however inappropriate), and dismiss or diminish the private school's safety concerns. Practically speaking, many of the undersigned schools can speak to the reality of safe concerns or inappropriateness of a placement, while Placing SAU personnel only *read* about the effects. The Placing SAU does not hear the fear in students', teachers', or educational technicians' voices; they do not see the scars or marks; and they do not see the effects their decisions have in real life—including on how the education of other students may suffer. In the context of education and placement agreements, poorly aligned incentives can have serious real-world consequences: Placing SAUs have little motivation to move a student promptly if a private school is required to continue serving them indefinitely.

In particular for special-purpose private schools serving students with significant behavioral or emotional disabilities, an indefinite obligation to continue educating a student after it is clear the placement is no longer appropriate is not just burdensome, but is unsafe and untenable. The undersigned schools and other SPPSs in Maine are designed to provide intensive, highly structured support to students whose needs cannot be met in public school settings. By definition, their populations are amongst the highest-need and most complex in the state, students whose disabilities manifest in ways that require individualized, multidisciplinary, and often crisis-level interventions.

For example, undersigned schools have reported extremely dangerous incidents, including a student taking an administrator outside and choking her to the point of unconsciousness with a belt, biting incidents severe enough to cause disfigurement, and students causing substantial injuries to their peers. Nobody wants to terminate services for students with the highest need. However, the SPPSs in these untenable situations must be able to act decisively to protect their staff and other students.

Of course, the undersigned SPPS do not place blame upon these students for their behaviors. These behaviors, while dangerous, often arise from the student's disability-related limitations, and by no means should our concerns about the Master Agreement be read to imply any level of malice or intent. The schools' concern is not punitive—it is about ensuring that both the student and the school community remain safe, and that the student can be transitioned, as quickly as possible, to a program equipped to meet their evolving needs.

We understand and share the Department's concern that it must ensure that students placed in the undersigned schools do not sacrifice the rights and services that they might receive in a public school by virtue of being placed in a private school. However, to our knowledge, no other state has read the IDEA obligation to mean that state educational agencies are *obligated* or required to mandate that students have a right to maintain their placement at a private school for an indeterminate and unlimited amount of time while a successor placement can be found. We are aware of several other states' approaches that follow the IDEA and ensure protection of student interests without sacrificing the private school's needs and duty to protect the safety of other students and staff. This includes many states that require the Placing SAU take responsibility for the students within a ten (10) day period of receiving notice from the private school that a change of placement is required.

Requiring the school to continue serving such a student indefinitely, without any clear timeline or authority to end the placement, forces educators into situations that compromise physical safety, violate occupational health standards, undermine the therapeutic environment the program is meant to sustain, and risks jeopardizing other students' access and education Unlike SAUs, SPPSs cannot simply transfer staff, adjust programming, or isolate risk within a larger system. Every classroom and clinical resource is directly impacted when resources must be reallocated in an effort to continue serving a student for whom the placement is no longer appropriate.

C. Requiring private schools to indefinitely retain students they can no longer effectively serve forces them to violate professional standards and educational ethics.

Even when a student's needs do not rise to the level of immediate safety concerns, an indefinite requirement that SPPSs continue serving students whose needs exceed the school's ability to provide services and expertise places these institutions in direct conflict with their professional codes of ethics and scope-of-competency obligations.

Service providers on staff with undersigned SPPSs are ethically obligated to provide educational programming that they can competently and responsibly deliver. When the student's needs require supports that fall outside that mission or capacity, they must take action. Here, an indefinite and indeterminate delay in identifying an appropriate successor placement, while the SPPS is compelled to continue enrollment places the SPPS in a position of providing services it is not qualified, staffed, or licensed to offer, undermining the integrity of its educational program and violating core professional standards. This is not merely a practical challenge; it is a deep ethical problem. These schools should not be forced to choose between following the Master Agreement and adhering to professional norms, accreditation standards, and their duty of care.

D. The agreement contemplates unworkable due process proceedings for private schools who cannot be party under current law.

Finally, under Section 6(b)(v), the Master Agreement contemplates that *only after* a parent has challenged the change in placement in a due process proceeding, may the SPPS remove a student

that it has identified presents an "imminent risk to the health or safety of the student, other students or school staff," borrowing the standard applicable to public schools under *Honig v. Doe. See* 484 U.S. 303 (1988). However, the procedure contemplated by the Master Agreement to achieve an emergency removal process is confusing, legally inconsistent, and, operationally, nearly totally unworkable.

First, in order effectuate an emergency removal, the Master Agreement contemplates that the SPPS must notify the Placing SAU that it has identified an "imminent risk," at which point, the Placing SAU files a claim in federal court to seek relief from the automatic "stay put" injunction that ordinarily applies to public schools under the IDEA. The "stay put" provision under the IDEA, 20 U.S.C. § 1415(j), applies to public agencies, not private schools. SPPSs are not "public agencies" within the meaning of the statute. Rather they are private service providers operating under contract with public school districts. Imposing a public-law injunction framework onto a private school misconstrues IDEA's structure and creates uncertainty about whether any federal court would even have jurisdiction over such a claim.

Second, even assuming the federal court would accept jurisdiction and follow a "stay-put" injunction against a private school, the process proposed in the Master Agreement assumes an alignment of interests between the Placing SAU and the SPPS, and the prompt cooperation of the Placing SAU. However, such an alignment of interests and cooperative attitude may not exist. The Placing SAU may disagree with the SPPS's assessment of imminent risk, wish to avoid litigation costs, or be incentivized to delay action to avoid assuming responsibility for finding or funding an alternative placement. Not only would the SPPS then be left indefinitely housing and serving a student it deems unsafe, with no ability to protect its staff or other students, the *student* would remain in an inappropriate placement, compromising their own education and safety.

Third, the Department's suggestion that the SPPS be "allowed to present testimony, documentary evidence, and legal arguments" in the Placing SAU's federal court action only compounds the impracticality of this arrangement. As the SPPS is not a party to the due process dispute between the parent and the Placing SAU and it would not have standing to appear in front of a Department hearing officer or in federal court. This structure leaves the SPPS wholly dependent on counsel for the Placing SAU, who represents a different client and may be ethically conflicted in advocating for the SPPS's interests, particularly where the Placing SAU disputes the SPPS's risk determination or wishes to avoid costs associated with assuming responsibility for, or identifying a new placement for the student

Finally, the entire process fails to provide a clear, timely, or legally viable pathway for an SPPS to remove a student who poses a genuine safety threat. In a system already designed to respond slowly through its due process mechanisms, layering in a requirement that depends on a separate entity's initiative and cooperation is not only inefficient, but dangerous.

5. Conclusion

If the Department of Education mandates that SPPSs continue to educate students in these dangerous situations, that decision will send powerful shockwaves through the community service providers that work with these students. This sends exactly the wrong message.

Of course, SPPSs empathize for families and students in these impossible situations, and we fully support their right to seek successor placement services. But imposing continuing obligations on SPPS, rather than Placing SAUs, is not the solution. Rather, it shifts all risk and responsibility to SPPS at the expense of the safety of SPPS students and staff. . The safety and well-being of our students and staff is our paramount concern, and no less important than a Placing SAU's efforts to provide for the safety of their students and staff.

Maine is facing a serious shortage of special purpose private schools serving children with disabilities, like the undersigned schools in this letter. There are long waitlists of students entitled to these services and statewide staffing shortages and the loss of critical federal and state funding have exacerbated these issues, particularly for the most acutely high-needs students,. Additionally, there is significant and growing evidence that the number of students requiring the type of intensive services SPPS provide is growing substantially. If SPPS are told that—even when staff are being rendered unconscious or permanently disfigured—they cannot suspend or terminate services for a student without violating Department of Education mandates, it will create a cascading series of events:

- It will create dangerous conditions for the highest need students, their peers, and staff,
- It will exacerbate the staff recruitment and retention crisis that already plagues the field,
- It will likely place the school in an impossible situation of being unable to comply with the Occupational Safety and Health Administration (OSHA) Act's general duty to ensure workplace safety and DOE mandates, and;
- It may result in program instability or closure, resulting in even fewer services for this underserved population of students.

There is one, entirely foreseeable yet unintended outcome, and that is SPPSs like the undersigned schools do not wish to "chance" being required to continue educating the highest-risk hardest-to-serve populations, even when there is a significant safety concern, and instead choose to dial back the services for the students who are most at risk.

While the undersigned schools want to collaborate with the Department and share the goal of having clarity on processes for these unfortunate situations, we feel compelled to share that we have no choice, **we are not able to sign the draft Master Agreement**. Thank you for your time and consideration of these complex issues. Please contact us if you need further information with respect to our position on this Agreement.

Sincerely,

/s/ Tara A. Walker
Tara A. Walker, Esq.
Fisher Phillips

For *Clarvida*
Spurwink Services, Inc.
Maine School Solutions, LLC
Dragonfly Academy
Essential Learning Solutions