MAINE ASSOCIATION OF INDEPENDENT SCHOOLS

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Re: Response and Comments to Draft Master Services Agreement

Dear Assistant Attorney General Forster & Director Frazier,

We are writing to provide our response and comments with respect to the draft Master Services Agreement that the Maine Department of Education released on October 15, 2025, on behalf of the independent schools that enroll publicly funded tuition students ("Town Academies") and the Maine Association of Independent Schools ("MAIS"). At the outset, we clarify that we share many of the goals of the Maine Department of Education (the "Department" or "MDOE") to ensure that all students in Maine, including those with disabilities, have access to the supports and services to which they are entitled under federal and state law, and to provide legal clarity on the respective obligations of independent schools and public state and local educational agencies. In doing so, it is our hope that a clear, coordinated policy framework will minimize the risk of disputes that divert resources from students and strain relationships among schools, families, and public agencies.

That policy framework must, however, ensure that it works for the best interests of Mainers, including the students, their communities, and the independent schools that serve them. To that end, the undersigned schools emphasize that student and staff safety is a non-negotiable cornerstone of any educational framework the Department proposes. We are concerned that the draft Master Services Agreement, in its current form, fails to provide for those goals. As detailed below, there are three chief concerns with the agreement as drafted that prevent the undersigned schools and interested parties from being able to sign the Master Services Agreement.

Misplacing IDEA responsibilities onto private schools that are not public agencies and have no authority to place students will create untenable safety and legal risks. These historic independent schools have a duty to maintain safe environments for all students and staff. Safety must remain the number one, non-negotiable element of this process. The goal of ensuring that

students with disabilities receive appropriate services cannot come at the expense of students' right to attend school in the safety and security of their own bodies.

Many of the undersigned schools have excellent relationships with their sending school districts, speaking freely, and cooperating often. Given that the Department has identified only one matter in which this situation has arisen with a town academy, this appears to be a solution in search of a problem. Many town academies already have processes set forth in their contracts with districts to provide notice to a student's IEP team or the district if the need for discharge arises, and the district cooperates in this effort. Thus, the undersigned do not feel that it is necessary to sign an agreement like the proposed Master Agreement to protect students or formalize processes with school districts that are already working well.

1. **The draft contains a process for discharge that places students and staff at significant safety risks.**

Chief amongst our concerns about signing this is that any master agreement appears to create a previously nonexistent right for students attending their schools to "stay put" indefinitely until a successor placement is made by the sending school district (despite that many of these students have not been "placed" at the school initially, as discussed below). Specifically, in Section 6 (Removal or Discharge), the Master Agreement would require private schools to have the student "continue to attend the [Private] School," while a successor placement is identified. The draft Master Agreement contemplates that the private school and sending district will "work together" in conducting a functional behavioral analysis, introducing or modifying behavior plans, or using "special circumstance[]" removals for up to 45 days. As discussed below, this approach goes too far. Forcing schools that have already determined that they cannot safely educate a student to *indefinitely* house and educate these students, often with complex behavioral and emotional needs outside the scope of their mission and staff expertise, creates serious, unacceptable risks for student and staff safety.

   A. **The Federal Department of Education has been explicit that the text and regulations of the IDEA expressly does not require private schools to follow these requirements.**

At the outset, the Department's reading of the IDEA goes beyond the textual mandate and is not **required** by the IDEA. Although the Department cites as authority for this section Title 20 U.S.C. § 1412(a)(10)(B), and 34 C.F.R. § 300.146 as its authority for Section 6, no state that we could identify requires *private schools to avail themselves of exactly identical* processes for local educational agencies to satisfy the IDEA requirement that a student with a disability who is "placed in" a private school by a public agency . . . "has all of the rights of a child with a disability who is served by a public agency." The reason for this is simple: School districts and private schools are not similarly situated. The Master Agreement contemplates only two types of removals pending the identification and implementation of a successor placement: "Special Circumstances," or behavior so dangerous that it causes death, organ failure, disfigurement, or "extreme pain," and ***only after parents file a due process claim***, a removal using the standards of *Honig v. Doe,* 484 U.S. 303 (1988), with very key procedural flaws, discussed below.

The U.S. Department of Education addressed exactly this question in a "comment and answer" section when it updated its regulations in 2006:

> *d* if the parents challenge the decisions of the private school to terminate the children's placements.
>
> *Discussion**: The Act does not give States and other public agencies regulatory authority over private schools** and does not place requirements on private schools.*

Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. 46540 (Aug. 14, 2006) (to be codified at 34 C.F.R. pts. 300 and 301). If either Congress or the Department of Education had intended the IDEA to require private schools to follow the identical processes that it set forth for public educational agencies, it would have explicitly done so. Rather, neither the federal statute nor the regulations place any express obligations on independent schools. As the U.S. District Court for the District of Maine recently noted, "While the statute gives private schools certain rights . . . it does not itself impose legal duties on private schools." *Spurwink Servs, Inc. v. Doe et al.*, Docket No. 2:25-cv-26-JCN, 2025 WL 2402777, at *6, (Slip Op. Aug. 19. 2025).

B. The framework outlined by the current Master Services Agreements would create untenable safety risks for the students of Maine.

As noted above, the current draft of the Master Agreement contemplates that, after an independent school notifies the school district of the need to change placement, the placing school district must "begin the search for a successor placement." The Master Agreement provides no time frame for the district to assume responsibility for its students, and it is no secret in Maine that waitlists can be long, depending on the student's unique needs and geographic proximity, and sometimes students can wait for years before being moving to a successor placement.

While we all support the rights of students to maintain educational programming, that does not come at any cost—and in particular a cost to safety. Under the draft Master Agreement, there are only two circumstances in which a student may be removed while a school district searches for a successor placement: The first, and this appears to be a gaping hole with respect to the drafters' intent, would create an unqualified "stay-put"-type of requirement (where none currently exists) *before* or absent parents filing any due process challenge to the change in placement. The second removal would be *after* the parent files a due process challenge, where the school district stands in the shoes of the private school in a due process proceeding that is procedurally and substantively flawed.

With the respect to the first circumstance, this requires that students remain in their current placement *before* any due process proceeding is filed. In that instance, the *only* removals contemplated would extend the IDEA's "special circumstances" removals, which would require private schools to continue serving the student unless the student:

1. "Carries or possesses a weapon to or at school,"
2. "Knowingly possesses or uses illegal drugs," or
3. "Inflicts serious bodily injury upon another person," defined as:
    A. "a substantial risk of death";
    B. "extreme physical pain";
    C. "protracted and obvious disfigurement"; or
    D. "protracted loss or impairment of the function of a bodily member, organ, or mental faculty."

20 U.S.C. § 1415(k)(1)(G)(i)-(iii), (7) (citing 18 U.S.C. § 1365(h)(3)). Only in those narrow three (3) instances, could the private school remove the student for up to **45 days** after which the student should be returned to the school environment. If Congress or the U.S. Department of Education intended that private schools must follow these exact and identical processes for students placed at those schools by the a school district, it would have done so explicitly. Rather, the U.S. Department of Education has explicitly stated the opposite: that the agency has intentionally *not* imposed these requirements upon private schools.

There are important safety reasons for the U.S. Department of Education's decision not to apply these requirements to private schools. As the local educational agency, the public school district controls the student's placement. If there is a lack of consensus among the IEP team regarding the placement decision, it is the district that decides (which the parent can challenge). The sending district controls when it makes calls to successor placements, how many schools it reaches out or applies to. Independent schools that do not specialize in serving students with disabilities are not equipped to manage prolonged high-needs placements.

Requiring a private school maintain an inappropriate placement, particularly an acute or high-needs placement impacts the entire school community, not only impacts the student who is experiencing these increased needs. As the Maine Public Research Institute 2025 report showed, even public schools with trained special educators are facing "extremely high rates of challenging student behavior" that cause "physical and emotional harm" and "consume substantial time across professional roles." As the Maine School Boards Association and Maine School Superintendents Association testified in just April of this year, at their schools:

> Staff are getting bit, hit, kicked, spit at, and swore at. In such situations, staff attempt to use strategies such as verbal requests, commands, and directions to de-escalate these dangerous situations. Educators with years of training are still finding that these techniques are not enough, and **classrooms remain unsafe**.

Further "parents now tell us that their **kids are afraid to go to school** because of their fellow students' behaviors." One educator from MSAD 11 testified, that in her district, "we are witnessing a growing trend of severe dysregulated behavior among our youngest students, particularly those in grades K through 3. These behaviors—hitting, biting, spitting, screaming, swearing—stem from trauma and are deeply distressing for the student in crisis.

The MEA testified, "We have heard from MEA members and administrators that the behaviors of some students are now causing absenteeism rates for other students to climb, and some

families report they are seeking alternatives to their local public school due to the behaviors of some students."

Forcing independent schools, including town academies, to indefinitely house students with complex needs, **after the school has already informed the IEP team that it cannot safely continue to provide services to this student,** without injuries that lead to *death, organ failure, disfigurement, or "extreme physical pain*" is an absolutely nonsensical choice for Maine students.

The second avenue for removal occurs **only <u>if</u> parents challenge** the change in placement (which, under the Master Agreement, they can do even before a successor placement is identified). Only in this case can the private school inform the sending district that they are unable to continue to educate the student without "**imminent risk to the health or safety of the student, other students, or staff**." This option is not available *before* a parent's challenge (notably, before any stay-put rights would attach if the student was attending a public school). Private schools operate under a different framework than public educational agencies. They are not authorized to place a student in an interim or permanent alternate placement, and the private school is not in a position to send the student to another private school without the support of the sending school district or the parent (and, sometimes even with the parent's support, the sending school district can scuttle a potential placement).

We can only imagine that this is an unintentional drafting error because no stay-put rights attach until the parent challenges the alternative placement in a due process proceeding. The Master Agreement would require the student to "stay put" until the sending district identifies a successor placement—*if* it agrees a successor placement is necessary at all. Under this approach, an independent school must demonstrate that a student meets unnecessarily and inappropriately high standards of safety risk before the independent school can seek to remove the student. The Master Agreement's requirement that a student must demonstrate behaviors so dangerous that it causes "death," organ failure, "obvious disfigurement," or "extreme pain" before removal is an option that places children and teachers at significant safety risk.

B. By failing to provide a timeline for removal, the Master Agreement creates perverse incentives for sending districts.

While well-intentioned, a requirement that forces independent schools to continue educating a student indefinitely, until a successor placement is made, creates contradictory incentives for public school districts to keep them in an inappropriate placement. Under the Master Agreement, public school districts have no reasons to move quickly to take responsibility for the student and find a successor placement, and every incentive to keep the student in the inappropriate private school placement. This has particularly negative effects in situations where a parent may support continuing to educate the student at the independent school or town academy, as they are often geographically closer, and where parents may believe, with every good intention, that their child may eventually move to a general educational environment. In these circumstances, it is entirely foreseeable that the school district would seek to delay and maintain the student in their present placement, devolving into an interminable placement at an independent school or town academy that does not have appropriate programming or staffing.

Even more broadly, the sending school districts, changing a student's placement often entails significant legal risk, including challenges from the parent. Prolonging the status quo becomes the path of least resistance, even when the town academy cannot safely or effectively meet the student's needs. The draft Master Agreement makes no requirement that a sending public district conduct the search for a successor placement in a timely or good faith manner. When a student remains indefinitely at a private school, the public district is enabled to **shift the risk and its IDEA obligations**, including specialized staffing, behavioral supports, and FAPE guarantees, onto a private institution that (i) has already made clear it cannot appropriately serve the student; and (ii) lacks the legal protections and authority over the student's education afforded to public school districts.

This creates a system where the public school district's legal obligations are quietly outsourced leaving the public school district free from any accountability for the student's education. Instead, the risk, burden, and legal obligations are imposed on independent schools, yet without the ability to act without the permission of the public school district. Ironically, the very students the Master Agreement seeks to protect are likely to suffer from educational stagnation and lack of progress. When a student remains in an inappropriate placement for months (or, worse, even years) while a successor placement is pending, that student loses access to the individualized supports envisioned by and at the core of the IDEA.

This is why even jurisdictions that require some form of process before independent schools serving "publicly placed" students with disabilities can discharge them have placed an outer timeline on the school district's time to act. Placing a timeline on the school district's assumption of responsibility or identification of a successor placement is the only mechanism that independent schools have to move a change in the student's placement forward. Having reviewed other states approaches, we cannot identify a state that reads the IDEA to require that private schools create identical processes to LEAs or public school districts that make placement decisions. When states have provided for discharge processes when students are placed in nonpublic schools, they have done so expressly, as follows, many with explicit timelines:

- In New Jersey, the state that received the most attention and to which the Department pointed as the model it sought to follow in the *Spurwink v. Doe* matter, the private school can terminate the student's current placement after the district board of education has provided written notice to the parents, which must occur within 10 school days of a notice of intent to terminate placement pursuant to N.J.A.C. 6A:14–2.3.

- Massachusetts bifurcates the terminations, with "emergency" terminations occurring when there is a risk of health or safety, which occur within two calendar weeks, or a planned termination if it can no longer meet the child's needs, within thirty calendar days. 603 Mass. Code Regs. 18.05.

- In Illinois, a nonpublic school seeking to terminate a placement must request an IEP meeting and notify the State Board of Education, and then may effectuate the termination after twenty business days, unless the health and safety of any student are endangered, in which case no time-frame is given. Ill. Admin. Code tit. 23, § 226.330(d)(5).

- In the District of Columbia, a private school must inform the sending district and provide fifteen school days before the termination takes effect. However, in the event of an emergency, the private school "shall not terminate enrollment of any student, unless and until the sending LEA has been informed by the most expedient and appropriate means of communication with subsequent notice in writing," and in which case no time-frame is given. Chapter A28 of Title 5.

- In Connecticut, nonpublic schools that receive special education placements must have policies for emergency and early termination of students that require immediate notification to the sending district and the child's parents, but do not provide a time frame of when such termination may take effect. Conn. Agencies Regs. 10-76d-17.

Clearly, New Jersey, Massachusetts, Illinois, D.C., and Connecticut are not all violating the IDEA. Where the IDEA permits states to create additional safeguards, it makes no sense to require *organ failure* (for example) before we identify an alternative, safer placement. Nor is it logical to treat the entity that makes placement decisions the same as a private school, which does not.

The Maine Education Policy Research Institute's March 2025 report on student behavior underscores the urgency of maintaining safe learning environments statewide. Commissioned by the Legislature's Joint Standing Committee on Education and Cultural Affairs, the study found: "Educators across professional roles in the state of Maine are managing extremely high rates of challenging student behavior . . . [which may] be a critical factor in the ongoing teacher shortage."

We are concerned that the framework in the current draft will force students to be educated at private schools that have *already opined* that they cannot meet the students' needs, for as long as it takes the sending school district to find a replacement. It is no secret that, depending on the students' needs, waitlists and processes to move into special purpose private schools can span months or years. The Master Services Agreement should follow the approach of these other states and provide an outer limit beyond which the school district must take responsibility for the child, particularly in emergency and safety-related situations.

2. **A one-size-fits-all approach to the Master Services Agreement fails to account for parental choice in Town Academy admissions.**

One of the chief problems with the Master Services Agreement, as drafted, relates to the assumptions made about many schools' admissions processes. At its core, the underpinnings of this Master Agreement assume that a student is being "placed" or "referred" to the private school by state and local educational agencies in order to meet their obligations to provide a free and appropriate public education ("FAPE"). While this is true for certain independent schools with whom many students with disabilities are placed—special purpose private schools—that is overwhelmingly not the case for town academies. Most students are not "placed" by their IEP team at the school, but rather attend the town academy as a matter of parental choice.

This error arises principally in Section 4, which states that the school is obligated to provide educational, special education, and (undefined) "related" services for each student "**enrolled**" with the school. For the reasons set forth below, this should say, "**placed**" at the school.

A. Maine's unique evolution of historic town academies.

As many members of the Department know, many cities and towns in Maine historically have declined to build their own public schools due to cost and population constraints. This decision made good common sense then, because it allowed towns to provide a full K–12 education without incurring the expense of constructing, maintaining, or staffing public school facilities and avoided duplicating existing infrastructure where high-quality private schools already existed. This ensured that taxpayer dollars were used for direct educational services.

The decision to send students to town academies continues to make good sense today, especially given that several communities are embroiled in controversies in which proposed bonds for school construction or renovation of schools are at historic highs, like the $156 million middle school being constructed in Windham,[1] and are being widely rejected by taxpayers.[2] In fact, the State even launched a commission to conduct a comprehensive study on why school construction and renovation costs are so high. Meanwhile Thornton Academy has gone forward with the construction of a new fieldhouse to house physical education classes, sporting events and assemblies, financing the entire $13.5 million project from donations, without charging local taxpayers any funds or incurring local debt.[3]

In communities with town academies, towns provide public tuition dollars to send their resident students to the nearby academy. These institutions continue to educate local students with a per-pupil public tuition, but they remain private and independent entities, governed by private boards, employing their own faculty, maintaining their physical infrastructure, and retaining independent admissions and curricular autonomy.

B. Why treating the town academies as IEP team "placements" is factually and legally incorrect.

For many of these historic town academies, where the town or district does not operate a public school, the student's enrollment is chiefly the product of the family's exercise of choice among

[1] https://www.pressherald.com/2025/07/06/maines-most-expensive-state-funded-school-is-being-built-in-windham-heres-whats-behind-it/.

[2] In Scarborough, voters rejected a $160 million bond to build a new elementary school, raising concerns about aging facilities, buildings, and portable "temporary" classrooms. https://www.pressherald.com/2024/04/21/scarborough-bond-failure-points-to-state-of-crowded-school-buildings-across-maine. In Cape Elizabeth, and Gray-New Gloucester, voters twice rejected large bonds (e.g., Cape Elizabeth, ~$116 million, then ~$95 million) for new or renovated schools. https://www.pressherald.com/2024/11/06/southern-maine-voters-give-mixed-response-to-school-bond-projects/.

[3] https://www.pressherald.com/2024/09/17/thornton-breaks-ground-on-field-house/. In contrast, in 2024, South Portland voters roundly rejected a similar proposal to spend $12 million building new high school athletic facilities.

various schools. Imposing requirements akin to public school stay-put obligation makes no sense in these settings for two main reasons.

First, as outlined above, state or federal law does not impose *any* sort of "stay put" obligations on private schools. The requirement that state educational agencies to ensure similar "standards" are applied to special education students in private schools and the guarantee of "rights the children would have if served by [public] agencies," are only triggered if a student is **placed** at the school. The federal regulations and courts interpreting those regulations have created important distinctions between publicly placed and parentally placed students, with regulations explicitly allowing private placements that are deemed "appropriate" for reimbursement purposes, even when they do not meet the standards that would apply to state or local educational agencies.

As noted in multiple circuit court decisions regarding IDEA, "the requirement that private schools meet state educational standards applies 'only when the child is placed in the private school by the state or local school system. The Act itself simply imposes no requirement that the private school be approved by the state in parent-placement reimbursement cases.'"

Second, imposing a stay-put-like requirement on students who matriculate to independent schools is nonsensical. In those situations, unlike a "placement" at a special purpose private school, at a student enrolled at a town academy, there has been no opportunity for the IEP team to meet, to invite the placement school, for the placement school to review the IEP requirements and to make the independent assessment as to whether it can serve the student based upon their current needs and the IEP plan. For that reason alone, the undersigned cannot enter into any agreement in which they are forced to continue to educate students that they have not evaluated and agreed to serve from the outset.

Similarly, even for town academies that have exclusive tuition contracts, so that the town academy operates as the default school for the students in that locality, there must be a process for the town academy to evaluate and determine whether the students can be served. At public schools, special education staff do this when they make a placement decision. There is no analogous process for this at a town academy.

The Department has acknowledged that there is not and can be no legal obligation for the school to operate a certain minimum level of special education services. Many of the undersigned schools also clarify that they do not operate "special education programs" in the same manner that a public school does. These schools support the needs of the students as identified by the sending school district, the school district pays a portion of and provides some personnel to implement these services. Town academies are not local governmental educational agencies, they are not funded in the same manner, and they do not have any control of costs or any ability to charge fees to cover offering programs. Rather, for special education-related expenses, they charge the parents (towns and public-school districts) based on actual costs of the prior year. Indeed, while the school must make reasonable accommodations for its students, this does not mean the town academy must make a fundamental alteration of their programs or activities. Rather, both the sending school district and the town academy generally agree, often on a student-by-student basis, to mutually determine whether the school, staff, and programs are sufficient (or "appropriate") to meet the needs of each individual student.

There may be a simple fix for this issue within the Master Agreement. Rather than requiring a school-by-school determination of which services are provided, which educational settings are offered, and admissions and services policies that would serve to identify *which* students could be admitted, the school should (consistent with the Department's FAPE obligations) be afforded the opportunity to review each incoming *placed* student's IEP plan, and determine whether it may provide services in accordance with that particular student's plan. This would trigger obligations only after the school has had the full and fair opportunity to determine whether it may meet the needs of the student, as outlined in their IEP.

3. Conclusion

It is essential that any agreement or regulatory scheme NOT endanger Maine students or school staff. Policies that force indefinite private-school enrollment while public agencies delay identifying successor placements risk student and staff safety in ways that no other states that we can identify have done. The IDEA does not require independent schools to maintain placements, and many other states have addressed precisely this issue to sensibly and logically balance the rights of the students to a special-education placement with the safety of the student, other students, and staff. Student and staff safety must remain the non-negotiable foundation of all placement decisions. No regulatory scheme should compel a private school to retain a student when it cannot safely or effectively do so.

Under the IDEA, a student is "placed" when the student's IEP team, which is run by the student's sending school district, determines that a specific setting is *necessary* for the student to receive a free and appropriate public education. The local educational agency (the sending district) remains legally responsible for ensuring that the placement is appropriate, monitoring the student's progress, and providing the required services. Maine's town academies are not IDEA "placements." Often, they are the result of parental choice among several options, or are contracted to receive students in the Town or area. The distinction is critical because it assumes that there has been a decision that the school can accommodate the student's IEP needs and is "appropriate." Treating them as IDEA "placements" would misconstrue the nature of the relationship, create legal and practical chaos, and ultimately disserve both students and families.

The impasse situation that is created when a Placing SAU refuses to take responsibility for a student who can no longer be effectively served by a private school is rare. As drafted, the undersigned Town Academies believe that the Master Agreement puts students and teachers in danger and are compelled to make clear that they have no choice, and they cannot sign this Master Agreement.

Additionally, they have shared that many superintendents in their districts have made clear that they do not believe it serves the best interests of their students. The Department has not been clear about what it expects will occur if private schools decline to sign this agreement. **We**

request a follow-up meeting with the Department to discuss the unique circumstances that occur in Town Academies, and why this draft Master Agreement is not appropriate for our setting.

Sincerely,

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Fisher Phillips

Daniel W. Walker, Esq.
Preti Flaherty

for *Maine Association of Independent Schools on behalf of*
Erskine Academy
Foxcroft Academy
Fryeburg Academy
George Stevens Academy
John Bapst Memorial High School
Lee Academy
Lincoln Academy
Maine Central Institute
Thornton Academy
Washington Academy