

Education Alert
August 18, 2020

**NAVIGATING CONTRACTS WITH APPROVED PRIVATE
SPECIAL EDUCATION SCHOOLS**

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In recent months, some private approved special education schools have insisted that school districts utilize the private school's monitoring contract or agree to an addendum to the school district's monitoring contracts. Some private schools have suggested problematic terms, such as:

- "such payment obligation shall be absolute and not subject to appropriation, reimbursement or other financial assistance..."
- "The Agency shall be obligated to pay the tuition and for the services indicated in the IEP at rates set forth by OSD, regardless of whether the Student's absence from School is related to an outbreak of influenza or other contagious illness, an act of terror or war, or any other crisis."
- "In the event that the Public Schools in the district are ordered closed by federal, state or local governments or agencies for any reason, including but not limited to an influenza pandemic or other contagious illness, act of terror or war or natural disaster, but the School reasonably determines that for the health and safety of its students it must continue to provide services during the Public School's period of closure, the Agency shall provide funding to the School at its current tuition and rates for services in the IEP during that time period regardless of Student's attendance record."

Some private schools insisted that students could not attend until there was a signed placement agreement, denying students a free and appropriate public education.

Murphy, Hesse, Toomey & Lehane raised the issue to the Massachusetts Department of Elementary and Secondary Education ("DESE") and DESE reviewed the issue. DESE stated that although it will not become involved in the individual contract terms between public school districts and private approved special education schools, 603 CMR 28.06(3)(f) requires school districts to have monitoring contracts with out-of-district special education schools and that the guidance from a 2002 DESE advisory found here:

http://www.doe.mass.edu/sped/advisories/02_5.html, is still applicable.

Reviewing the guidance and regulations, it is recommended that school districts continue to use their monitoring contracts and be cautious about the content of any proposed private

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school contract or addenda. 603 CMR 28.06(3)(f) has a list of certain required terms that must be included in contracts between school districts and approved private special education schools. Some of the private schools' proposed contract language contradicts these terms, such as terms stating that the school will use its "best efforts," to comply with an IEP, rather than agreeing to follow the IEP. Some private schools' proposed contracts have also not included provisions:

- (1) allowing DESE to conduct visits,
- (2) providing access to documents, including general documents available to the public, documents specifically related to the student placed by such district, and other documents only to the extent they are necessary to verify and evaluate education services provided at public expense, or
- (3) agreeing to comply with all other applicable requirements of 603 CMR 28.00 and applicable policy statements and directives issued by the Department.

These terms are required under 603 CMR 28.06(3)(f). Additionally, 2002 DESE guidance states that the contract should not include "any other matters that are inconsistent with state or federal law," yet the private schools have proposed the terms quoted earlier in this client alert requiring payment in absolute terms, irrespective of whether services were provided, contrary to the law.

School districts should not accept terms that contradict the law and deny a student a free and appropriate public education. Instead, school districts may want to consider inserting terms to their monitoring contracts requiring private special education schools to follow a student's IEP and provide services irrespective of whether the school is in-person, remote, or hybrid, to provide required devices, to document in detail services provided and for the school to send notice to families of these services/plans. If a school district continues to receive pressure from a private school and needs assistance responding or needs template language for its monitoring contract, please contact your attorney.

This Client Alert was prepared by Felicia Vasudevan and was reviewed by Alisia St. Florian, Vineesha Sow, Mary Ellen Sowyrda, Andy Waugh and Kevin Bresnahan. If you have any questions about this issue, please contact Alisia St. Florian or the attorney responsible for your account, or call (617) 479-5000.

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