

BASIS STATEMENT AND FINDINGS OF EMERGENCY

Chapter 101: Maine Special Education Regulation

In this emergency rule, the Maine Department of Education is adding private schools serving as out-of-district educational placements as potential parties to mediations, due process hearings, and expedited due process hearings in the Maine Unified Special Education Regulation (“MUSER”) to avoid an imminent and ongoing threat to the health, safety and general welfare of students with disabilities who are entitled to a free, appropriate public education (“FAPE”), the dedicated professionals who provide educational services to them, and the school community-at-large.

The Department states the following basis for the rule and makes the following findings of emergency:

BASIS STATEMENT

Statutory and Regulatory Background

The State of Maine receives federal funding pursuant to the Individuals with Disabilities Education Act (“IDEA”) in exchange for agreeing to comply with IDEA and its regulations. IDEA does not, itself, regulate private schools – only state education agencies (“SEAs”) and other public agencies including local education agencies (“LEAs,” in Maine, referred to as school administrative units or “SAUs”). However, IDEA also requires that: “Each SEA must ensure that a child with a disability who is placed in or referred to a private school or facility by a public agency -- . . . (c) has all of the rights of a child with a disability who is served by a public agency.” 34 C.F.R. 300.146(c); *see* 20 U.S.C. § 1412(a)(10)(B). As explained in the comments to this section of the federal regulation reported in the Federal Register at 71 Fed. Reg. 46,598 (Aug. 14, 2006) at the time of adoption:

The Act does not give States and other public agencies regulatory authority over private schools and does not place requirements on private schools. The Act imposes requirements on States and public agencies that refer to or place children with disabilities in private schools for the purpose of providing FAPE to those children because the public agency is unable to provide FAPE in a public school or program. The licensing and regulation of private schools are matters of State law. The Act requires States and public agencies, including LEAs, to ensure that FAPE is made available to all children with disabilities residing in the State in mandatory age ranges, and that the rights and protections of the Act are extended to eligible children and their parents. . . . It is the

responsibility of the public agency to determine whether a particular private school in which the child with a disability will be placed for purposes of providing FAPE meets the standards that apply to the SEA and LEA and that a child placed by a public agency be afforded all the rights, including FAPE, that the child would otherwise have if served by the public agency directly.

In sum, pursuant to the IDEA, it is up to the State of Maine to license and regulate private schools, and it is up to the SEA, and specifically to the public agency making the educational placement in the private school to determine, prior to making the placement, whether, among other things, the student will have all the rights, including FAPE, that the child would have if served by the public agency directly.

To fulfill that obligation, a Maine statute authorizes the Commissioner of Education to adopt major substantive rules governing all aspects of special education. 20-A M.R.S.A. § 7005(1).¹ Other Maine statutes requires that all private schools be approved in advance of the enrollment of any child with a disability, identifies the minimum criteria for approval, and further provides that special education services offered by an approved private school must be provided under the supervision of the SAU responsible for the education of the child. 20-A M.R.S.A. §§ 7252-A, 7204(4). Finally, “[t]he commissioner may require that special education programs in an approved private school or agency receiving state funds comply with rules for the conduct of programs within public schools.” 20-A M.R.S.A. § 7501.

The Department’s special education regulation, MUSER, provides the requirements for Department approval of private school programs serving children with disabilities. MUSER, § XII.2.A. It describes the process for placing a previously-approved program on non-approved status. MUSER, § XII.2.E. MUSER also regulates so-called “out-of-unit placements,” such as when an SAU places a student at a private school, and outlines the respective roles of both the sending SAU and receiving school. Section IX.3.I states:

The sending SAU is responsible for:

- (1) Initiating the 30 day IEP review and any other reviews recommended;
- (2) Initiating the required annual review of the child’s IEP and placement;
- (3) Revising the child’s [IEP] as a result of the meetings;

¹ For ease of reading, despite the grant of rulemaking authority to the Commissioner, this basis statement refers to “the Department” as the entity proposing the emergency rule.

- (4) Ensuring the completion of any required reevaluation of the child;
- (5) Participating in any meetings related to proposed changes in the child's [IEP];
- (6) Ensuring the parent's involvement in the meetings;
- (7) Providing written notice as defined in Section XV of this rule; and
- (8) Ensuring compliance with this rule.

The receiving placement is responsible for the following:

- (1) Providing representative attendance at the initial IEP Team Meeting when requested by the sending SAU;
- (2) Providing representative attendance at the 30 day IEP review meeting;
- (3) Providing representative attendance at the annual review and at any other meetings when the receiving placement or the sending SAU propose to revise a child's [IEP];
- (4) Implementing a child's [IEP], which shall not be amended without an IEP Team meeting or the consent of the sending SAU and the parent (where applicable);
- (5) Providing to the sending SAU access to all the child's educational records relating to the placement;
- (6) Providing to the sending SAU progress reports at least as often as the sending SAU issues progress reports for its in-district students; and
- (7) Ensuring compliance with these rules and the Individuals with Disabilities Education Act.

In 2021, the Department became concerned that some SAUs, private schools, and regional special education programs believed that the language of MUSER XI.3.I allowed a receiving out-of-unit placement to remove a student with a disability from school for any reason, without utilizing the IEP Team process, and without maintaining "stay put" (the continuation of a disputed placement) in the event of a dispute. In response, the Department issued Administrative Letter 28 (Nov. 24, 2021) which states, in pertinent part:

MUSER IX.3.I requires a receiving placement to ensure compliance with “these rules and the Individuals with Disabilities Act.” While the Department views this language to cover the requirements for a change of placement, and for stay put, it is clear that some School Administrative Districts, SPPS [special purpose private schools], and Public Regional Programs have not operated with this understanding.

After consulting with counsel, the Department has determined that SPPS and other out-of-unit placements are not in compliance with IDEA when they terminate a student’s placement without going through the IEP process. Maine will enforce the federal standard of using the IEP process in the change of placement. Effective immediately, All SAUs must notify the SPPS and out-of-unit placements that in order to continue these placements, they must abide by the federal standard and provide FAPE to eligible students who are placed at SPPS and other out-of-unit placements.

The Department believed that the misunderstanding had been resolved, but in 2024 and 2025 the issue formally resurfaced with both a due process hearing and a state complaint investigation involving students who were removed by their private schools without using the IEP process and without the private school honoring “stay put” while the parents’ subsequent due process proceedings went forward. In the due process hearing, the hearing officer attempted to order the private school to readmit the student as their “stay put,” but the private school was not a party to the due process hearing. In the state complaint investigation, the Department recognized that it could direct the SAU to take corrective action, but not the private school. 20-A M.R.S.A. § 7206(1), (5).

The Spurwink Litigation

In January of 2025, one of the private schools, Spurwink Services, Inc., (“Spurwink”) sued the Department and the Commissioner (among others) in Federal court seeking (among other things) a declaration that MUSER’s “stay put” and FAPE obligations do not apply to private schools. Spurwink simultaneously moved for a preliminary injunction seeking to “strike down the clause in MUSER IX.3.I.(7) that conflicts with the IDEA.”

On August 19, 2025, the Court issued a decision denying the motion for preliminary injunction. While the decision primarily rested on the lack of harm to Spurwink, given that the Department had acknowledged it lacked an enforcement mechanism to compel Spurwink to

readmit the student or comply with “stay put,” the Court addressed the issue of the Department’s authority to regulate Spurwink by reasoning that:

Maine’s special education statutes provide agency rulemaking authority, see 20-A M.R.S.A. § 7005, and authorize special education services through contracts and through approved private schools, *id.* §§ 7251-A, 7252-A. Unlike New Jersey, Maine’s statutes do not explicitly and unambiguously place the same IDEA-related obligations on private schools as they do on public schools. Maine law, however, provides that MDOE “may require that special education programs in an approved private school or agency receiving state funds comply with rules for the conduct of programs within public schools,” *id.* § 7501, and an MDOE rule specifies that a receiving out-of-unit placement (including a private school) “is responsible for,” among other things, “Implementing a child’s Individual Education Program, which shall not be amended without an IEP Team meeting or the consent of the sending SAU and the parent (where applicable),” and “Ensuring compliance with these rules and the Individuals with Disabilities Education Act.” MUSER §§ IX.3.H–I. MDOE also has issued written guidance that “Special Purpose Private Schools . . . and other out-of-unit entities must ensure compliance with IDEA, utilizing the IEP team process and maintaining “stay put” in the event of a dispute. . . .”

[recitation of Administrative Letter #28 omitted as it is quoted above at p. 3]

Defendants argue that while the structure is not identical to New Jersey’s process, under Maine law, a special purpose private school has the same obligation as a public school to provide FAPE, to follow the IEP process when seeking a change of placement, and to maintain “stay put” during a parental challenge. [Spurwink] describes pertinent provisions of Administrative Letter 28 as “incorrect ” but [Spurwink] has not offered an adequate explanation for why a federal court has license to disregard or overrule a state agency’s interpretation of its own regulations.

Spurwink Services, Inc. v. Doe et al., 2025 WL 2402777 *6-7 (D. Me. 2025). The Court continued by concluding that Maine’s regulation does not improperly transfer responsibility for FAPE from the SAU to the private school and is not preempted by the IDEA. *Id.* at *7-8.

On May 19, 2026, the Court dismissed the case at Spurwink’s request and with no objection from the Department or the Commissioner. Spurwink and the Department agree that MUSER provides no administrative enforcement mechanism for violations of MUSER by private schools.²

In addition, as part of the Spurwink litigation, the Department received a copy of a contract that Spurwink had been using for several years that allowed Spurwink alone to determine whether the student would continue to attend. This contract was signed by at least one SAU after the Department’s directive in the Administrative Letter that they notify any out-of-district placement they were required to use the IEP Team process for any change of placement. Spurwink contends that it entered into such an agreement with any SAU that placed a student with them as a condition of admission. It has become clear to the Department that neither Spurwink³ nor the sending SAUs were complying with MUSER; in fact, they were agreeing to exactly the opposite of what MUSER requires.

The Department Attempts a Contractual Solution

The reason for the lengthy gap in time between the order on the preliminary injunction and the dismissal of the *Spurwink* lawsuit was because the parties requested and the Court agreed to stay the litigation while the Department attempted another approach with the private schools: 20-A M.R.S.A. § 7252-A(2) requires that there be a master contractual agreement between private schools seeking to provide special education and the commissioner, and while there has never been such an agreement in place, the Department viewed the statute as an opportunity to solve the issue of process and enforcement contractually.

The Department proposed a first draft of a master contractual agreement in October 2025 for public comment. Even though the Department’s contractual initiative was not subject to the Administrative Procedure Act, the Department chose to open the process so that the SAUs, the private schools and the public had the opportunity to weigh in. The draft agreements and all of the comments are available at [Private Schools Special Education Programs | Department of Education](#).

The Department’s first draft attempted to solve the issue of removals/dismissals by tying the SAU and the private schools together and requiring the SAU to exercise its due process rights on behalf of the private school. The commenters did not favor this approach, concerned that the SAU’s interest and the private school’s interest might not align. Several of the commentators pointed to other states, specifically Massachusetts, as a potential model. Massachusetts has

² Lewiston School Department, also a defendant in the *Spurwink* litigation, is continuing with its own lawsuit against Spurwink attempting to impose either an administrative or judicial process to enforce “stay put” on Spurwink. The Department is not a party to that lawsuit.

³ While the case was brought by Spurwink and necessarily involved Spurwink’s conduct, the Department believes that Spurwink’s conduct is similar to other private schools and does not mean to single out Spurwink’s conduct as unique.

provisions for both planned and emergency dismissals/terminations of private school placements, but significantly, it also includes private schools as potential parties to due process hearings.⁴ In January 2026, the Department proposed a second draft adopting a version of the “Massachusetts model.” The commenters had concerns with the Massachusetts model as well, with the public schools noting that the “Massachusetts model” allows for students to be removed in an emergency after two calendar weeks, which is inconsistent with what MUSER currently requires. The Department elected not to go forward with the second draft of the master contractual agreement, given the short time left in the current school year and hoping for additional guidance from the Court in the *Spurwink* litigation.

At this point, despite the Department and representatives of the SAUs and private schools working hard to come to a contractual solution, there remain obstacles to bringing it to a mutually agreeable end, primarily due to the continued lack of a regulatory enforcement mechanism.

In the meantime, children with disabilities remain out of their placements at private schools, in violation of their rights under IDEA and MUSER, and professionals who work with students with the most significant disabilities in private schools fear serious injury if students remain in settings where they are not able to protect their students, and themselves.

FINDINGS OF EMERGENCY

In addition to the above narrative supporting the adoption of this emergency rule, the Department makes the following findings:

1. Students with disabilities face imminent harm to their health, safety and welfare if they continue to be removed from their educational placements without the process required by the IDEA and MUSER and if their “stay put” rights are ignored. The students who are removed without process often have significant disabilities and are significantly impacted by sudden changes to routines, removal from familiar spaces, and the replacement of familiar faces with strangers. In addition, the shortage of available educational placements, particularly for students whose significant behavioral issues make them difficult to place, has resulted in the discharged students languishing without educational services as their prior educational placement is no longer willing to engage with them in any capacity while their SAU attempts to locate an appropriate successor placement.
2. Families of students with disabilities face imminent harm to their health, safety, and welfare if their children continue to be removed from their educational placements

⁴ Notably, Massachusetts does this without a statute or a rule, it is simply on the forms provided by the Bureau of Special Education appeals.

without the process required by the IDEA and MUSER and their right to challenge the removal and secure their children's "stay put" placements are violated. Parents of students with disabilities have important procedural safeguards and the right to insist that they retain those safeguards when their children are placed by their SAU in private schools as opposed to public schools. In addition, when a student is suddenly removed from their educational placements, it causes significant disruption to their family. For example, parents may be unable to work because they need to care for their child with a disability, causing financial stress to the family. Family members and pets in the home may not be physically safe when the child with a disability acts out in fear and frustration at no longer being allowed to go to school. The family may feel unable to properly advocate for their child with a disability to get them the appropriate educational placement they are legally entitled to, causing them emotional harm.

3. As stated in *Spurwink's* briefing in the *Spurwink* litigation, and as reiterated by private schools in their comments to the draft contractual agreement, educational professionals face imminent harm to their health, safety and welfare if students with disabilities remain in educational placements where the educators are unable to prevent them from injuring themselves and those around them. Before the Court, *Spurwink* described the situation it faced as "untenable" despite "herculean efforts" with the student engaging in regular punching, hitting, kicking, and flipping over furniture, until it culminated in an episode of dysregulation where the student bit three employees so severely "that one employee was referred to a plastic surgeon, and another lost fingernails on the fingers that were bitten." While doing their best to care for these students, educators in both public and private schools have been beaten, concussed, terrorized and traumatized sometimes requiring protracted medical care due to the severity of injuries sustained while trying their best to care for students who simply need a higher level of services than they can provide.
4.  the staff work to address the needs of a dysregulated student, the school community experiences imminent harm to its health, safety, and wellbeing. The school community must be characterized by respect, dignity and a sense of safety in order for students to engage in instruction and learning. When students are dysregulated and engaging in threatening or aggressive behaviors, classrooms and areas of the school must be evacuated while staff work to address the needs of the dysregulated student. Such evacuations are highly disruptive to the learning environment and cause significant fear and anxiety in the other students in the school environment. This fear and anxiety grow as the frequency, intensity and duration of these incidents grow. Children subjected to these violent disruptions and subsequent evacuations express fear of coming to school. Families of these students express outrage that the school is not doing enough to maintain an orderly learning environment for their children and, as such, may seek educational opportunities elsewhere.

5. The educational community at large faces imminent harm to the general welfare if the Department is unable to enforce IDEA/MUSER. Maine's continued receipt of federal funds depends on the ability to comply with the federal statute and regulations by ensuring that students placed at private schools have the same rights as students placed at public schools. The Department needs to be able to enforce its own rule to establish and maintain the general supervision of the implementation of IDEA in Maine, as required by federal law. SAUs need to be able to continue to make educational placements in private schools that are able to serve students who are unable to be educated in public schools. Private schools need to be able to continue to operate and attract employees to do difficult jobs.
6. No party should be allowed to act unilaterally, and all parties should be able to access a process whereby disputes can be heard by an independent third-party decisionmaker. Nobody benefits from a system that forces the Department, public schools, private schools, and parents to go directly to federal court to address issues that could and should be initially handled at an administrative hearing.
7. To prevent the harm described in the narrative and findings above, the Department is amending MUSER on an emergency basis to include private schools serving as educational placements as potential parties to administrative due process hearings. The Department finds that the appropriate response to the ongoing crisis and imminent harm caused by the lack of an administrative forum to resolve educational placement disputes and the provision of FAPE that is open to both placing SAUs and receiving private schools (as well as parents of children with disabilities) is not to create a new one, but to use the pre-existing administrative due process hearing detailed in MUSER and familiar to the special education community. Given the imminent nature of the problem and the lengthy period it has already taken to attempt a judicial and a contractual solution, the Department finds that the elimination of the public hearing and comment period are required to mitigate or alleviate the threats described above. The Department notes that the prior opportunity for public input during the contractual process mitigates the loss of the opportunity to comment on the rule change.

EMERGENCY CHANGES TO MUSER

The Department is amending MUSER to include private schools serving as out-of-district educational placements as potential parties to due process hearings. Students with disabilities placed in private schools must have the same rights with respect to FAPE -- and specifically changes of educational placement and "stay put" -- as students who are placed in public schools. The Department has chosen to include the private schools without limitations (*e.g.* only as a respondent) to ensure that there are no situations where a private school is left without an

administrative remedy in an IDEA/MUSER dispute as to provision of FAPE or educational placement.

The Department is making the following specific changes to MUSER:

- (1) In Section XVI. DISPUTE RESOLUTION PROCEDURES: (MEDIATIONS, COMPLAINTS, AND HEARINGS) on p. 159

1-A. Private Schools

Notwithstanding subsections 1.B(2) and (3) above, in all subsections below relating to mediations, due process hearings or expedited due process hearings for children 3-22, a private school serving as out-of-district educational placement (see section IX.3.H, I) may be a party to any disagreement relating to placement or the provision of a free appropriate public education. Each subsection shall be read to include private schools serving as out-of-district educational placements (and, as appropriate, their leaders, e.g. a headmaster where it says superintendent) with respect to these two types of disagreements. Nothing in this or any subsequent subsection may be interpreted to remove the ultimate responsibility for providing FAPE in the least restrictive educational environment from the sending SAU or transfer it to the out-of-district educational placement.

- (2) In Appendix 1 on page 231 after **Dispute Resolution** and before **State Complaint Procedures**

Dispute resolution

20-A M.R.S.A. §7202 et seq.

In all paragraphs below relating to mediations, due process hearings or expedited due process hearings for children 3-22, a private school serving as out-of-district educational placement may be a party to any disagreement relating to placement or the provision of a free appropriate public education. Each paragraph shall be read to include private schools serving as out-of-district educational placements (and, as appropriate, their leaders, e.g. a headmaster where it says superintendent) with respect to these two types of disagreements. Nothing in this or any subsequent subparagraph may be interpreted to remove the ultimate responsibility for providing FAPE in the least restrictive educational

environment from the sending SAU or transfer it to the out-of-district educational placement.