



Guidance From SED on Contracting With Private Entities for Student Services



On June 2, 2010, the State Education Department (SED) issued an important guidance memorandum about the ability of school districts to contract with private entities to deliver “core instructional services” to students. This memorandum follows a prior guidance memorandum on the same topic issued in July 2009.

In the new memorandum, SED reiterates its position that public school districts may not contract with private entities to provide core instructional services to students. But SED seeks to clarify exactly what types of services and instruction fall under this definition. SED states that core instructional services include instruction designed to meet state learning standards in the seven general curriculum areas. It also includes instruction in courses “for which credit is awarded toward a high school diploma.” SED identifies several types of instruction it does not consider to be core, including tutoring and enrichment programs that are not offered for credit and advanced courses, such as college courses.

SED clarifies the right of school districts to contract for the provision of “related services” for students classified with disabilities. For services provided by certified personnel, these services should be provided by school district personnel to the greatest extent possible. But to the degree that a school district has limited staffing resources and is at risk of violating a student’s individualized education program, SED states that the school board may contract with an outside entity to provide the related services. If the school board does take this action, however, the contract for services can only exist for one school year at a time.

SED devotes particular discussion to the provision of occupational and physical therapy services. Noting that occupational and physical therapists are not certified personnel but rather licensed professionals with no tenure rights, SED concludes that school districts may contract with outside entities to provide these services.

SED also comments on the use of outside instructors for suspended students. Like special education services, SED states that non-school personnel can provide this instruc-

tion, but only in the limited circumstance where the school “lacks qualified staff to provide the instruction at an alternate location.” SED bases this exception on the right of suspended students to receive a free public education. In order to make these arrangements, though, the school district must “retain supervisory control” and demonstrate that it was “unable to provide such services by hiring new employees or utilizing existing employees.”

Finally, SED addresses the propriety of using distance or online learning programs, stating that those programs may be used, but only as a “supplementary or additional resource to assist a district’s certified teachers in the delivery of instruction.”

In sum, the guidance memorandum gives school districts some flexibility regarding the ability to contract with outside providers. Instead of issuing a blanket prohibition, SED carves out specific circumstances where outsourcing may be appropriate. Generally speaking, such arrangements may be made when a school district is legally required to perform a particular type of instruction or service but does not have the staffing resources to meet the requirement. It does, however, put the onus on the school district to affirm the lack of sufficient staffing options.

If you have questions about how these developments may affect your school or about any other education-related issues, please feel free to contact a member of Hodgson Russ’s Education Law Practice Group.

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