

QUESTIONS AND ANSWERS RELATED TO CONTRACTS FOR INSTRUCTION

Q1. What are "core instructional services?"

A1. Generally, core instructional services comprise those instructional programs which are part of the regular curriculum of the school district and to which students are entitled as part of a free public education. This would include both general and special education programs and related services which school districts are required by law to provide as part of a program of public education and for which a certification area exists and to which tenure rights apply pursuant to Education Law and/or Commissioner's regulations.

The Commissioner has found that "establish[ing], conduct[ing], manag[ing] and maintain[ing] a course of instruction in general academic fields" does not involve "peripheral services such as security services or a recreational program, but is the very core function of a school district" (Appeal of McKenna, et al., 42 Ed Dept Rep 54, Decision No. 14,774). Therefore, core instructional services include those in which students are provided classroom instruction to meet State learning standards in the seven general curriculum areas (English language arts; mathematics, science and technology; social studies; languages other than English; the arts; health, physical education and family and consumer sciences; and career development and occupational studies) (see 8 NYCRR §§100.1, 100.2, 100.3, 100.4, 100.5). Instruction in courses for which credit is awarded toward a high school diploma would also constitute "core instructional services." Core instruction includes special classes for students with disabilities.

Core instruction does not include other supplemental instructional services, such as tutoring and enrichment programs that are not offered for high school credit, advanced courses such as college courses that are beyond the regular high school curriculum and services, such as online instructional services and distance learning, that assist teachers in providing instruction in their classrooms.

Q2. Can school districts contract with non-profit or other entities to provide distance or online learning opportunities for students?

A2. Yes, provided that the distance or online learning program is used as a supplementary or additional resource to assist a district's certified teachers in delivering instruction. In these situations, the distance or online program itself would not constitute "core instruction" as described in A1 above. The Department continues to examine the use of technology for instructional delivery and anticipates further discussion with the Board of Regents on this subject in the coming months.

Q3. When can school districts contract with a non-profit or other entity?

A3. School districts may contract with certain entities where specifically authorized by statute or regulation, or where contracting is necessary to carry out duties imposed on the school district by State or federal law. Examples of specific statutes and regulations authorizing contracting with other entities include:

- **Education Law §305(33)** authorizes the Commissioner of Education to approve providers of supplemental educational services ("SES") pursuant to the federal No Child Left Behind Act. This provision authorizes any local educational agency that receives federal Title I funds to contract with approved SES providers, which shall include, but not be limited to, public schools, BOCES, institutions of higher education and community-based organizations.
- **Education Law §3202(6)** requires that children cared for in a hospital or other institution for the care, custody and treatment of children, other than a school, must be provided with educational services by their school district of residence. This provision authorizes such school districts to provide these services by a tutor employed by the district, by contract with a school connected with such hospital or institution, or by contract with the local public school district in which such hospital or institution is located.
- **Education Law §3602-e** authorizes school districts with approved pre-kindergarten program plans to enter into any contractual or other arrangement necessary to implement such plans. Eligible agencies that may provide pre-kindergarten services pursuant to an approved pre-kindergarten program plan include a provider of child

care and early education, a day care provider, early childhood program or center, or certain community-based organizations.

- **Education Law §§4401(2) and 4402(2)(b)** authorize school districts to enter into contracts for special education services or programs, including related services, with other school districts, BOCES, State-operated and State-supported schools, approved private residential and nonresidential schools both inside and outside New York State, and the State University at Binghamton for non-residential special education at the Children's Unit.
- **Education Law §4401(2)(n)** authorizes school districts to enter into formalized agreements for the provision of transition services (as defined in Education Law §4401[9]) in programs such as vocational training programs approved by the Department or by another State agency.
- **Section 100.2(q)(2) of the Commissioner's Regulations** authorizes arrangements with institutions of higher education to provide advanced courses which convey high school credit and college credit.

Q4. Can a school district contract with private entities to provide core instructional services through employees of that private entity?

A4. No, except in the circumstances described in A3, school districts lack the authority to contract with an independent contractor to provide core instructional services (as described in A1) through employees of that independent contractor (Appeal of McKenna, et al., 42 Ed Dept Rep 54, Decision No. 14,774), such as social work services (Appeal of Barker and Pitcher, 45 Ed Dept Rep 430, Decision No. 15,375), psychological services (Appeal of Friedman, 19 Ed Dept Rep 522, Decision No. 10,236), or to hire substitute teachers (Appeal of Woodarek, 46 Ed Dept Rep 1, Decision No. 15,422; pet. to review disms'd Kelly Services, Inc. v. USNY, et al., Sup Ct Albany County, 5/22/07, Index No. 7512-06).

Q5. Can school districts contract for the provision of special education "related services" for which a certification area

exists and to which tenure rights apply pursuant to Education Law and/or Commissioner's regulations?

A5. Yes, but only in limited circumstances and with qualified individuals over whom the district has supervisory control.

Pursuant to the federal Individuals with Disabilities Education Act ("IDEA"), school districts are required to provide students with disabilities with a free appropriate public education ("FAPE"). A board of education must provide related services as part of the continuum of special services and programs available to students with disabilities to enable such students to benefit from instruction (see Education Law §4401[2][k]; 8 NYCRR §200.1[qq]). Related services include: audiology, counseling including rehabilitation counseling services, occupational therapy, physical therapy, speech pathology, certain medical services, psychological services, school health services, school nurse services, school social work, assistive technology services, interpreting services, orientation and mobility services, parent counseling and training and other appropriate developmental, corrective or other support services and appropriate access to recreation (20 USC §1401[26]; Education Law §4401[2][k]).

In Appeal of Barker and Pitcher, the Commissioner held that school districts do not have general authority to contract with non-profit entities to provide related services (Appeal of Barker and Pitcher, 45 Ed Dept Rep 430, Decision No. 15,375). However, that case involved a school district that abolished a tenured school social worker position and then contracted with a for-profit corporation to provide similar services (Appeal of Barker and Pitcher, 45 Ed Dept Rep 430, Decision No. 15,375). Thus, the Barker decision was based in part on consideration of the board of education's need to exercise supervisory control over instructional staff and in part on the negative impact that contracting with a private entity to deliver related services would have on the tenure rights of certified school district employees. Contracting out cannot be used as a vehicle for evading the tenure laws or the requirements that teachers be duly certified.

However, school districts also have obligations under the IDEA and Article 89 of the Education Law to deliver the services necessary to ensure that students with disabilities receive FAPE. The Department recognizes that there will be situations in which school districts will not be able to deliver FAPE to students with disabilities without contracting with independent

contractors. Where a school district is unable to provide the related services on a student's individualized education program ("IEP") in a timely manner through its employees because of shortages of qualified staff or the need to deliver a related service that requires specialized expertise not available from school district employees, the board of education has authority under Education Law §§1604(30), 1709(33), 2503(3), 2554(15)(a) and 4402(2)(b) to enter into contracts with qualified individuals as employees or independent contractors to provide those related services (see also §§1804[1], 1805, 1903[1], 2503[1], 2554[1]). Section 200.6(b)(3) of the Commissioner's regulations requires that related services be provided by individuals with appropriate certification or license in each area of related service. Consistent with the holding in Appeal of Barker and Pitcher, in order to ensure that such arrangements are not used to circumvent New York State's teacher tenure laws, a school district must document that it would retain supervisory control over the individual and that, despite reasonable efforts, it has been unable to provide such services by hiring new employees or utilizing existing employees, or through any of the contractual arrangements authorized by Education Law §4401(2), including contracts with other school districts, BOCES, approved state or state-supported schools, and approved private residential and nonresidential schools both inside and outside New York State.

Finally, school districts that, after exhausting the steps outlined above, find it necessary to contract with individuals should do so only for a period of one school year at a time. Before any such contract can be extended, or a new contract entered, school districts must again take reasonable efforts to provide such services as described above.

Q6. Can districts contract for the provision of special education related services, such as occupational therapy and physical therapy ("OT/PT"), for which a certification area does not exist and to which tenure rights do not apply pursuant to Education Law and/or Commissioner's regulations?

A6. Yes. As noted in A1 and A5 above, the restrictions on contracting apply to both general and special education programs and related services which school districts are required by law to provide as part of a program of public education and for which a certification area exists and to which tenure rights apply pursuant to Education Law and/or Commissioner's regulations. The related services of OT/PT, however, are not

provided by certified personnel who have tenure rights under Education Law. Therefore, the considerations underlying the contracting limitations described above do not apply in the context of related services such as OT/PT and other specialized services for which certification is not required and to which the tenure provisions of Education Law do not apply and the board of education would have the authority to contract for such services under Education Law §§1604(30), 1709(33), 2503(3), 2554(15)(a) and 4402(2)(b) (see also §§1804[1], 1805, 1903[1], 2503[1], 2554[1]).

Q7. Can districts contract for the provision of applied behavior analysis ("ABA") for special education students?

A7. ABA is an instructional methodology. While a school district may contract for a related service provider (such as a psychologist or speech and language therapist) to oversee an ABA program or to work directly with a student using ABA methodology, ABA is not a "special education program or service" in and of itself. The same circumstances and conditions that apply to the provision of related services also apply to the provision of related services using ABA methodology (see A5).

Q8. Can districts contract for the provision of transition services for students with disabilities with IEPs?

A8. Yes. Pursuant to Education Law §4401(2)(n), special education includes "formalized agreements" for the provision of transition services in programs such as vocational training programs approved by the Department or by another State agency (see A3). Other transition services might include job coaching.

Q9. Can districts enter into contracts for the instruction of suspended students?

A9. Yes, but only in limited circumstances and with qualified individuals over whom the district has supervisory control.

Education Law §3214(3)(e) requires school districts to provide alternative instruction to students of compulsory school age who are suspended from school. Alternative instruction must be substantially equivalent to the student's regular classroom program (Appeal of Deborah F., 42 Ed Dept Rep 178, Decision No. 14,813). The question of whether a program offers substantially

equivalent instruction must be decided on a case-by-case basis (Appeal of Deborah F., 42 Ed Dept Rep 178, Decision No. 14,813). For example, Commissioner's decisions have found two hours of alternative instruction per day sufficient to fulfill a district's obligation under the Education Law (Appeal of Camille S., 39 Ed Dept Rep 574, Decision No. 14,316).

Because alternative instruction is the only form of classroom instruction that suspended students will receive during the term of the suspension, this constitutes core instruction for which the district cannot contract with a private entity (see A1, A4). Where a school district provides alternative instruction within its school building(s), such instruction must be provided by appropriate, qualified district staff. However, in the limited circumstances in which alternative instruction for suspended students is either not offered within a district's school building(s) or the district lacks qualified staff or is otherwise unable to assign existing qualified staff to provide such instruction at an alternate location, such as the student's home, it may be necessary for the district to contract with a qualified individual to provide such instruction. Because districts are required by state law to provide resident students with a free public education, a school district's authority to enter into contractual arrangements where necessary to deliver such services would be grounded in Education Law §§1604(30), 1709(33) and 2503(3), which authorize boards of education to "have all powers reasonably necessary ... to discharge duties imposed expressly or by implication" by statute (see also §§1804[1], 1805, 1903[1], 2503[1], 2554[1], 2554[15][a]).

Before contracting with qualified individuals to provide alternative instruction to suspended students, a school district must document that it will retain supervisory control over such individuals and that, despite reasonable efforts, it has been unable to provide such services by hiring new employees or utilizing existing employees, or through contracts with other school districts or BOCES. School districts that, after exhausting such reasonable efforts, find it necessary to contract with individuals should do so only for a period of one school year. Before any such contract can be extended, or a new contract entered, school districts must again take reasonable efforts to provide such services as described above.

Q10. Can districts contract for the provision of instruction for homebound students?

A10. Yes, but only in limited circumstances and with qualified individuals over whom the district has supervisory control.

When students are unable to participate in regular classroom instruction due to illness, injury and/or disability, they may require that instruction be provided at their home or another alternate location. In the limited circumstances in which the district lacks qualified staff or is otherwise unable to assign existing qualified staff to provide such instruction at the student's home or another alternate location, it may be necessary for the district to contract with a qualified individual to provide such instruction. Because districts are required by state law to provide resident students with a free public education, a school district's authority to enter into contractual arrangements where necessary to deliver such services would be grounded in Education Law §§1604(30), 1709(33) and 2503(3), which authorize boards of education to "have all powers reasonably necessary ... to discharge duties imposed expressly or by implication" by statute (see also §§1804[1], 1805, 1903[1], 2503[1], 2554[1], 2554[15][a]).

Before contracting to employ qualified individuals to provide instruction to homebound students, a school district must document that it will retain supervisory control over such individuals and that, despite reasonable efforts, it has been unable to provide such services by hiring new employees or utilizing existing employees, or through contracts with other school districts or BOCES. School districts that, after exhausting such reasonable efforts, find it necessary to contract with individuals should do so only for a period of one school year. Before any such contract can be extended, or a new contract entered, school districts must again take reasonable efforts to provide such services as described above.

Dated: June 2, 2010