

# Educating Virtually: Update on Legal Obligations, Requirements & Litigation

Drew Marriott  
March 25, 2021



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- Overview of Issues Surrounding Virtual Education
- District-operated Virtual Programs
- MOCAP Providers
- 1250 Agreements
- Legislative Updates
- Litigation related to MOCAP Providers
- Guidance (for now)

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## Virtual Education Overview



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### District-operated Virtual Education

- Many Missouri districts are operating their own virtual programs, either by creating their own content, or contracting with providers to provide some of the content.
- Allows for district control, district staffing, and most importantly, the ability to monitor student progress, engagement, and evaluate the content and instruction.
- Ability to create framework in which you require students to return to in-person instruction if a virtual platform is not working for them.
- Requires decisions about staffing, how to evaluate, content creation, platform for delivering content, and host of other decisions that the district will be required to make.



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### § 162.1250 (1250 Agreements)

- Allows for agreement with outside vendors to implement virtual instruction.
- “When courses are purchased from an outside vendor, the district or charter school shall ensure that they are aligned with the show-me curriculum standards and comply with state requirements for teacher certification. The state board of education reserves the right to request information and materials sufficient to evaluate the online course. Online classes should be considered like any other class offered by the school district or charter school.”



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### Considerations for 1250 Agreements

- Under this, a school district can be on the hook to ensure that each course and its instructor meet state standards and certification requirements.
- Under an agreement with a vendor, the district has more leeway to determine when a course may benefit a student and when a course is or is not appropriate because the student has no affirmative statutory right.
- To take virtual courses that are outside of MOCAP.
- The appeal rights outlined in MOCAP do not apply to virtual courses under § 162.1250, RSMo.



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### Virtual Ed Developments

Missouri legislation from 2018 created the Missouri Course Access and Virtual Schools Program (MOCAP)

- giving students broader abilities to take virtual courses
- at their resident district's expense.



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### MOCAP



- MoVIP was the previous virtual education program which MOCAP replaced, pursuant to § 161.670, RSMo.
- Based on the MOCAP statute, school districts are *required* to approve students' requests to enroll in virtual courses or programs
  - if they meet eligibility requirements and
  - the class or program is in the student's "best educational interest."



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## MOCAP

To be eligible, the student has to be

- enrolled full-time in the district and
- have attended a public school at least one semester immediately prior to enrolling in the online course
- *unless* a medical condition or disability prevented attendance.



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## MOCAP

- If a student meets the eligibility criteria and the class is in the student's "best educational interest," as decided by the district, the district must allow the student to enroll.
- If the eligibility and "best educational interest" criteria are not met, the district has discretion to allow the student to take the course, under the understanding that such a decision could set precedent for future requests.



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## MOCAP

- "Best educational interest" is an individualized determination.
- The determination should at least include the considerations related to that specific student.



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## MOCAP

“Best educational interest” is an individualized determination, but can include the following considerations, at the district’s discretion:

- The student’s attendance.
- The student’s grade point average.
- The student’s technological abilities.
- The student’s self-motivation.
- Whether the virtual course has appropriate rigor compared to the district’s current course in the same subject.
- Whether the student has been successful taking virtual courses in the past.



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## MOCAP



- If students’ requests to enroll in MOCAP courses or programs are denied, those students have the right under the law to appeal that decision to the Board, and then on to DESE.
- There is no requirement that districts allow students to enroll in virtual courses or programs that are not approved by MOCAP.
- There is also no requirement that districts pay for virtual courses or programs that are not MOCAP-approved.



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## MOCAP

If we approve a student for MOCAP, can we require conditions to make sure they are progressing and succeeding as a student?

Section 167.670 states:

- (7) School districts and charter schools shall monitor student progress and success, and course or full-time virtual school quality, and annually provide feedback
- to the department of elementary and secondary education regarding course quality.



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Section 167.670 states:

(6) The department shall monitor student success and engagement of students enrolled in their program and report the information to the school district or charter school. Providers and the department may make recommendations to the school district or charter school regarding the student's continued enrollment in the program. The school district or charter school shall consider the recommendations and evaluate the progress and success of enrolled students that are enrolled in any course or full-time virtual school offered under this section and may terminate or alter the course offering if it is found the course or full-time virtual school is not meeting the educational needs of the students enrolled in the course.



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## MOCAP

### Does our district have to let students take MOCAP courses?

- If a student meets the eligibility criteria and the class is in the student's "best educational interest," as decided by the district, the district must allow the student to enroll.
- If the eligibility and "best educational interest" criteria are not met, the district has discretion to allow the student to take the course, under the understanding that such a decision could set precedent for future requests.



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## MOCAP

### Can our district allow students to take virtual courses that aren't MOCAP-approved?

- Yes! Under § 162.1250, RSMo., a district can create a cooperative agreement with a vendor or a school district who sponsors or that has developed online courses or programs to provide virtual education to students.
  - Creating this agreement is the district's *option*.
  - The district does not have to offer or approve virtual courses or programs that are not MOCAP-approved.



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## Virtual Learning for Special Education Students

- Students with disabilities need to be provided equal access to virtual programming.
- Ultimately, moving to virtual education is a change in placement that needs to be determined by the IEP or Section 504 Team.
- This may not look like other students' virtual programming.
- The District is still on the hook to ensure the student is providing FAPE.
- Most virtual vendors are not providing special education to students and may be limited as to what modifications and accommodations they provide.
  - This should be a consideration when doing the “best educational interest” determination within an IEP team meeting to determine appropriate placement.



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## Legislative Updates



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## Missouri school districts could lose control of virtual education decisions under proposed legislation

Missouri State - Feb 3, 2020



Missouri State Sen. Bob Chase, R-Lake Saint Louis, works at his desk in the Senate chamber in Jefferson City on March 31, 2016. (Associated Press)



stltoday.com



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### Legislation: SB95

- Changes:
  - Virtual school programs would become attendance centers, so full-time enrolled students would no longer be included in the resident district's attendance.
  - Parent has final "best educational interest" decision-making authority.
  - Virtual schools can remove students if the provider believes the course isn't in the student's BEI.
  - Full-time virtual schools notify parents of lack of engagement.
  - DESE creates the required policy, not districts.
  - \$100/day civil penalty and attorney's fees for not notifying parents of right to MOCAP.



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### Legislation: SB55

- Changes Related to Virtual Education:
  - MOCAP becomes "MCAVSP"
  - If the district withholds a portion of the cost invoiced by the vendor, DESE has to withhold the difference from state aid.
  - Full-time students participate in state assessments through the vendor, and performance is assigned to the attendance center of the full-time program.
  - DESE adopts a policy related to enrollment of full-time students, including continuous enrollment throughout the school year.
  - Parent has final decision-making authority regarding BEI.
  - Virtual schools monitor progress and remove students if not in BEI.
  - Virtual school can unenroll due to lack of student engagement.
  - Civil penalties/attorney's fees for failure to provide information in an impartial manner regarding MOCAP.



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### Litigation related to MOCAP Providers



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## Litigation: MOCAP Providers (K12/MOVA)

- Estill v. Fulton Public Schools
- Bucci v. Independence School District
- Maloney v. Independence School District
- Other Litigation and Articles



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### OUR CLIENTS

The attorneys here at The Schindler Law Firm are well-versed in a number of industries and areas of practice (<http://schindlerlitigation.com/areas-of-practice>). We are confident that we can effectively assist you or your business with any legal issues that pertain to the areas of practice in which we specialize.

Since our beginning in 2003, we have continued to exceed the expectations of our clients and excel in every area of service that we provide. The testimonials (<http://schindlerlitigation.com/testimonials>) of some of our former clients are evidence of our expertise and dedication. Some of our past clients include:

- Children's Education Alliance of Missouri
- Community Care Centers, Inc.
- Doing Steel, Inc.
- Eldercare Management Services, Inc.
- Landmark Excavating & Equipment Company
- McCormack Baron Management, Inc.
- Miracle Supply Company, Inc.
- Paul Harris
- Rex and Jeanne Sinquefeld
- Sense Corp
- Urban Strategies, Inc.



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## Miya Estill v. Fulton Public Schools

IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

STATE OF MISSOURI BY  
MIYA ESTILL, and MIYA ESTILL,  
Individuals and as Next Friend of Miya  
D.N.E., J.T., and M.T.,  
Plaintiffs,  
v.  
MISSOURI DEPT. OF ELEMENTARY  
AND SECONDARY EDUCATION,  
FULTON PUBLIC SCH. DIST.,  
and  
GRANDVIEW R-1 SCH. DIST.,  
Defendants.

Response (Defendants)

FINAL ORDER AND JUDGMENT OF WRIT OF HABEAS

- Ordered DESE to include Missouri Virtual Academy (MOVA) as an approved MOCAP Provider, despite the fact MOVA failed to apply, and meet the requirements mandated by DESE.
- Resulted in MOVA becoming an "approved" MOCAP provider.
- Resulted in expansion and growth of MOVA as a virtual provider and ensuing litigation about whether a school district can deny enrollment in a MOCAP program and whether a district can require steps to ensure student progress and success.



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## Bucci v. Independence School District

- Originally filed in Cole County, Missouri.
- Plaintiff asserted an action against Independence School District, Grandview R-2, and DESE.
- Related to Student IEPs.
- Matter removed to Federal Court (over Plaintiff's objections).
- Court determined:
  - Enrollment in a MOCAP program is a change in placement under IDEA, and required meeting of an IEP team to determine placement, and was therefore appropriately removed to Federal Court.
  - Before the Federal Court could make a determination about whether the student was properly denied enrollment in MOVA, Plaintiff dismissed their case.



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## Maloney v. Independence School District

- Background
- Lawsuit
  - Plaintiff sought a temporary restraining order, which was denied.
  - Plaintiff sought declaratory judgment and permanent injunction—both were rejected after trial.
  - Multiple depositions of district officials, and DESE officials.
- Trial Court determined that the plain language of the statute requires a school district to monitor student progress and success and that a district can require seat time, benchmark assessments, end of course assessments, and state assessments to monitor student progress and success, especially if MOVA refuses to provide that information (which MOVA refuses to provide).



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IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI  
AT INDEPENDENCE

ROBERT MALONEY, Individually and as  
Next Friend of Minor B.M.

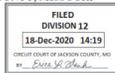
Plaintiff,

v.

INDEPENDENCE PUBLIC SCH. DIST., et al,

Defendants.

Case No.: 2016-CV03159



FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT



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7. Plaintiff is not entitled to a declaration that ISD may not condition MOVA enrollment on seat time or any other standard not specifically stated in the MOCAP statute, or that ISD violated MOCAP in this regard. As DESE testified, § 161.670 is silent, leaving such determinations to the District's discretion. Neale 2, 39:6-15, 50:16-25, 137:3-138:6, 142:18-23. Much less does it provide B.M. an unqualified right to complete her coursework in her preferred location. B.M. remains a student of ISD. The declaration Plaintiff seeks would conflict with § 161.670.3(6)'s express requirement that districts monitor the progress and success of students. See Neale 2, 28:12-23 (both DESE and ISD have monitoring obligations under MOCAP).



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8. For similar reasons, Plaintiff is not entitled to a declaration that ISD may not threaten B.M.'s MOVA enrollment as a result of her refusal to meet seat time requirements. Section 161.670.3(6)-(7) makes ISD responsible for B.M.'s progress and success. B.M., though enrolled in MOVA, remains a student of ISD and subject to its policies and rules. If B.M. refuses to permit monitoring of her progress at MOVA, ISD will be prevented from meeting statutory obligations. Again, B.M.'s on-going enrollment in MOVA is subject to ISD's on-going determination that MOVA is meeting her educational needs. § 161.670.3(6). An order



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9. Plaintiff is not entitled to a declaration that ISD may not require B.M. to submit to assessment of her progress more than once per semester, or threaten her "enrollment status" if she refuses to comply. Again, § 161.670 contains no such restriction on ISD's ability to perform its statutory duties. Limiting assessment to one time a semester limits ISD's ability to quickly ascertain that a student is struggling in virtual classes and take action. As a result, the student could fail a class, or simply not participate, and ISD would not know until it was too late to intervene, thereby harming the student, losing educational time, and wasting taxpayer funds.



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10. Having found that ISD has discretion to require seat time and testing, the Court turns to the reasonableness of ISD's exercise of that authority. The Court finds that ISD's Superintendent, Dr. Herl, Assistant Superintendent, Dr. Randy Maglinger, and others testifying on behalf of ISD, reasonably believed that MOVA's cursory monthly reports were inadequate to enable them to satisfy their statutory obligation to monitor B.M.'s progress and success and ensure that MOVA was meeting her educational needs. Dr. Herl further testified that what he learned about B.M.'s learning environment at home during this litigation further convinced him of the need for monitoring. It is not the Court's role to substitute its discretion for the District's. Accordingly, the requirement of 5 hours seat time per week, and completion of benchmark assessments, was not unreasonable, arbitrary, or an abuse of discretion.



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### The Cash and Consequences of For-Profit Online Education in Missouri

By Eric Berger

PHOTO ILLUSTRATION BY DAN EAST  
Online education has become big business.

This story was supported by the *Pulitzer Center*.

Attorney *Joshua Schindler* had one word for the way Missouri school districts treat families who want to enroll their students in a virtual education program: "disgusting."

But a review of the evidence that Schindler and lobbyists have presented to lawmakers reveals that the state and school districts are not actually depriving students of a quality virtual education at anywhere near the level that Schindler describes.

The program does not, however, appear to be the best. In general, kindergarten through twelfth-grade students' academic performance and graduation rates in virtual programs across the country are significantly lower than in-person institutions, according to a bounty of research.

[The Cash and Consequences of For-Profit Online Education in Missouri | Feature | St. Louis | St. Louis News and Events | Riverfront Times](#)



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### Virtual learning company admits releasing student data in bid to expand in Missouri

Kurt Erickson  
Oct 20, 2020



[Virtual learning company admits releasing student data in bid to expand in Missouri | Education | stltoday.com](#)



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## Guidance



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### Guidance (subject to legislative changes)

- The current MOCAP framework is subject to legislative efforts that, if successful, will divorce any oversight or best educational interest analysis from local school districts and educators working with those students.
- Subject to those legislative changes, it is important to make sure we are making individualized, student specific decisions about enrollment in virtual education.
- If a student is participating in virtual education, whether through a district run program, through a 1250 agreement, or through a MOCAP provider it is important to monitor student progress and success—that may lead to a determination that the student needs to return to in person instruction.



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## Attendance

- Many districts are experiencing issues of possible truancy or even educational neglect with students who are attending school virtually.
- Consider how your district evaluates attendance for in-seat students.
- How can that translate to virtual education students?
- What factors should the District Consider?
  - Check-ins
  - Daily work?
  - What will constitute an “absence”?
  - At what point are parents notified?
  - At what point is Children’s Division or the Juvenile Office notified?



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## Removal

- Is the student attending through MOCAP?
- Is the student attending an in-District program?
- Is the student a special education student?



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## MOCAP Removal

Section 161.670, RSMo.:

- The department shall monitor student success and engagement of students enrolled in their program and report the information to the school district or charter school. Providers and the department may make recommendations to the school district or charter school regarding the student's continued enrollment in the program. The school district or charter school shall consider the recommendations and evaluate the progress and success of enrolled students that are enrolled in any course or full-time virtual school offered under this section and may terminate or alter the course offering if it is found the course or full-time virtual school is not meeting the educational needs of the students enrolled in the course.



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## MOCAP Removal

- If the District determines that the course or program isn't meeting the "educational needs" of the student, the student can be removed.
- Clearly document the information you have that shows the student's educational needs aren't being met.
- Ensure that decisions are made consistently.
- There is some risk involved, as this hasn't yet been litigated by a court and the statute is silent (at this point) regarding how students can be removed.



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### In-District Virtual Removal

- The District will have more leeway to make a decision with regard to its own students in its own program.
- If students aren't meeting requirements the District set forth for virtual programming, or it's clear a student isn't making progress in virtual, the student can be removed.
- Clearly document what issues you're seeing (attendance, completion, mastery, engagement, etc.) in case a MOCAP request is submitted.



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### Special Education Virtual Removal



- Virtual education is a placement decision made by the Section 504 or IEP Team.
- If a student isn't making adequate progress, especially compared to the progress the student made while in-seat, it is likely that a change in placement is appropriate.
  - Data will be key.
- The team should consider data regarding progress and make a determination as to whether a change in placement is warranted, in order to educate the student in the least restrictive environment.
- If the student is a MOCAP student, it may be appropriate to provide both notice of removal from the MOCAP course, as well as appropriate prior written notice required by the IDEA.



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