

## **An Enforceable, Flexible, Perpetual Enrollment Agreement?**

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### Introduction

Many schools have explored using a “perpetual” enrollment agreement—an agreement signed just once by parents as each student enters the school. It seems like a great way to simplify paperwork, reduce associated administrative burdens, and smooth reenrollment going forward, perhaps with the implied message that students are expected to return each year.

But perpetual enrollment agreements have potential pitfalls that could risk a school’s financial well-being, which is based (in part) on having valid enrollment agreements. Most states, such as Massachusetts and New York, have not specifically ruled that perpetual enrollment agreements are enforceable. Other states, such as California and Illinois, impose specific requirements on such agreements. Moreover, perpetual agreement provisions often inevitably contain uncertainties that can be fatal in some states: How long will the student be enrolled? What will tuition be in the future? These uncertainties could render the agreement unenforceable. And yet creating contractual certainty in a perpetual agreement that will remain in effect for many years into the future could rob the school of flexibility to change key terms in later years.

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Thus, before using perpetual agreements, schools should carefully consider whether the costs outweigh the benefits.

## Significance of the Enrollment Agreement

The enrollment agreement is the foundation of the legal relationship between the family and the school. It is the primary—and preferably the only—contract between these parties. It specifies the family’s obligations, including tuition amount and due dates. It should protect the school from misbehaving parents (parental comportment), misuse of the school’s name and logo, and risks that ought to be covered by a student’s health insurance. The enrollment agreement should permit the school to use student images and work, and it can also be an efficient means of obtaining other required authorizations, such as parental consent for students’ use of web-based applications for educational programming.

If there are disagreements with a family, the enrollment agreement ought to give the school the right to take appropriate action. So it is critically important that the enrollment agreement can be enforced in court or arbitration (if need be). Accordingly, each school should be absolutely certain that its enrollment agreement is legally as solid as possible.

A perpetual agreement could be in place for as many as 13 or more years. It may be worth hundreds of thousands of dollars. So it must be enforceable, appropriately comprehensive, and sufficiently flexible to adapt to future changes in the school’s circumstances. With so much at stake, litigation challenging the enforcement of a perpetual agreement should be expected to bring special attention to the perpetual agreement, including the process of getting it signed, and each parent’s awareness of the terms of the agreement. These are important documents and not boilerplate forms.

## More Efficient and Riskier?

Having a *perpetual* agreement seems like it would be more efficient than reliving the *annual* reenrollment process, every year, for every family. For example, busy parents would have to read and sign only one agreement. Perhaps they would feel good that the default expectation is that their child will be reenrolled. Busy school employees would benefit from processing only one agreement per student.

But while the potential benefits of perpetual enrollment agreements are significant, they also come with real risks, which should be carefully considered and addressed.

In particular, a perpetual enrollment agreement ought to address the following topics, among others:

- **Duration:** The perpetual agreement's extended duration (and corresponding uncertain future tuition amounts) could render the agreement too indefinite to be enforceable. For example, will the agreement set tuition five or 10 years into the future? And if the school locks in future tuition amounts, will it be able to balance the budget in 10 years if costs have increased more than budgeted?
- **Flexibility for Future Terms:** A perpetual agreement may need to be replaced in the future to allow for new, unforeseen terms that better serve the school's interests when circumstances change. For example, if the board decides to dramatically increase (or decrease) the size of the international student body, will the school need new terms in the enrollment agreement relative to travel arrangements, health insurance, or local guardians to integrate or synchronize the enrollment agreement with the school's new "homestay program" for its international students?
- **Enforceability Under State Law:** Drafting an enforceable enrollment agreement (as determined by a court or arbitrator) will depend upon state law, which varies significantly and can change dramatically from one year to the next. For example, if a court were to decide that some part of the school's perpetual agreement was not

enforceable (perhaps in a key provision such as “parental comportment”), then the school could be faced with a period of time when families would be party to an agreement that was defective from the school’s perspective. Or if state law were to change, for example, with respect to deferred payment terms, the school might need to amend all active perpetual agreements.

These examples are not exhaustive, so this article will not answer every question for every school. But since most courts have not yet endorsed perpetual enrollment agreements, there are real risks. There just is not much clear legal guidance to show us where perpetual agreements would be both practical and clearly legally enforceable.

For these reasons, schools that want absolute certainty might simply stop reading here. Typical annual agreements are familiar and courts regularly enforce them.<sup>2</sup> Schools can update them every year as needs change. The annual agreement might be preferable for some schools, particularly when balanced against the risks of a perpetual agreement. But for those schools that want to make a change, applying essential principles of applicable contract law, such as the need for definite terms, should make it possible to draft a perpetual enrollment agreement that is as enforceable as an annual enrollment agreement.

## Definite Contractual Terms

To be enforceable, an agreement generally must be definite as to key elements such as duration and price.<sup>3</sup> This requirement is met by the traditional enrollment agreement that specifies a one-year term and a set tuition amount. Perpetual agreements create potential risks

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<sup>2</sup> *E.g.*, *Sisters of the Holy Child Jesus at Old Westbury, Inc. v. Corwin*, 51 Misc. 3d 44, 44-45 (N.Y. App. Term 2016) (holding that the enrollment contract’s liquidated damages clause was not an impermissible penalty); *Barrie Sch. v. Patch*, 401 Md. 497, 511-12 (2007) (holding that liquidated damages clause in agreement between parents and school was valid and enforceable); *St. Margaret’s-McTernan Sch., Inc. v. Thompson*, 31 Conn. App. 594, 596 (1993) (enforcing liquidated damages provision equal to annual tuition); *The Princeton Montessori School v. Leff*, 248 N.J. Super. 474, 480-81 (App. Div. 1991) (enforcing liquidated damages provision equal to one year’s tuition).

<sup>3</sup> WILLISTON ON CONTRACTS § 4:21 (4th ed.) (“It is a necessary requirement that an agreement, in order to be binding, must be sufficiently definite to enable the courts to give it an exact meaning . . . . A lack of definiteness in an agreement may concern the time of performance [or] the price to be paid . . . .”).

because the duration and future tuition amounts are generally not known when the agreement is signed.

### *Duration*

There are two common approaches to duration in perpetual agreements if the school wants a definite duration. A school might state that the term ends on a specific date (*i.e.*, the student’s anticipated graduation date). This simple approach would seem to make good sense, but it will not work for all students, such as those who take off a semester or do not graduate on time for other reasons.

Alternatively, the term may be for one academic year, but with an evergreen clause—renewable automatically each successive year until graduation unless the agreement is terminated by written notice prior to a predetermined, contractually-defined date each year. While this seems like a viable option, it creates an administrative burden to manage the renewal window for all enrollment agreements.

Regardless of how the perpetual agreement’s duration is structured, some state laws impose specific requirements that will need to be addressed. For example, several states have enacted laws requiring that automatic renewal provisions appear “clearly and conspicuously” in the original agreement.<sup>4</sup> California requires that such provisions be in a larger font (or a contrasting font, style, or color) as compared to the surrounding text or be otherwise identified “in a manner that clearly calls attention” to automatic renewal language.<sup>5</sup> Illinois requires written notice of automatic renewal to consumers “no less than 30 days and no more than 60 days before the cancellation deadline pursuant to the automatic renewal clause.”<sup>6</sup> Arguably, this

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<sup>4</sup> *E.g.*, California, Cal. Bus. & Prof. Code §§ 17601-02; Georgia, Ga. Code Ann. § 13-12-3; Florida, FL ST § 501.165; Hawaii, Rev. Stat. § 481-9.5; Illinois, 815 Ill. Comp. Stat. Ann. 5/11c; Louisiana, La. Stat. Ann. § 9:2716; New Mexico, N.M. Code R. § 12.2.11.8; North Carolina, Gen. Stat. Ann. § 75-41; Oregon, Or. Rev. Stat. Ann. 646A.295.

<sup>5</sup> Cal. Bus. & Prof. Code §§ 17601-02.

<sup>6</sup> 815 Ill. Comp. Stat. Ann. 5/11c

greatly minimizes the benefits of having a perpetual agreement by requiring annual paperwork and creating a litigation risk that a family will refuse to pay and then claim that they did not receive the requisite renewal notice.

### *Tuition and Payments*

In order to address the common state law requirement of definiteness, the amount of tuition can be made sufficiently definite by including a clause such as “the current tuition amount (\$\_\_\_\_) is subject to a \_\_\_\_% increase annually.” Depending upon state law, this might render the perpetual agreement sufficiently definite as to price. However, due to the realities of how tuition rates are generally established, setting an annual percentage increase for future years may not be feasible or realistic.

Alternatively, the agreement may state that tuition payments are due each year with the exact future amount to be determined by the school and communicated to families by a specific date in advance of any annual termination or non-renewal deadline. The enforceability of such a provision would depend on state law.

Schools ought to consider possible changes to a family’s chosen payment option each year (*e.g.*, single payment v. monthly plan) and/or any change(s) with respect to who is financially responsible for paying tuition.

The agreement ought to address how best to handle deposits. This could be done with a one-time payment per student that is applied to the student’s final tuition payment before graduation or the deposit could be refunded when the student leaves the school.

Closely connected to annual tuition, schools should determine how to address financial aid, as eligibility may vary for students from one year to the next. Appropriate language should be incorporated to address this issue.

Unfortunately, grappling with each of these financial issues could result in some kind of annual paperwork—which (again) would defeat (some of) the value of having a perpetual agreement.

### *Termination*

The perpetual agreement ought to preserve the school’s discretion to terminate the agreement when a student (or family) is not a good match. The agreement can specify multiple potential events and/or conditions that may terminate the agreement. It might condition continued enrollment on the student’s successful completion of the prior year in good academic, financial, and disciplinary standing, as well as parental comportment. It might state that the agreement does not guarantee continued enrollment. All of this language will ideally be drafted as broadly as possible to maintain maximum flexibility within the bounds of applicable state law.

In this regard, termination is often triggered by a violation of school policies, as referenced in the enrollment agreement. But these policies ought to be reviewed annually, as laws and best practices evolve quickly. So, schools should consider how to properly address each family’s obligation to comply with future school policies (*e.g.*, student handbook policies) without incorporating those policies into the agreement or creating other risks under state law.

Finally, when student (or parent) misbehavior becomes a concern, raising the possibility of expulsion, the school will need to remind the family not only of the relevant school policy(ies) but also of the relevant contract provisions. At that point, families may not have read their perpetual agreement for *many* years, which could add to both the practical and legal challenges of relying upon the parental comportment language in the perpetual agreement. If parents have not read the parental comportment provision in many years, how will they react when the school informs them that it is considering removing their child from the school based on the parents’ misbehavior? Schools might consider whether this type of misbehavior would be less likely to occur if every parent read and signed a new enrollment agreement every year.

## Collecting Outstanding Tuition in the Event of a Breach

Over the course of each student’s enrollment at a school, the enrollment agreements signed by each student’s parents are potentially worth hundreds of thousands of dollars. As such, the importance of the enforceability of the enrollment agreement cannot be overemphasized. So, switching from the certainty of an enforceable annual version to the potentially unenforceable perpetual version may be riskier than a school would prefer.

It is unclear in most jurisdictions how much unpaid tuition schools can successfully collect under a perpetual agreement. If a family abruptly withdraws from the school, how much will a court make them pay if the school has to sue to get paid? In contrast, a court’s likely reaction to a collection lawsuit under an annual agreement is relatively well-established.

In the case of an annual enrollment agreement, payment of the full year’s tuition is typically required if a student leaves school after a certain date. Many state courts have enforced these one-year awards as a reasonable estimate of liquidated damages (the school’s anticipated loss at the time of contracting).<sup>7</sup>

For example, in 2016, a New York state court ordered a family to pay a full year’s tuition when the family withdrew their daughter after the deadline specified in the enrollment agreement.<sup>8</sup> The court reasoned that the school based its annual budget upon, and made “irreversible financial commitments to teachers and staff” based on, promises made by families in enrollment agreements.<sup>9</sup> Courts in Maryland, New Jersey, Ohio, and Georgia have issued

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<sup>7</sup> *E.g.*, *Pierre v. St. Benedict’s Episcopal Day School*, 324 Ga. App. 283, 288 (2013) (enforcing liquidated damages provision equal to one year’s tuition); *W. Res. Acad. v. Franklin*, 999 N.E.2d 1198, 1201 (Ohio Ct. App. 2013) (holding that clause requiring defendant to pay full tuition was not punitive, but rather constituted a valid liquidated damages provision); *Barrie Sch.*, 401 Md. at 511-12 (citing cases holding that “a year’s tuition constitutes a reasonable liquidated sum for breach of a school enrollment contract”) (internal citations omitted); *Turner v. Atlanta Girls’ Sch., Inc.*, 288 Ga. App. 115, 117 (2007) (holding that provision requiring family to pay sum equal to one year’s tuition was not penalty clause because it was “a reasonable estimate of the school’s probable loss for a breach”); *Leff*, 248 N.J. Super. at 483 (enforcing liquidated damages provision equal to one year’s tuition).

<sup>8</sup> *Corwin*, 51 Misc. 3d at 48-49.

<sup>9</sup> *Id* at 44-45.



similar decisions in recent years.<sup>10</sup> However, some courts have suggested that recovery may depend on whether the school experiences *actual* financial loss, considering whether the school is at full enrollment.<sup>11</sup>

It is unclear whether the damages recoverable under a perpetual agreement would be analyzed similarly or not. Though these agreements purport to bind parties for more than one year, if a family were to breach (*e.g.*, refuse to pay after a student withdraws or is expelled), it is questionable whether a court would award damages for more than one year.<sup>12</sup> Contract law in most jurisdictions disfavors “penalty clauses” and thus the damages provision should be tailored to approximate the school’s anticipated financial loss. The agreement should also be tailored to state law—which might mean setting liquidated damages as equal to one year of tuition.<sup>13</sup>

## Maintaining Adequate Flexibility

A final challenge in drafting a perpetual agreement is to anticipate where the school will need “wobble room” to make future modifications to the perpetual agreement—and to do so without creating so much uncertainty that a court could deny enforcement of the perpetual agreement due to a lack of definiteness of key terms.

Creating enough certainty to have enforceability often means eliminating the flexibility needed in the future. Whether the school can adequately address the unforeseen (and perhaps

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<sup>10</sup> *E.g.*, *Pierre*, 324 Ga. App. at 288; *Franklin*, 999 N.E.2d at 1201-02; *Barrie Sch.*, 401 Md. at 511-12; *Turner*, 288 Ga. App. at 117; *Leff*, 248 N.J. Super. at 483.

<sup>11</sup> *Barrie Sch.*, 401 Md. at 522 (Bell, C.J., dissenting) (opining that consideration of whether a liquidated damages clause should be considered a penalty “should include the effect of the breach, [including] whether actual damage have been [sic] incurred”); *Pierre*, 324 Ga. App. at 288 (holding that liquidated damages provision was reasonable estimate of loss, in part because school was not at full enrollment).

<sup>12</sup> *See Barrie Sch.*, 401 Md. at 509 (“Despite their general propriety, a clause purporting to provide liquidated damages will be deemed invalid as a penalty where the amount agreed upon is ‘grossly excessive and out of all proportion to the damages that might reasonably have been expected to result from such breach of the contract.’”) (internal citation omitted); *Leff*, 248 N.J. Super. at 483 (“An educational institution . . . must make arrangements for the education of its students on a *yearly* basis . . .”) (emphasis added).

<sup>13</sup> *See, e.g., Barrie Sch.*, 401 Md. at 509.

unforeseeable!) changes in circumstances over the course of a long-term agreement will depend upon state law and the school's tolerance for risk or uncertainty.

To the extent possible, the school ought to strive to anticipate major changes in economic and other circumstances by including language in the perpetual agreement that allows for future changes in tuition and fees. Such updates would be issued annually, ideally all at the same time, on or before a specific date each year.

The school should also reserve the right to change other key terms of the agreement as necessary to address changes in the law, best practices, or other circumstances, to the extent possible under state law. Legal requirements and best practices evolve, so the school ought to avoid being handcuffed to outdated provisions. Thus, the perpetual agreement should seek to protect the school's ability to amend agreement terms as much as possible consistent with applicable law and/or the school's tolerance for risk. Again, however, these efforts to maintain (and implement) flexibility create costs for the school, including uncertainty about the enforceability of the agreement and the headache of annual paperwork.

## Practical Tips

Schools that successfully transition to using perpetual enrollment agreements typically implement a multistep process that includes giving careful thought to the cultural, legal, logistical, and public relations considerations. This process often includes the following steps:

- Consider whether the perpetual agreement is a good fit for the school, taking into account the school's risk tolerance in light of concerns about enforceability under applicable state law.
- Partner with experienced school counsel, familiar with perpetual enrollment agreements.
- Draft an agreement that is legally enforceable but also as flexible as possible, consistent with applicable law (and/or the school's risk tolerance). Include legally appropriate

provisions for incorporating annual updates to the perpetual agreement.

- Create a transition plan to migrate to the perpetual agreement and explain the new agreement to current families.
- Address any applicable electronic signature requirements.
- Conduct annual legal reviews of the agreement for changes in the law, best practices, and other circumstances.
- Follow through with timely annual updates.

## Conclusion

This incredibly important choice is not simple. The enrollment agreement represents the foundation of the school's financial well-being, as well as the legal foundation of the school's relationship with its families. Given the importance of enrollment agreements to a school's financial health, and the uncertainties associated with enforcing a perpetual agreement, schools should carefully consider the risks of adopting a perpetual agreement. In the end, if the advantages of a perpetual agreement seem too good to be true, then (the school may decide) perhaps they are. School leadership should consult with experienced counsel on the question of using annual versus perpetual agreements, as the question warrants careful thought and discussion.