Special Education

Administrative Advisory SPED 2006-2:
Changes to the State Special Education Regulations at 603 CMR 28.00

To: Special Education Administrators, Charter School Leaders, and Other Interested Parties

From: Marcia Mittnacht
State Director of Special Education

Date: August 29, 2005 (Note: Attached chart revised 9/12/05)

Certain changes to the state special education regulations at 603 CMR 28.00 have been adopted by the Board of Education and went into effect as of July 1, 2005. This advisory will provide:

(1) An overview of the substantive changes to the regulations;
(2) A description of the responsibilities that are associated with "programmatic responsibility" and "financial responsibility;" and
(3) A chart that may be helpful in making prompt determinations of school district responsibility.

(1) Overview of Substantive Changes to the Regulations

Throughout the regulations various non-substantive formatting and technical changes were made. Additionally, please note that the citations in the state regulations to specific federal regulations may change upon the adoption of final Federal regulations under IDEA-2004, currently expected on or around December 2005. Following is a section-by-section overview of the substantive regulatory changes to state special education regulations.

Section 28.01: Authority, Scope and Purpose -- There are no changes in this section.

Section 28.02: Definitions

- Definitions for "Parent's school district," and "Resident school district" have been deleted. Use of those terms is unnecessary with the changes made within new Section 28.10.
- 28.02(12) "Least Restrictive Environment" now includes the full statutory definition for ease of reference.
- 28.02(19) is new; it defines "state agency" to mean a Massachusetts state agency.

Section 28.03: School District Administration and Personnel

- 28.03(1)(a)(4) refers to the required parent training included in section 28.07 of the former regulations. The training is part of a district’s responsibility, rather than that of the parent advisory council, as suggested by its location in the former regulations. The language is moved with no changes.
- 28.03(1)(c)(2) is required by the reauthorized IDEA; it modifies the requirement to serve a student who is moving to Massachusetts from another state by requiring that the Massachusetts district provide the student with comparable IEP services until the new district determines if a new evaluation is necessary.
- 28.03(1)(e)(3) deletes the reference to Federal spending requirements because Massachusetts provides an individual entitlement to services for private school children with special needs. This sentence in the former regulations was inaccurate in light of this higher standard for services.
- The sections relating to assignment of school district responsibility have been moved from 28.03 to new section 28.10.

Section 28.04, Section 28.05, and Section 28.06

- Changes in these sections are limited to technical and formatting changes, and other changes to ensure use of consistent terminology.

Section 28.07: Parent Involvement

- The reference to annual training for parents formerly in 28.07 has been moved to 28.03.
- 28.07(5) is revised to clarify that the age of majority is 18 years of age.

Section 28.08: Continuum of Options for Dispute Resolution

- 28.08(3)(d) introduces the new process that can be used for appealing school district assignment that is defined in new section 28.10.
- 28.08(5) adds new language that is required to clarify an intersection with the reauthorized IDEA
when a request for a hearing is initiated.
- 28.08(5)(b) adds a reference to the administrative rules recently adopted by the Bureau of Special Education Appeals.

Section 28.09: Approval of Public and Private Day and Residential Special Education School Programs

- Changes in this section are limited to technical and formatting changes, and other changes to ensure consistent terminology.

Section 28.10: School District Responsibility

- 28.10 replaces current Section 28.03(4), and articulates all of the requirements related to assignment of school district responsibility.
- Throughout 28.10, whenever one district may bill another for services provided, the procedures of the circuit breaker program (603 CMR 10.07) are specified as the appropriate procedures to use to calculate the excess costs of special education services, including transportation costs.
- 28.10(1)(c) clarifies that responsibility of school districts under this section applies only to responsibility for activities or services covered by the special education law.
- 28.10(1)(d) emphasizes that school districts may not cease responsibility until a new district is responsible under 28.10.
- 28.10(2)(a)(1) clarifies that when students live with their parents in two different school districts the school district where the student is enrolled is responsible as long as such student requires an in-district program for special education purposes. Subsection (a)(2) is the companion regulation for a student who requires an out-of-district special education program. It provides that the school districts where both parents reside shall share fiscal and programmatic responsibility when students live with both parents during the school year, irrespective of school vacation periods.
- 28.10(3) deletes reference to the assignment of responsibility when a student is in the hospital, the effect of this removal is that the community that was responsible before the student entered the hospital remains responsible.
- 28.10(5) addresses the impact of the McKinney-Vento Homeless Assistance Act on school district responsibility. Subsection (b) assigns programmatic and financial responsibility to the district where a homeless student temporarily resides if the parent chooses to enroll the student in such district and the student requires an in-district program. However, for students served in out-of-district placements, fiscal responsibility continues to be with the school district where the student resided when he/she became homeless and remains with that district until the student establishes residence elsewhere.
- 28.10(7) authorizes the Department to make temporary assignments of district responsibility when the student's services are at risk or are not being provided.
- 28.10(8)(a)(3) and (5) authorize the Department to make assignments for students who have limited guardianships or who have been hospitalized while in the custody of a state agency.
- 28.10(8)(c) is revised; it identifies the criteria the Department uses when making assignments. Several criteria are new, including in subsection (c)(2), circumstances relating to guardianships obtained by state agencies; in subsection (c)(4), criteria for determining when a student's guardian is limited in authority and therefore guardianship is not a proper basis for assignment; and in subsection (c)(5), new language maintaining continuity by providing that whichever community was responsible before a student went into the care or custody of a state agency shall remain responsible when a student goes into the care or custody of a state agency.
- 28.10(9) is new; it sets forth the process for appealing LEA assignments to the Bureau of Special Education Appeals.

(2) "Programmatic Responsibility" and "Financial Responsibility"

In certain circumstances, responsibility for a student may be split by the regulations into programmatic responsibility and financial responsibility. Such cases primarily fall under section 28.10(4). If the circumstances are such that the student is attending an out-of-district placement, the two responsible school districts may agree to vest both programmatic and financial responsibility with the district where the parent(s) or legal guardian resides. If the districts make such an agreement, it must be documented and signed by both districts so that programmatic concerns are appropriately referred only to the district where the parent(s) or legal guardian resides. Specific articulation of the differences between programmatic and financial responsibility follows:

**Programmatic responsibility:** When a school district has "programmatic responsibility," that district must ensure that evaluations, IEPs, and services are provided for eligible students as required under special education law.

- a. The programmatically responsible district convenes the Team meetings, invites the financially responsible district(s) to participate in them, and has authority to propose the IEP and placement that result from Team meeting deliberations.
- b. For students who may be graduating, the programmatically responsible district is the district that awards the high school diploma to the student if he or she meets the district's applicable graduation requirements.
- c. The programmatically responsible district must provide the Department with SIMS data about the student for required data submission elements, including an identification of the student as enrolled in the district.
- d. The programmatically responsible district shall maintain the student record.
e. The programmatically responsible district is not eligible to seek reimbursement under the state-funded "circuit breaker" program.

Financial responsibility: When a school district is assigned "financial responsibility," that district must finance the student's special education program, but has no authority to propose or require use of a specific program.

a. The financially responsible district has the right to participate as a member of the Team convened by the programmatically responsible district, but is not the district that commits to the IEP or the placement; that authority rests with the programmatically responsible district.

b. To the extent that the student's program is in-district or in circumstances where there is no tuition, the cost of the student's program is calculated using the procedures of the "circuit breaker" program, and will additionally include the transportation costs (not covered by the "circuit breaker" program) when they are required as part of the special education program.

c. The school district with financial responsibility may claim the student for purposes of receiving reimbursement under the state-funded "circuit breaker" program.

(3) A School District Assignment Chart

The chart on the following page has been prepared to assist you with determining school district responsibility in most circumstances. The chart simplifies the regulatory requirements. Please also note that the chart does not include all regulatory requirements or address all circumstances under which responsibility is determined, and it does not substitute for a careful reading of the regulations.

The form to request assignment from the Department of school district responsibility (form 28M/2) may be found at Special Education Forms webpage. Pursuant to 603 CMR 28.10 subsections (7) and (8), such requests should be limited to circumstances when the student is not receiving services, or when lack of an assignment threatens the students placement or program or for students in living situations described in section 28.10(3) or (4). Assignment by the Department of Elementary and Secondary Education is dependent on your provision of complete information and documentation.

We hope this advisory is helpful. If you have any questions or require additional information, please contact Program Quality Assurance Services at the Department of Elementary and Secondary Education (781-338-3700).

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<tr>
<th>Student Circumstances</th>
<th>Residence and Custody</th>
<th>Programmatic and Financial Responsibility</th>
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| Student's special education program may vary across all types of special education placements, except residential placements. Student's residence may also vary: | May include: | Programmatic and financial responsibility will most often rest with the district where the student actually resides and is enrolled. This will be true for all students in in-district type special education placements, regardless of custody considerations.
- student may reside with one parent or both parents, or
- the student may reside in a foster home, or
- the student may be age 18 or older and have established his or her own residence as an adult. | Responsibility will only be shared with two districts if the student is in an out-of-district placement and parents reside in two different districts and the student resides (not including school vacation periods, but actual residence) with both of them. Shared responsibility does not result from simple residence of the parents in two different districts. |
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<tr>
<th>Responsibility based on residence of the parent(s) or guardian - 603 CMR 28.10(3)</th>
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<tbody>
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<td>The student may be</td>
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<td>- in a pediatric nursing home, or</td>
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<td>- may be in a special education residential school, or</td>
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<td>- may be in a residential facility operated by a state agency.</td>
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<td>not</td>
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<tr>
<td>Programmatic and financial responsibility will most often rest with the district(s) where the parent(s) resides, Exception: if one parent has sole physical custody or had sole physical custody before the student entered state custody, responsibility will rest with the district where that parent lives.</td>
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<tr>
<th>Shared school district responsibility -- 603 CMR 28.10(4)</th>
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<td>Student’s living situation may include:</td>
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<td>- living with a relative, or</td>
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<td>- living in a foster home outside of Massachusetts, or</td>
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<tr>
<td>- living in a group home, or</td>
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<tr>
<td>- being in a crisis or respite facility.</td>
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<tr>
<td>Although most students in this group are in the custody of DSS or another state agency, some may be uninvolved with a state agency.</td>
</tr>
<tr>
<td>Under this regulation, the district where the student lives has programmatic responsibility and the district(s) where the parent(s) or guardian lives has financial responsibility. If a student's placement is out-of-district, the programmatically responsible district may agree to transfer programmatic responsibility to the financially responsible district, but is not required to do so. If such agreement is made, it must be documented and signed by both districts.</td>
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<th>Responsibility for Homeless Students</th>
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<td>Student is in a living situation that is considered &quot;homeless&quot; under the McKinney-Vento Act and may be receiving special education services in any type of placement.</td>
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<td>Custody may be with the parent(s) who is also homeless or with a state agency.</td>
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<tr>
<td>The school district(s) that had programmatic and financial responsibility prior to the student becoming homeless remains responsible unless the student is enrolled where he or she is temporarily residing. In such case, if the student is receiving in-district services, the programmatic and financial responsibility switches to the school district where the student is enrolled. If the student is receiving out-of-district services, the programmatic responsibility switches to the school district where the student is enrolled, but the financial responsibility remains with the former district until the student is no longer homeless. See 28.10(5).</td>
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