

Supplemental Educational Services (SES) and the Massachusetts Conflict of Interest Law (G.L. c. 268A)

Supplemental educational services (SES) are additional academic instruction designed to increase the academic achievement of eligible (low income) students in Title I schools in the second year of improvement, corrective action, or restructuring. The purpose of this guide is to assist district administrators of SES and SES providers in complying with the Massachusetts Conflict of Interest law as it pertains to SES.

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Sections of the Conflict of Interest Law (M.G.L. c. 268A) Relevant to School District Employees Participating in SES

You do not have to be a full-time, paid school district employee to be covered by the Massachusetts conflict of interest law. Anyone performing services for a school district or school or holding a school district or school department position, whether paid or unpaid, including full- and part-time employees, elected officials, volunteers, and consultants, is a municipal employee subject to the conflict of interest law. Some persons holding these positions may be “special” municipal employees if they have been so designated by the municipality they serve.

The following sections of the conflict of interest law are relevant to municipal employees (as that term was just explained above) who wish to provide SES:

- **Section 17:** A municipal employee cannot directly or indirectly receive or request compensation from anyone other than the city or town or municipal agency in relation to any particular matter in which the same city or town is a party or has a direct and substantial interest. For example, in the SES context, since a particular student’s tutoring plan would be a matter of interest to the district, a full-time school employee could not be paid by an external SES provider in relation to the tutoring plan. Also under Section 17, a full-time school employee would not be allowed to communicate with the district on behalf of the SES provider, for instance by asking the district to modify a student’s tutoring plan to include additional elements that the SES provider would then provide. This section of the law applies less restrictively to persons holding positions that have been designated as “special” by the municipality.
- **Section 19:** A municipal employee cannot participate as an employee in a particular matter in which s/he has a financial interest. For example, a teacher who was also an SES provider employee would violate this section by recommending one of her students for SES tutoring, and then being paid to provide those services.
- **Section 20:** A municipal employee is prohibited from having a financial interest in a municipal contract unless there is an applicable exemption. In the SES context, there is no exemption that would allow a school employee, whether full-time or part-time, to have such a financial interest. A school employee would violate this section by having a second employment contract with his or her own district, or by having an employment contract with an SES provider that has a contract with his or her own district.
- **Section 23(b)(2):** A municipal employee is prohibited from using his or her position to obtain unwarranted privileges which are of substantial value and which are not available to similarly situated individuals. A school employee would violate this section by using his or her position to obtain paid tutoring opportunities, or give an advantage to an SES provider.
- **Section 23(b)(3):** A municipal employee is prohibited from engaging in conduct that could create an appearance that s/he can be improperly influenced in the performance of his/her official duties.

The Massachusetts Department of Elementary and Secondary Education (ESE) consulted with the State Ethics Commission to develop guidance for school district employees who wish to participate in providing SES and comply with the conflict of interest law. ESE’s goal is to give clear, uniform guidance applicable to all SES providers and their employees. To achieve that goal, the requirements set forth here apply to all ESE providers and their employees. These requirements are stricter in some respects than the conflict of interest law would

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require for “special” municipal employees, but ESE has determined that the value of clear, uniform guidance supports this approach, and that a uniform approach is preferable to determining, on an individual basis, whether each district employee, official, or volunteer who wishes to provide SES tutoring is or could be a “special” municipal employee. ESE has the authority to create these requirements pursuant to G.L. c. 268A, section 23(e).

Requirements for SES Providers

All providers of supplemental educational services (SES) must ensure that their recruiting and hiring practices are in compliance with the guidance provided in this brochure, which is intended to prevent violations of the Massachusetts Conflict of Interest Law (G.L. c. 268A) by municipal employees who are school employees, officials, and volunteers. All approved providers are required to sign an Assurances and Certification statement affirming their compliance with this guidance.

- **Non-district providers** are prohibited from hiring school committee members, employees or volunteers of a district to perform tutoring or any other services within the same district in which the person is employed. This is to prevent potential violations of Sections 17 and 20 of the conflict of interest law, as explained below.
- **District providers** may employ their own staff to work in the district’s SES program if:
 - The district pays the employee for SES provision under the employee’s regular contract for all services rendered (i.e., incorporates payment for SES with the teacher’s regular salary payment), to prevent violations of Section 20 of the conflict of interest law, as explained below; and
 - The district uses objective criteria for selecting students for the program without the involvement of any teacher who works in the program, and does not allow any teacher to tutor his or her own students, to prevent violations of Sections 19 and 23(b)(2) of the conflict of interest law, as explained below.

Information for District SES Providers

Can a teacher be an SES tutor in a district-run SES program?

Yes, but the district will need to follow the Requirements for SES Providers set forth above.

Can a paraprofessional employed by a district also be an SES tutor in the same district?

Yes, so long as the district follows the Requirements for SES Providers set forth above.

How can district providers hire SES tutors?

District providers may hire district employees if they follow the Requirements for SES Providers set forth above. These requirements are intended to prevent violations of Sections 19 and 23(b)(2) of the conflict of interest law, which could occur if teachers refer their own students for SES services which they will then provide, or if teachers use their official positions to create opportunities for SES providers. Alternatively, the district may hire tutors who are not employed by the district.

How may district providers compensate SES tutors?

District providers must ensure that the contract of each teacher hired to work as a tutor for the district's SES program contains a provision allowing for work beyond the teacher's regular teaching duties. Most contracts typically contain such a provision. The reason for this is to comply with Section 20 of the conflict of interest law, which restricts municipal employees from having multiple paid arrangements with the district.

Information for External SES Providers

How can external providers hire SES tutors?

External providers are not prohibited from hiring licensed teachers; however, the teachers they hire cannot be employed by the district in which they are providing SES, because of the likelihood that a teacher hired by an external SES provider to tutor in his or her own district would violate Sections 17 and 20 of the conflict of interest law. A Section 17 violation is likely to occur if a district employee is paid by an external provider to provide tutoring services to a district student, because the student's tutoring is a particular matter in which the district has an interest. A Section 20 violation is likely if a district employee has a financial interest in a contract between the district and the external provider. An external provider can hire teachers from neighboring districts, private schools, and charter schools. They may also choose to hire teachers with expired teaching certificates, certificates from other states, or certified teachers who are not currently working in the field.

Can an external provider hire a teacher or paraprofessional as an SES tutor?

Yes, so long as those teachers or paraprofessionals employed by external providers do not work with any students from their district of employment, again to avoid violations of Sections 17 and 20.

Why can't providers hire teachers or paraprofessionals from the district in which they are providing SES?

As explained above, this is to prevent violations of Sections 17 and 20 of the conflict of interest law on the part of district employees, officials, and volunteers.

Can external providers employ individuals who also volunteer at schools in the districts they serve?

No. Anyone who performs services for a school or a school district, including on a volunteer basis, is considered to be a municipal employee subject to the conflict of interest law.

Can external providers have volunteers who work at schools in the districts they serve?

A school district employee who wishes to volunteer with an external SES provider may do so provided he or she complies with Sections 17, 19, 20, 23(b)(2), and 23(b)(3) of the law, as described above.

Can external providers hire a substitute teacher who teaches at the same school that the students attend?

No. Substitute teachers, both short- and long-term, are considered municipal employees and therefore must comply with all conflict of interest requirements. As explained above, this situation would likely result in violations of Sections 17 and 20 of the conflict of interest law, and is therefore not permitted under this guidance.

May an external provider hire school volunteers or other municipal employees as recruiters?

No, all municipal employees are subject to the conflict of interest restrictions already described. In addition,

under the federal rules for this program, neither students, parents/guardians, nor anyone else can be offered a monetary incentive for a student enrolling in a program.

Are providers prohibited from hiring school district employees other than teachers to work for their program?

Not to work in the districts by which they are employed, for the reasons described above. They can hire them to work in other districts.

Additional Questions

Is the Conflict of Interest law new in Massachusetts or new to SES?

No. The Massachusetts Conflict of Interest law has been in effect and applicable to all school district employees and volunteers since 1963. ESE consulted the State Ethics Commission to clarify how the law applies to the SES program.

Has the advice provided to the Massachusetts Department of Elementary and Secondary Education (ESE) by the State Ethics Commission been reviewed by the U.S. Department of Education (ED)?

Yes, ED has reviewed the State Ethics Commission's advice regarding the Conflict of Interest law as it pertains to SES, and has agreed that ESE has the authority to manage its SES program consistent with state law.

Are current staff members "grandfathered in"?

If by this you mean, may current staff members disregard these requirements, no. The requirements described here are not new. All municipal employees, as defined at the beginning of this guide, must comply.

Can retired teachers work as SES tutors?

Retired teachers are subject to Section 18 of the conflict of interest law, which prohibits them from being paid by anyone other than the district in connection with any particular matter in which they participated while employed by the district. This would, for example, prohibit a former teacher from tutoring a former student whose tutoring plan she devised. Section 18 also prohibits former district employees from contacting their former school departments in connection with any particular matter that was under their responsibility at any time during the two years prior to retirement, for one year after retirement. Retired teachers may work as SES tutors provided that they follow these requirements.

If an external provider changes its tutor requirement from licensed teachers to unlicensed teachers, does it need to submit a new application to provide SES?

A change of this nature would be allowed as part of the annual SES contract renewal, and they must contact the department in order to clarify how this should be documented in their renewal application. SES does not require licensed teachers, and so long as the approved elements of the application governing professional development remain the same, the provider does not have to submit a new application. Other provisions, such as those governing qualifications, professional development, and criminal record check requirements still apply.

May a district provider subcontract with an external provider to provide SES on behalf of the district?

No.

Does this policy give district providers an unfair advantage over external providers?

District providers are bound by the same requirements as external providers. As approved providers, district providers may use teachers employed by the district to tutor students in their program, but they must ensure that the hiring of teachers is completely separate from the student enrollment process. Moreover, district providers must take care to ensure they offer unbiased assistance on parents' selection of a provider focused on the specific academic needs of the student and the preferences of the parent. Districts are not permitted merely to assign students whose parents request assistance to a district program.

Will this policy result in a shortage of providers and thus limit parents' options?

Parents have access to a broad and diverse range of providers, including district, external, and online providers, who will be able to meet parental demand for SES.

What guidance can I give to my prospective employees in complying with the Conflict of Interest law?

Anyone may request free advice about how the conflict of interest law applies to them in a particular situation from the Legal Division of the State Ethics Commission electronically by following the instructions here: http://www.mass.gov/?pageID=ethterminal&L=2&LO=Home&L1=Commission+Services&sid=leth&b=terminalcontent&f=legal_request_opinion&csid=leth. In addition, the Commission's Legal Division has an attorney on call during normal business hours to answer questions about the law, at (617) 371-9500.

Resources

Massachusetts State Ethics Commission

<http://www.mass.gov/ethics>. The Commission's Legal Division has an attorney on call during normal business hours to answer questions about the conflict of interest law at (617) 371-9500.

Federal Non-Regulatory Guidance on Supplemental Educational Services

<http://www2.ed.gov/policy/elsec/guid/suppsvcsguid.pdf>

Technical Assistance Handbook for District Administrators & SES Providers

<http://www.doe.mass.edu/ses/TAMannual.pdf>