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| **PUBLIC COMMENT REPORT** | | |
| **PROPOSED AMENDMENT TO SPECIAL EDUCATION REGULATIONS ASSIGNING SCHOOL DISTRICT RESPONSIBILITY:**  **Amendment to 603 CMR 28.10** | | |
| **Executive Summary** | | |
| The Department received public comment submissions from two attorneys who represent school districts. One submission contained five comments; the other contained six.  All comments are reflected in this report. Although one attorney submitted comments shortly after the public comment period closed, the comments were accepted.  Based on the public comments, the Department proposes three changes, which are indicated below. | | |
| **General Comments** | | |
| **Comment:** One comment requested the Department to issue “transition rules” to address the changes in financial responsibility that will occur when the proposed regulations take effect. The basis for the request was the commenter’s belief that the regulations would be implemented immediately, rather than at the beginning of the next fiscal year.  **Response:** The proposed regulations will not go into effect until July 1, 2018, and will **not** be retroactive, thus allowing districts sufficient time to review and plan for implementation. Also, the Department will issue guidance regarding the proposed regulations, once approved, that will address any changes in financial responsibility as a result of the amendment. The Department does not anticipate the proposed regulations will have serious fiscal impacts on districts upon implementation.  **Comment:** One comment requested the Department to issue a regulation on best interest determinations under ESSA.  **Response**: The regulations assigning school district responsibility are not intended to address best interest determinations under ESSA. The Department has jointly issued guidance with the Department of Children and Families (DCF) that addresses ESSA best interest determinations. The document can be accessed at this link: <http://www.doe.mass.edu/sfs/foster/>  **Comment:** One comment suggests adding a regulation to address whether a student must stay in the school they are attending at the time that they exit foster care, due to either adoption or to return to the care of biological parents.  **Response**: This is not an issue that is properly addressed in the regulations assigning school district responsibility. The ESSA guidance document referenced above addresses this issue on page 5.  **Comment:** One comment suggests that the regulations address transportation for students in foster care.  **Response:** The ESSA guidance referenced above addresses transportation for students in foster care. The regulations assigning school district responsibility are not intended to address transportation. | | |
|  | **603 CMR 28.10(2)** | **Comments** |
|  | (2) **School district responsibility based on student residence.** The school district where the student resides shall have both programmatic and financial responsibility under the following circumstances:  (a) When students live with their parent(s) or legal guardian.   1. When a student who requires an in-district placement to implement his or her IEP lives with both of his or her parents during the school year, irrespective of school vacation periods, and the parents live in two different Massachusetts school districts, the school district where the student is enrolled shall be responsible for fulfilling the requirements of 603 CMR 28.00. 2. When a student who requires an out-of-district placement to implement his or her IEP lives with both of his or her parents during the school year, irrespective of school vacation periods, and the parents live in two different Massachusetts school districts, the school districts where the parents reside shall be equally responsible for fulfilling the requirements of 603 CMR 28.00.   (b) When students are eighteen years of age or over and they have established their own residences as adults.  ~~(c) When students have been placed or are funded by the Department of Children and Families in a foster home located within Massachusetts.~~ | **Comment:** No comments were received on 603 CMR 28.10(2). |
|  | **603 CMR 28.10(3)** | **Comments** |
|  | (3) **School district responsibility based on residence of parent(s) or legal guardian.** The school district where the parent(s) or legal guardian resides shall have both programmatic and financial responsibility under the following circumstances:  (a) When a student is in a pediatric nursing home.  (b) When a student whose IEP requires an out-of-district placement lives and receives special education services at a special education residential school pursuant to a placement by the IEP Team.  (c) When a student lives and receives educational services in an institutional facility operated by or, through contract, authorized by the Department of Mental Health, the Department of Public Health, the Department of Youth Services, or the Department of Correction or County House of Correction, except as provided below.   1. If an eligible student ~~requiring in-district services~~ ~~had been~~ was placed or resided in ~~a Department of Children and Families~~ foster care ~~home for at least three months~~ ~~before entering the~~ at the time the student entered the institutional facility, ~~the school district in which the student was enrolled before entering the facility shall remain programmatically responsible and the school district where the parents reside shall be financially responsible~~ then responsibility shall remain with district(s) assigned most recently pursuant to 603 CMR 28.10(5)(b). 2. If a student is 18 years of age or older and has established his or her own residence as an adult, the school district where the student resided prior to entering the institutional facility shall remain programmatically and fiscally responsible.   ~~(d) When a student whose IEP requires in-district services is placed by the Department of Children and Families in an approved residential school, programmatic and financial responsibility will be with the district where the parent(s) or legal guardian resides. The school district of the city, town or regional school district where such approved residential special education school is located shall provide educational and special educational services to the student in accordance with his or her IEP, shall participate in any Team meetings convened by the school district where the parent(s) or legal guardian resides and shall receive reimbursement from the school district where the parent(s) or legal guardian resides for such services using the procedures of 603 CMR 10.07 to calculate such costs, including transportation expenses where applicable.~~ | **Comments:** No comments were received on 603 CMR 28.10(3)(a).  **Comment:** The commenter agrees with the additional language proposed for 603 CMR 28.10(3)(b) and suggests another addition to emphasize that the residential placement is pursuant to a DCF determination and not the Team’s decision.  The commenter proposes to revise the language to state: “pursuant to an educational placement in a residential school by the IEP Team.”  **Response:** The Department does not find the additional language necessary, as the proposed language already indicates the residential school is an educational placement by the IEP Team.  **Comment:** Request to omit the phrase “whose IEP requires an out-of district placement,” as out-of-district placements are inclusive of day schools and other types of placements that are not residential schools.  **Response:** The suggested omission is in regard to language that is contained in the current regulations and has not been problematic. The Department does not find the suggested omission to be necessary as a clarification given that the regulation specifies the type of out-of-district placement addressed is that of a residential school.  **Comments:** No comments were received on 603 CMR 28.10(3)(c). |
|  | **603 CMR 28.10(4)** | **Comments** |
|  | (4) **Shared school district responsibility.** The school district where the parent(s) or legal guardian resides shall have financial responsibility and the school district where the student resides shall have programmatic responsibility when a student who is not in foster care, as defined below in 603 CMR 28.05(b), is ~~in a~~ living ~~situation other than that described in 603 CMR §28.10(2) or (3) including but not limited to~~ in a relative's home~~; that is not funded by the Department of Children and Families, a foster home funded by the Department of Children and Families that is located outside of Massachusetts, a group home,~~ or living in a residence, ~~or~~ crisis, or respite facility funded or supervised by a state agency other than the Department of Children and Families. ~~and an approved residential special education school as a result of action by the Department of Children and Families~~.  (a) When such a student is served in an in-district program, the school district where the student lives shall provide such services and may bill and shall receive payment for the special education costs (using the procedures of 603 CMR 10.07 to calculate such costs, including transportation expenses where applicable) from the school district where the parent(s) or legal guardian resides, unless such student is over 18 years of age and has established his or her own residence as an adult as described in 603 CMR 28.10(2)(b).  (b) When such a student is served in an out-of-district program, the school district where the parent(s) or legal guardian resides shall pay the tuition costs for the student's IEP program directly to the out-of-district school, and such other payments as may be required to other individuals or entities that provide services required by the student's IEP.  (c) In all cases where financial and programmatic responsibility are shared, the school district where the student resides shall invite the school district where the parent(s) or legal guardian resides to participate as a member of the student's Team, provided that such participation shall not limit the student's right to timely evaluation and placement in accordance with 603 CMR 28.00. | **Comment:** The commenter suggests that the use of the term “foster care” in 603 CMR 28.10(4) be further clarified by referencing the definition of foster care in 603 CMR 28.10(5)(b). Thus, the commenter suggests adding the following language: “. . . who is not in foster care as that term is defined in 603 CMR 28.10(5)(b) . . . ”  **Response:** The Department Accepts the proposed language and will make the suggested revision.  **Comments:**  No comments were received on 603 CMR 28.10(4)(a). |
|  | **603 CMR 28.10(5)** | **Comments** |
| **(a)** | **Responsibility for Homeless Students and Students in Foster Care.**  (a) Nothing in 603 CMR 28.00 shall limit the educational rights of homeless students and parents afforded under the McKinney-Vento Homeless Assistance Act, 42 U.S.C. § 11431 et seq. (McKinney-Vento). The following provisions apply to these students.  ~~(a)~~ 1. Homeless students shall be entitled to either continue to attend their school of origin, as defined by McKinney-Vento, or attend school in the city or town where they temporarily reside. To the extent feasible, homeless students should remain in their school of origin unless doing so is contrary to the wishes of such student's parent(s) or legal guardian or state agency with care or custody of the student.  ~~(b)~~ 2. The school district(s) that was programmatically and financially responsible prior to the student becoming homeless shall remain programmatically and financially responsible for a homeless student until the parent(s) or legal guardian or state agency with care or custody of the student chooses to enroll the student in the school district where the shelter or temporary residence is located. When a student whose IEP requires in-district services is enrolled in the school district where the student is temporarily residing, then that school district shall become programmatically and financially responsible upon enrollment. When a student whose IEP requires out-of-district services is enrolled in the school district where the student is temporarily residing, then that school district shall become programmatically responsible upon enrollment and the school district(s) that was financially responsible prior to the student becoming homeless shall remain financially responsible until the student is no longer homeless. | **Comment:** No comments were received on 603 CMR 28.10(5)(a). |
| **(b)** | (b) Nothing in 603 CMR 28.00 shall limit the educational rights afforded under the Every Student Succeeds Act (ESSA) to students who are in foster care, which means 24-hour substitute care for children placed away from their parents or guardians and for whom the Department of Children and Families has placement and care responsibility. This includes, but is not limited to, placements in foster family homes, foster homes of relatives, group homes, emergency shelters, residential facilities, child care institutions, and preadoptive homes. The following provisions apply to these students:   * + 1. The school district(s) that was programmatically and financially responsible prior to the student’s entry into foster care or prior to a subsequent change in the student’s foster care setting shall remain responsible for the student’s special education program for as long as the student continues to attend the same school.      * + 1. For students in foster care who do not continue to attend the same school, and who enroll in the district in which their foster care setting is located, programmatic responsibility shall be with the district in which the student is enrolled and financial responsibility shall be with the district where the parent(s) or legal guardian resides.     2. When the Department of Children and Families relocates a student to reside in and attend an approved residential school, the school district that was programmatically responsible prior to this relocation shall remain programmatically responsible and the district where the parent(s) or legal guardian resides shall be financially responsible.     3. For all situations in which school districts share responsibility for students in foster care, the following provisions shall apply:        1. When such a student is served in an in-district program, the school district with programmatic responsibility may bill and shall receive payment for the special education costs (using the procedures of 603 CMR 10.07 to calculate such costs, including transportation expenses where applicable) from the school district where the parent(s) or legal guardian resides.        2. When such a student is served in an out-of-district placement, the school district where the parent(s) or legal guardian resides shall pay the tuition costs for the student’s IEP program directly to the out-of-district school, and such other payments as may be required to other individuals or entities that provide services in the student’s IEP shall apply.        3. The school district with programmatic responsibility shall invite the school district where the parent(s) or legal guardian resides to participate as a member of the student’s Team, providing that such participation shall not limit the student’s right to timely evaluation and placement in accordance with 603 CMR 28.00. | **Comment**: The commenter proposes that “shall remain responsible” in 603 CMR 28.10(5)(b)(1) be clarified by revising it to state “shall remain programmatically and financially responsible.”  The commenter also suggests using “school of origin,” a term used in the ESSA foster care provisions, instead of “same school.” The commenter also suggests that the regulations address when a parent moves during the student’s time in foster care.  **Response:** The Department does not believe that the regulation needs clarification as suggested. The first suggestion would create a redundancy as earlier in the same sentence “responsibility” is specified as programmatic and fiscal responsibility. The Department not accept the second suggestion because the proposed amendment intentionally does not use the language in ESSA to distinguish that the regulations address school district responsibility only. The commenter’s request for the regulations to address the move of the parent will be addressed in forthcoming guidance; however, we note that the regulation on its face would still apply.  **Comment:** The commenter proposes that 603 CMR 28.10(5)(b)(2) be revised to explicitly address when a student who has continued to attend the school of origin after entry into foster care moves to another grade level and thus would attend a different school if the student stayed enrolled in the same district. The commenter assumes that the student would move to another school in the same district in this situation and that programmatic responsibility would not shift.  **Response:**  The timeframe in which students retain their rights under ESSA to continue to attend their schools of origin is addressed in the Department’s guidance issued jointly with the Department of Children and Families. This issue is not the proper subject of regulations that govern school district responsibility.  In addition, the proposed regulations already address the situation with which the commenter has concern. The plain language of 603 CMR 28.10(5)(b)(1) states that school district responsibility does not shift for a student who continues to attend the school of origin after entry into foster care “as long as the student continues to attend the same school.” 603 CMR 28.10(5)(b)(2) addresses all situations in which students in foster care enroll in new schools in the district in which foster care is located, including the situation referenced in the comment.  **Comment:** The commenter suggests that 603 CMR 28.10(5)(b)(3) include the language in the current 603 CMR 28.10(3)(d) requiring the district providing in-district services to be reimbursed by the financially responsible district. The commenter also suggests that the proposed 28.10(5)(b)(4)(i) may not apply if the district with programmatic responsibility is different from the district in which the residential school is located. The commenter finally suggests that, for in-district services, school implementing IEP may be “at the table” but would not have programmatic responsibility.  **Response:** The comments appear to address situations in which DCF relocates students to approved programs for residential purposes only. For school attendance, the comment appears to assume the student will remain either at the school of origin or enroll locally. This is not the situation this regulation was designed to address.  In response to this comment, and to clarify any ambiguity in the language of the regulations, the Department has made minor changes to 603 CMR 28.10(5)(b)(2, 3). This additional language should clarify the specific situations covered by each of the three school attendance scenarios described in 603 CMR 28.10(5)(b)(1-3).  **Comment:** The commenter proposes that 603 CMR 28.10(5)(b)(4) be revised to ensure that whenever a student is in foster care the same district is both programmatically and financially responsible for the student. Otherwise, the commenter is concerned that the programmatically responsible district will make placement and service decisions without knowledge of the budgetary obligations of the fiscally responsible district. In addition, the commenter is concerned that the fiscally responsible district will not be able to discuss with DCF whether a placement for which it might be responsible is in the student’s best interests.  **Response:**  When programmatic and financial responsibility has been bifurcated for purposes of a special education placement of a student in foster care under the proposed amendment, the right of the financially responsible district to attend the Team meeting and participate in decisions around special education placement and services provides an adequate safeguard against the programmatically responsible district making unilateral decisions that would adversely affect the financially responsible district. The current version of 603 CMR 28.10 allows for bifurcation of district programmatic and financial responsibility and, therefore, there is no conceptual change in the proposed amendment. The proposed amendment is based on the general rule that the district of the student’s enrollment is programmatically responsible because it is familiar with the student and their needs, and the parents’ district(s) is financially responsible for the duration of the student’s time in foster care, thus providing for fiscal continuity. All relevant parties may participate in discussions with DCF regarding its determinations of foster care settings and related school district enrollments for children in its custody. No revisions will be made to the proposed amendment based on this comment. |
|  | **603 CMR 28.10(8)** | **Comments** |
|  | **Department Assignment of School District Responsibility.**  (a) The Department may assign or a school district or agency may request the Department's assistance in assigning a city, town, or school district to be responsible for students in living situations described in 603 CMR 28.10(3), ~~or~~ (4), or (5) in the following circumstances.   1. Students who are in the care or custody of a state agency and have no parent or legal guardian residing in Massachusetts; or 2. ~~w~~When the residence or residential history of the student's parent(s) or legal guardian is in dispute; or 3. ~~w~~When the student has a legal guardian who has been appointed on a limited basis; or 4. ~~w~~When a student has not yet been determined to be eligible and/or is not receiving services; or 5. ~~w~~When a student is in the care or custody of a state agency and is hospitalized and the agency gives notice to the responsible school district that the student will not return to the residence held prior to hospitalization.   (b) A request for an assignment shall not limit the right of the student to timely evaluation, services, or placement in accordance with 603 CMR 28.00. The school district or state agency requesting assignment shall be responsible for providing to the Department all required documentation to ascertain the legal status or residence(s) of the student or the student's parent(s) or legal guardian.  (c) The Department shall use the following criteria to assign a city, town or school district responsibility for a student in a living situation described in 603 CMR 28.10(3),  ~~or~~ (4), or (5).   1. If the child has been voluntarily surrendered for adoption or freed for adoption by the Probate Court or the Juvenile Court, the school district(s) where the parent(s) lived at the time that the child was surrendered or freed for adoption or when parental rights were terminated shall be responsible. 2. If the student is in the care or custody of a state agency and such state agency has obtained a legal guardianship for the student when the student has turned 18, the school district(s) where the parent(s) lived at the time the court granted the request for guardianship shall be responsible. 3. If the parents' rights have been terminated and the Probate Court or the Juvenile Court has appointed a legal guardian for a minor student, the school district where the legal guardian resides shall be responsible. 4. If the legal guardian is an agency or organization or the legal guardian has been appointed on a limited basis such as a guardian ad litem, or a guardian appointed solely to monitor medications or finances, the school district where the parent(s) lives or last lived shall be responsible. 5. If the student's parents live in two different school districts, such school districts shall be jointly responsible for fulfilling the requirements of 603 CMR 28.00 except if the student actually resided with either parent immediately prior to going into a living situation described in 603 CMR 28.10(3) or (4) or the parents are divorced or separated and one parent has sole physical custody, then the school district where the student resided with the parent or the school district of the parent who has sole physical custody shall be responsible and shall remain responsible in the event the student goes into the care or custody of a state agency. 6. If the student's parent(s) or legal guardian resides in an institutional setting in Massachusetts, including, but not limited to, a correctional facility, a hospital, a nursing home or hospice, or a mental health facility, a halfway house, a pre-release center or a treatment facility, the school district where the parent(s) or legal guardian lived prior to entering the institutional setting shall be responsible. 7. If the student's parent(s) or legal guardian does not reside in Massachusetts, and the parent's or legal guardian's whereabouts are unknown, the school district of the last known Massachusetts residence of the student's parent(s) or legal guardian who lived in Massachusetts shall be responsible.   (d) Using the above criteria, the Department shall notify in writing the assigned school district(s) of its decision. Upon notification of responsibility for provision of special education to a student under 603 CMR 28.10(8)(d), the school district(s) shall immediately assume responsibility for the student in accordance with the requirements of 603 CMR 28.00. Until such notification, the school district(s) that had been responsible for providing special education to such student under 603 CMR 28.00 shall continue to be responsible.  (e) The school district(s) that had been responsible for providing special education to the student prior to assignment by the Department under 603 CMR 28.10(8)(d) may bill and shall be eligible to receive payment (using the procedures of 603 CMR 10.07 to calculate such costs, including transportation expenses where applicable), from the newly assigned district for the special education costs that were incurred during the period of time in which the newly assigned district should have been responsible.  (f) A school district may seek a review of the Department's assignment under the procedures of 603 CMR 28.10(8) at any time that the district has information that was not available to the Department at the time that the assignment was made. The Department will review the information presented and will confirm or change the assignment of school district responsibility, and notify the districts of this decision under 603 CMR 28.10(8)(d). | No comments were received on 603 CMR 28.10(8). |