IOWA DEPARTMENT OF EDUCATION

Guidance for School Districts on Permissive and Nonpermissive Special Education Costs, Including Programs Located at Private Facilities (Effective FY15)

December 20, 2013

Overview

At the direction of the Governor's Office, the Department of Education (DE) is providing updated guidance related to allowable costs of special education that could be paid by public school districts from special education weighted funding. This guidance is designed to cover the following, with an emphasis on instructional programs of the district offered at the location of private facilities (residential or day programs) or purchased instructional programs:

1. Determine what is an allowable cost from special education weighted funding,
2. Determine what is an allowable cost, if any, from general purpose resources, and
3. Separate which costs are district (or area education agency [AEA]) costs and which costs are private facility costs.

In the prior year, the Governor had directed the Office of the Auditor of State to look at specific private facilities and billings submitted to districts. Issues were identified with the billings during those site visits. This study will attempt to specifically address the issues identified. The Department also reviewed the findings of special audits of private providers of special education in one or more other states for generic issues found that could also be possible within Iowa. While looking at costs, the Department also looked at other non-fiscal responsibilities related to students, staff, and instructional programs.

This guidance restates what is expressly stated or clearly implied in Iowa Code and Iowa Administrative Code regarding state facilities, non-state facilities, actual costs, compulsory attendance, responsibility for instruction, and responsibility for placement. This guidance lists a number of issues identified or considered possible given the current structure, including what districts/AEAs must do, and what districts/AEAs can and cannot pay for, as well as a detailed list of costs at the object category level to ensure clarity. This document has been reviewed by special education program experts in the Division of Learning and Results and special education finance experts in the Division of School Finance and Support Services, as well as by legal staff.

The Department was also requested to provide delivery models for the instructional programs. The three top models have been provided in a separate document.

This guidance does not look at whether the costs are necessary for the private facilities to operate their custodial, rehabilitation and other treatment programs, but rather whether school districts or AEAs can use their education funds for any of those costs. The Department is willing to participate in the discussion with the state agencies that have supervision over the various state and private facilities and with stakeholders of how those additional non-educational costs are covered.

What Iowa Code States

- **State facilities.** A number of state agencies, other than the Department of Education, have sole jurisdiction, authority and budgetary responsibility for state-level facilities under their agencies. This includes Department of Human Services (DHS), Department of Public Health (DPH), Judicial Branch, Department of Corrections, and Board of Regents. State institutions and facilities do not have Code authority to bill school districts or AEAs for any instructional services, including special education services, offered at state institutions. The state institutions that fall under this include, but may not be limited to: Mental Health Institutes, Resource Centers, Iowa Juvenile Home (JH), State Training School, Penitentiaries and Correctional Facilities, Iowa Blind and Sight Saving School, Iowa School for the Deaf, University of Northern Iowa, Iowa State University, and The University of Iowa (Center for Disabilities and Development, state Psychiatric Hospital, University Hospital and Clinics, Belin-Blank, laboratory schools, etc.). However, by law, the Department of Education has educational supervision over the elementary and secondary schools under the control of DHS. Although the definition of actual costs of special

education would apply to state facilities, the purpose of this guidance is for districts, AEAs, and private facilities; therefore, nothing further will be discussed here regarding state facilities.

- **Non-state facilities.** There is a second tier of facilities that are not state, but are still under the sole jurisdiction of DHS, DPH, and Judicial Branch for everything except the education program. These include, but may not be limited to: county, city, or private hospitals with psychiatric services, juvenile detention centers, juvenile shelters, mental health care facilities, foster care facilities, residential custody (many types), residential treatment (many types), day treatment programs at facilities licensed to provide those treatments on a residential basis, Psychiatric Medical Institutes for Children (PMICs), and substance abuse treatment facilities. These differ from the state-level facilities in that the non-state facilities cannot offer an instructional program. Therefore, the school districts (and the AEA in the case of Juvenile Homes) are required to provide the instructional programs. The facilities have a license, a contract or agreement with their supervising state agency and have a care plan on each client that outlines all the treatment, rehabilitation, custodial, and other services the facility will offer. Those services are 24-7 in the case of residential and are for the full time period of the day treatment program in the case of a day program. Therefore, the instructional program that the school district must provide is concurrent with the treatment or care program that the facility must provide. The costs and responsibilities of the facility are completely separate from the costs and responsibilities of the school district/AEA. Accountability for legal responsibilities assigned to one agency cannot be transferred to another agency nor can the costs of meeting those legal responsibilities be transferred. One agency may contract with a second agency to fulfill the responsibilities of the first agency, but the first agency remains accountable to ensure that each of its legal responsibilities is met. In addition, no profit can be realized on instructional programs.

- **Actual Costs.** There is no difference in the definition of actual costs of special education instruction or in the definition of allowable general purpose costs, regardless of where the instructional program is offered, when it is the responsibility of the school district or AEA. It is important to realize that special education is not a location, classroom or place. It is a list of services documented on the student's individualized education program (IEP). These services are provided to give the student access to the general curriculum and to ensure a Free and Appropriate Public Education (FAPE). It is the school district's or AEA's responsibility to ensure FAPE.

- **Compulsory Attendance.** All facilities or institutions that have custody of children of compulsory attendance age, who have not graduated or completed a high school equivalency diploma, are subject to the compulsory attendance law in Iowa Code chapter 299. That includes all state, city, county, public or private facilities or institutions.

- **Responsibility for Instruction.** School districts have jurisdiction over all educational programs and schools within their boundaries that are not state operated or nonpublic schools (IC 274.1). Therefore, facilities/institutions, even though subject to the compulsory attendance law, have no choice in how the educational program is provided.

- **Placement.** Iowa shares responsibilities regarding children. Placement by DHS or the courts is primarily for treatment, custodial, rehabilitation, etc., but is not primarily for educational purposes. DHS and the courts do not place students in public or nonpublic schools' educational programs, nor can AEAs or school districts place public students in nonpublic or private schools. AEAs/districts do not have authority to place students for treatment, but may decide to tuition students to educational programs provided by other public schools. Even if a facility were to establish an accredited nonpublic school or establish a private school on its property, the students placed at that licensed facility for treatment, custodial, rehabilitation, etc., are required by law to have a public education provided by the public school district in which the facility is located. Therefore, AEA and school districts could not place the students at the facility into the nonpublic school or private school, if such existed, operated by the facility. The AEA or school district also could not contract with that nonpublic school or private school to offer an educational program to public students.

- **Sources** include, but are not limited to, Iowa Code chapters 217, 218, 222, 225, 226, 232, 233A, 233B, 234, 237, 246B, 262, 263, 265, 269, 270, 271, 273, 282, 299, and 904, and supporting Iowa Administrative Code rules, and federal statutes and regulations such as the Individuals with Disabilities Education Act (IDEA).

Current Issues Related to Instructional Delivery

- There seems to be some potential for expenditure and legal authority creep between entities, both private and state institutions.

- Any treatment included in the agreement or care/treatment plan could also be included on the IEPs – so there is a potential for the cost to be paid twice: once by DHS/courts and again by districts. If treatment is on the care/treatment plan, then it cannot be paid by a school district, even if it is also on the IEP. It can't be paid by more than one entity, and the care/treatment plan is determined first in order for placement to occur. The IDEA provides that education agencies are payors of last resort.

- Entities licensed to provide treatment on a residential basis can offer that same treatment in a day program—however, in both situations the primary purpose of the student being at that facility is for the custodial, rehabilitation, and treatment program. The cost of transportation for the students in a day treatment program to get to the treatment facility is a treatment cost, not an education cost, and cannot be billed to districts. Such transportation is under DHS's jurisdiction.
- In the situation where students could be transported from a facility to a public school classroom to provide FAPE, the facility would need to send staff for treatment, rehabilitation, custody, or security services that are needed and that they are to provide. These responsibilities do not transfer from the facility to the public school. Generally, this would mean that it is impractical to locate a classroom off site of the facility for students who have been placed at the facility by the courts, DHS, or parents and for whom treatment is required during the school day. It is more practical for the students to stay on the premises of the facility, because the facility has legal responsibility 24-7 for residential, and throughout the entire day program for day treatment programs. The education programming would be delivered on site in these situations. Legal jurisdiction does not transfer.

- Transportation from a district to a facility for a day treatment program is a treatment cost and cannot be charged to a school district. Only transportation from the facility to the public school district, if the instructional program will be offered at the public school, is a cost of education.

- A belief was expressed by facilities that the funding they receive is not adequate to cover all their costs related to custody, rehabilitation, and treatment; this perception could create a strong incentive to inappropriately pass those costs onto education.

- Mental health issues are increasing without treatment options and funding growing at the same rate. Children who need treatment for mental health issues are being enrolled in school districts. School districts are not licensed or authorized to provide direct mental health treatment; and especially cannot do so when the child does not have an IEP or does not have the service listed on the IEP.

- Potential conflicts of interest exist when the same people or the same entity are providing both treatment and education:

    - It is difficult to keep the costs completely separate and accurate for appropriate billing.
    - There is a high risk that one (education or treatment) will be valued over the other, and one is not provided adequately.
    - There is a high risk that no oversight or action is taken on violations of IDEA or violations of compulsory attendance law.
    - There is a high risk that treatment could be billed both to the supervising state agency and the district.
    - There is a high risk that health costs could be billed both to Medicaid and to the district.

- There are concerns over potential insufficient or inconsistent LEA oversight of both the educational program and the billing process.

- Since school districts cannot transfer their legal authority for program management and delivery in these cases, processes and procedures are needed to ensure the districts' proper role. Even though the district may purchase the services of staff from the facility, the district cannot transfer legal responsibility for the program. Therefore, the district must be actively involved in the management, direction, supervision, and evaluation of the program, evaluation of the students, and staff development of teachers.

- The process used by a district or AEA to obtain a copy of the care/treatment plan required by DHS and to ensure there are no duplications of the costs on the care/treatment plan on billings to districts is underdeveloped.

- Entities accepting students that are placed for custody, rehabilitation, or treatment are responsible for that custody, rehabilitation, and treatment 24-7, and for day program students for the entire period of that day program. Education is ONLY on top of that custody, rehabilitation, and treatment, but is not in place of. Therefore, it would not be allowable for facility costs (rent, operations & maintenance, etc.) to transfer to districts or AEAs providing the educational program and services, when treatment is needed or required at any time during the school day. When care/treatment plan is needed during the school day, it is seldom possible for the students to leave the facility unless facility staff accompany the students so that the custody, rehabilitation, and treatment continues simultaneously with the education program being provided by the district or AEA.

- Cost containment must be a consideration in any process to approve expenditures.

- Education costs must be for actual costs and must not include profit; profit appears to be included in costing.

- The state wants to ensure that there is not intermixing of legal authority and responsibilities between entities:

    - Facilities that are not state institutions are licensed to provide custody, rehabilitation, and/or treatment, but they are not licensed or accredited to provide education. Courts and DHS place students at facilities primarily for the services that the facility is licensed to provide.
    - AEAs and districts are accredited to offer education, but are not licensed or authorized to provide custody or treatment. Students attend schools primarily for the education that the districts or AEAs provide.
    - If a district or AEA believes that a student needs to be placed for treatment; it should contact DHS for that placement. It appears that districts or AEAs are placing students directly for treatment (as opposed to educational program) without working with DHS. Responsibility for children is shared in Iowa.
    - A district, or group of districts, could form a consortium to <u>jointly</u> administer an educational program that they <u>jointly</u> establish and for which each of them had legal authority to provide separately. If students in the program need treatment as identified on their IEPs, but do not necessarily need placement, the consortium could purchase those services from an entity licensed to provide that particular treatment at the site of the consortium's educational program. *[This does not apply to an educational program at a treatment facility or day program where Iowa Code assigned the educational program to the district of location. Districts cannot transfer this legal responsibility to others.]*

- Facilities cannot enter into contracts with any district within the state of Iowa except the district of location.

- School districts are not <u>only</u> fiscal agents for the facilities. Districts are personally responsible for managing the instructional program, the use of public funds, billing, and ensuring compliance with the law.

What Districts/AEAs Must Do

- Establish educational programs/special education services where Iowa Code requires them to do so. The district/AEA is the sole legal entity that shall maintain the programs/services and ensure that supervision of that program and oversight of the billing occurs.

- Obtain a copy of the DHS or court treatment/care plan agreement with the facility as soon as the child is placed. This is to be created at the time of admission to the facility per Code. Work with DHS for any placement of students where the primary purpose is for treatment rather than for education.

- In the case of a court-ordered placement, obtain a copy of the court order authorizing placement. The facility will have this within 48 hours of placement per Code.

- In the case of a PMIC, obtain the written document that states the reasons for the admission.

- Ensure that the facility is not billing districts nor otherwise transferring responsibility for providing the facility's responsibility under law and its contract with DHS/courts regarding continuous provision of custodial, treatment, security, and other services. The educational program is provided on top of, and concurrently with, the facility's

non-educational program responsibilities. The district and AEA must be diligent that these responsibilities do not transfer to the teachers providing the education or to the district or AEA itself.

- Ensure that any educational/instructional costs are actual costs and permissive. This will require a level of accounting detail that allows the districts to determine permissive and nonpermissive costs.

- Both the resident district and the district of location shall be actively involved in the IEP team meetings.

- Ensure that any education program operating within the school district boundaries adhere to all pertinent state and federal laws, including, but not limited to, testing requirements, No Child Left Behind (NCLB) provisions, IDEA provisions, teacher licensure, curriculum development, professional development expectations, and core curriculum implementation.

What Districts/AEAs Can and Cannot Pay For

- A chart is provided of appropriate and inappropriate costs by object category. The district or AEA should contact the Department's Bureau of Finance, Facilities, Operation and Transportation Services (FFOTS), to determine appropriateness of any item not listed.

- Allowable costs for education of students with IEPs are exactly the same without regard to where that education is offered.

- Billing for costs for students without IEPs is limited to the district cost per pupil (DCPP)/maximum tuition rate. The district is not required to pay this full amount to the facility if the facility has been contracted to provide for education staff—districts should retain enough of the DCPP tuition to cover their own costs for program oversight and billing. If the district is not contracting with the facility to provide the education staff, the full amount should be retained by the district.

- Do not bill for or pay those costs that are in the DHS/court agreement or treatment/care plan, including transportation between home and a day treatment program, <u>even if</u> the treatments are also on the IEP. Do not pay for any special education instruction or education services that are not required by the IEPs or that are provided to all new students and are not individualized.

- Realize that the GPP amounts on a student receiving an education pursuant to an IEP are for the general program component and for the administrative oversight costs. Since the administrative oversight costs are a district responsibility, the applicable portion of the GPP should be retained by the district and not forwarded to a facility contracted to provide the education staff. If the facility has not been contracted to provide the education staff, all of the amount should be retained by the district.

- Districts/AEAs cannot pay for non-educational costs and cannot pay for any facility-related costs (rent, utilities, use charges, remodeling, etc.). The responsibility of the facility for custodial, rehabilitation, and treatment of children is continuous and is not suspended when educational staff are present. This is supported in DHS rules.

- For purposes of <u>billing</u> for instructional programs, there are two separate and distinct treatment programs that will have an educational component for the students participating in or placed in the treatment programs at the private facility. This distinction is based on the type of treatment program offered by the private facility. One type of treatment program is provided to students living in a residential facility. The other type of program is provided to students who do not live at the facility, but who need the same treatment as the private facility is licensed to provide—these are commonly called day treatment programs. Day treatment program simply means "not residential." Beyond this distinction, there is nothing significant that is unique to day programs for instructional program purposes. In fact, the instructional program component in a residential facility is still a "day program," in that the public school district has no part in the residential or treatment components. Tuition for day programs operates just like any other programs offered by the district for which tuition is charged to resident districts. The purpose of Iowa Code distinguishing programs of students in residential programs from any other day programs offered by the district is to tell the serving district how it will receive funding for students who are living within its district due to a placement who would not otherwise be resident students; in other words, whether the serving district will file a state claim or will bill the resident district. The program remains a program of the public school

district and is not a program of the private facility, even if the public school district is purchasing education staff from the private facility.

- The school district of location is not required to purchase the instructional program from the private provider/facility. The school district decides whether to use its own district teachers, purchase the teachers from the private provider/facility, or hire teachers from a separate provider or entity. The district of location assumes no responsibilities from the facilities; its responsibility is to provide appropriate instruction comparable to classroom instruction in district buildings. The educational program is on top of, and offered concurrently with, the treatment program provided by the private provider/facility. If the district purchases the instructional program, it must obtain time records on staff to ensure it does not pay for costs unrelated to the IEP, or that were eligible for Medicaid reimbursement, or that were on the care/treatment plan. The district also needs direct access to payroll and all financial records to support actual costs. Billings are required to be itemized by Iowa Code. If the district employs its own teachers, then the district only would need a copy of the treatment/care plan, and the district would not pay any money to the facility.

- For students with IEPs placed in a residential program or in a day program, only allowable actual special education costs, allowable amounts of GPP, and allowable amount of SBRC-approved administrative costs can be billed to the resident district by the district of location. For students without IEPs placed in a residential program or in a day program, the district of location cannot bill an amount that exceeds, and may be less than, an amount equal to 1/180th of its district cost per pupil (DCPP) for each day of enrollment for general education students. The district cost per pupil (maximum tuition rate) is the limit in Code on what the district of location can bill the state under foster and residential care or can bill the resident district for providing the instructional program to students placed at a residential facility.

- For students placed in a residential program or in a day program, where the facility is contracted to provide the instructional staff on behalf of the district of location, the amount paid to the private facility is determined by the terms of the written contract between the private facility and the district of location. The district of location may agree to pay additional amounts for additional instructional services from its general purpose money, but it may not pass those costs on to other resident districts or include them on the SES as special education costs. It is not a sound financial practice to agree to pay additional amounts beyond what Code allows as maximum tuition. The district of location may agree to pay less than it receives in tuition from resident districts, also, because it may need to retain a portion of the tuition payment to cover its own costs related to that instructional program. No costs which are not directly related to instruction can be paid to the facility by the school district.

- It is important to realize special education is not a location, classroom, or place. It is a list of services documented on the student's IEP. These services are provided to give the student access to the general curriculum and provide FAPE. In order to determine whether an expenditure is allowable as a special education cost, it must be listed in the student's IEP, and the service must be provided for the purpose of meeting the student's needs listed on the IEP. Therefore, the licensure or certification of a special education teacher is not the determining factor of whether or not the teacher's salaries and benefits are allowable special education expenditures. The purpose of the services the teacher provides for students with IEPs is the determining factor. If the teacher is teaching English (content), the purpose of the service is general education. Only the portion of time spent providing the services listed on the IEP are special education services. And only those costs that are not related to the purposes for which the DHS or courts placed the student in the facility can be paid by school districts (or AEAs if JHs) throughout the placement, even if also on the IEP. In addition, the students placed in facilities are Medicaid eligible, and the facility is responsible for filing for that reimbursement for services they provide where those services are eligible for reimbursement. These services might also be on the IEP, but because they are eligible for Medicaid reimbursement, the provider will bill Medicaid instead of billing districts or AEAs. The provider cannot simply choose to bill the AEA or district instead of filing for Medicaid reimbursement.

- The GPP is a fixed rate to cover the non-IEP costs of providing the students with an education, including, but not limited to, administration, fiscal services, general program, operations and maintenance. It is not for costs of treatment, supervision, security, custodial room and board, etc., for which students were sent to the residential facility by the courts, DHS, families, etc.

- The amount of funds generated through the tuition in billing process is the maximum amount to be charged for providing an instructional program at a private facility. The community school district has no duty to pay for costs outside of the calculation and may not voluntarily pay for costs that would result in use of public funds for private

purposes.

- Districts cannot pay any billing until the services have been rendered or the materials received. The community school district doesn't pay the private facility for the billings until the funds from those billings are received from the other resident districts. Costs must be actual costs and cannot be a per pupil or per-diem amount.

- Students from out of state placed in Iowa, and Iowa students placed out of state, fall under the Interstate Compact Agreement. Whatever state establishes the placement for custodial and treatment purposes also is responsible for special education actual costs under an IEP. The original state that was involved in the original placement continues to hold jurisdiction over all matters for that student, including the financial responsibilities, throughout the placement. For any out-of-state placement of an Iowa student with an IEP, whether initiated by the school district/AEA or not, the district must ensure that it has a current IEP at all times and participates in all IEP meetings (Skype, teleconference, etc.). The responsibility for the educational program and ensuring that the IEP is met remains the responsibility of the original Iowa district of residence. Compare the IEPs to any billing received to be sure that every cost on the bill is related to the IEP listed services and does not include any services that are provided to all new students that are not unique to the individual, costs in the care/treatment plan, or costs that are eligible for Medicaid reimbursement and should have been claimed from Medicaid instead of being billed to the district/AEA.

- Iowa school districts and AEAs may only place students in a facility if the placement is for educational purposes rather than treatment purposes and is necessary to provide FAPE. The educational placement required to provide FAPE must be at no cost to the parents. However, responsibility for children in Iowa is a shared responsibility, and some of the placement costs may fall under DHS or the court system rather than being solely the responsibility of the district or AEA. This is why it's important for the district to involve DHS in placement in facilities to ensure that each entity pays costs applicable to each.

- Iowa school districts and AEAs may only place students out of state if the placement is for educational purposes rather than treatment purposes and is necessary to provide FAPE, and if no Iowa facility is available to provide the services the student needs pursuant to the IEP or an appropriate placement in an adjoining state is nearer than an appropriate placement in Iowa. If a school district cannot find an Iowa agency that can offer the special education program and services that a resident student requires under the IEP, and the IEP team has identified an out-of-state facility which is able to provide the program, the district must first notify its AEA of the desired placement, and the district/AEA must initiate and complete an out-of-state placement request form to be sent to the DE for approval. Without this approval, the district is not eligible to submit a high cost claim. A placement primarily for custodial or treatment purposes, in-state or out-of-state, can only be accomplished through DHS or the courts, or placement by the parents. Placements by parents are at the parent's risk. If the parent fails to prove the public school program placement was inappropriate because it did not provide FAPE and that the private placement was proper, the parent would not be eligible to receive reimbursement for the costs.

- Iowa AEAs or school districts do not have authority or licensure to create boarding schools or build dormitories to provide educational programs.

To make this easier for auditors and districts to follow, a chart of expenditures is provided. If an expenditure is not listed, the district/AEA should contact the Department's Bureau of Finance, Facilities, Operation and Transportation Services, to determine allowability of that expenditure. These costs principles are the same whether the special education instructional program is out of state, at a private facility, or in a public school. The column for unallowed expenditures has only been completed where it appeared pertinent to costs of the state or private facility.