

The Most Frequently Asked Questions on the Education Rights of Children in Homeless Situations: Students Receiving Special Education and Related Services

This document is an excerpt from “The Most Frequently Asked Questions on the Education Rights of Children in Homeless Situations,” published by the National Association for the Education of Homeless Children and Youth (NAEHYC) and the National Law Center on Homelessness & Poverty (NLCHP) in September 2016. To download the entire document, see http://www.naehcy.org/sites/default/files/dl/legis/2016-09-16_FAQ_FINAL.pdf

The answers are general responses based on federal statutes, regulations, and guidance; relevant case law; and best practices from across the country. It cannot be emphasized enough that these are general responses, and that answers could change based on the facts of a particular case. McKinney-Vento issues require a case-specific inquiry. This document is meant to provide basic information and tools to assist parents, youth, liaisons, administrators and advocates in understanding the McKinney-Vento Act.

96. Do special education laws explicitly refer to students experiencing homelessness?

A: Yes. The Individuals with Disabilities Education Act (IDEA) contains several provisions specific to children in homeless situations. IDEA defines homeless children to include any children or youth considered homeless under McKinney-Vento. 20 U.S.C. §1402(11); 34 C.F. R. §300.19. It includes a specific requirement that states ensure that children with disabilities experiencing homelessness are identified, located and evaluated. 20 U.S.C. §1412(a)(3)(A); 34 CFR §300.111. Additional provisions are described below, and general resources on this topic can be found at http://center.serve.org/nche/ibt/sc_spec_ed.php.

97. Do students receiving special education who are homeless have the right to remain in their school of origin?

A: Yes. The McKinney-Vento Act applies to students receiving special education services the same way it applies to other students. In addition, any state receiving IDEA funds must ensure that the requirements of the McKinney-Vento Act are met for all children with disabilities in homeless situations in the state. 20 U.S.C. §1412(a)(11)(A)(iii); 34 CFR §300.149(a)(3). Therefore, a student receiving special education who is homeless must remain in the school of origin, unless it is not in the student’s best interests or it is against the parent’s/guardian’s/unaccompanied youth’s wishes. More often than not, the best interest determination will weigh in favor of keeping a special education student in the same school, because changing schools and educational programs can be particularly detrimental to students with special needs. However, there may be particular circumstances in which changing schools is in the student’s best interest; for example, if the distance is such that the commute would be more detrimental than changing schools.

There are additional legal requirements under the IDEA, 20 U.S.C. §§1400 et seq., that might come into play. However, IDEA does not supersede the McKinney-Vento Act; a special education student retains all McKinney-Vento rights.

98. If a student receiving special education services becomes homeless and elects to remain in the school of origin, who pays for transportation?

A: LEAs must provide transportation to the school of origin upon request. 42 U.S.C. §11432(g)(1)(J)(iii). This is true regardless of the services the student receives, including special education and related services. Transportation can be included as a related service in a student’s Individualized Education Program (IEP), when appropriate. “If a child’s IEP Team determines that a child requires transportation as a related service, then IDEA funds can be used to provide transportation to the child.” U.S. Department of Education, Office of Special Education and Rehabilitative Services, August 5, 2013 letter to Diana Bowman (available by contacting pjulianelle@naehcy.org). If transportation is not an appropriate related service, the student’s transportation should be funded in the same manner as that of other students experiencing homelessness. In addition, special education buses can be used to transport homeless students without disabilities when the buses “are not full and are able to pick up nondisabled homeless children along the usual bus routes, and no additional IDEA funds would need to be expended to transport those nondisabled children.” August 15, 2013 letter to Diana Bowman.

99. Must schools immediately enroll students receiving special education who are homeless?

A: Yes. The McKinney-Vento Act applies to students who are homeless and who receive special education. Those students must be enrolled immediately in school, to include attending classes and participating fully in school activities. This is true even if the student is unable to produce records normally required for enrollment, such as previous academic records and copies of IEPs. 42 U.S.C. §11432(g)(3)(C)(i)(I). In addition, any state receiving funds under the Individuals with Disabilities Education Act (IDEA) must ensure that the requirements of the McKinney-Vento Act are met for all children with disabilities in homeless situations in the state. 20 U.S.C. §1412(a)(11)(A)(iii); 34 CFR §300.149(a)(3). There are other legal requirements under the IDEA, 20 U.S.C. §§1400 et seq., that might come into play. However IDEA does not supersede the McKinney-Vento Act; a special education student retains all McKinney-Vento rights.

100. Must schools provide special education services immediately to students experiencing homelessness who have IEPs from another school district or state?

A: Yes. When children with current IEPs change LEAs during the school year, the new district must provide the children with a free, appropriate public education (FAPE) immediately, “including services comparable to those described” in the previous IEP, in consultation with the parents. While such services are being provided, the LEA can either adopt the existing IEP or implement a new IEP. If the new LEA is in a different state, the district can choose to conduct a new evaluation and develop a new IEP, while services are being provided. 20 U.S.C. §1414(d)(2)(C)(i).

101. How can a school determine what services to provide a student receiving special education, if there are no school records?

A: The enrolling school must immediately admit the student and must contact the previous school for records. 42 U.S.C. §§11432(g)(3)(C), (D). To facilitate provision of FAPE for children who change districts during the school year, IDEA specifically requires enrolling schools to promptly obtain the child's records from the previous school, and previous schools to promptly respond to such records requests. 20 U.S.C. §1414(d)(2)(C)(ii). The McKinney-Vento liaison should work with special education staff to ensure that a child's special needs can be identified and addressed quickly. The district should establish procedures for obtaining a child's school records expeditiously. If the records cannot be transmitted immediately, the enrolling school can speak with staff from the previous school to get basic information about the student. Former teachers, counselors and administrators should be able to provide this information. Even if records are delayed, the student must be enrolled in school and provided FAPE immediately. State laws and regulations implementing IDEA may also contain procedures for providing interim IEPs and interim services.

102. If a student changes LEAs while special education evaluations are underway, must the new LEA continue the evaluation process?

A: Yes. Under IDEA, LEAs must complete initial evaluations within 60 days of a parent's request, or within time frames established by the state. These time limits apply to students who change school districts during the evaluation process, so the new school district cannot "restart the clock" when a student enrolls. The only procedure to extend the time frame is if the new LEA is making sufficient progress to ensure a prompt completion of evaluations, and the parent and school agree to a specific time when the evaluation will be completed. In addition, IDEA specifically requires schools to ensure that assessments of children who change LEAs during the school year are coordinated with prior schools as necessary and as expeditiously as possible, to ensure prompt completion of full evaluations. To expedite evaluations, the new school should immediately get all the evaluations and other paperwork completed on the student from the old school and consult with the previous school psychologist, counselor and/or teachers about the student's needs. 20 U.S.C. §§1414(a)(1)(C)(ii), (b)(3)(D).

In addition, the U.S. Department of Education has noted: "There are compelling reasons for school districts to complete evaluations and eligibility determinations for highly mobile children well within the evaluation time frame that is applicable in a State, and we strongly encourage school districts to complete their evaluations of highly mobile children within expedited time frames (e.g., within 30 days), consistent with each highly mobile child's individual needs, whenever possible." U.S. Department of Education, Office of Special Education and Rehabilitative Services, August 5, 2013 letter to State Directors of Special Education (available by contacting pjulianelle@naehcy.org).

103. If an unaccompanied youth is under 18, who signs for special education services?

A: Under IDEA, the following people can sign for special education services for a minor: a parent or legal guardian; an adult acting in the place of a parent and with whom the youth is living; or if consistent with state law, a foster parent. 34 C.F.R. §300.30. If the LEA cannot identify or locate such an adult, it must appoint a surrogate parent. If the student is an unaccompanied youth or a ward of the state, IDEA requires that the district ensure the student’s rights are protected, including by assigning a surrogate parent. The surrogate parent must be trained in special education procedures and cannot be a school district employee or other person who might have a conflict of interest. 20 U.S.C. §1415(b)(2); 34 CFR §300.519(a)-(b).

However, as the process of appointing a surrogate parent can take several weeks, LEAs should appoint immediate, “temporary” surrogate parents for unaccompanied youth. Temporary surrogate parents can consent for evaluations or sign IEPs so that assessments and services can begin immediately, while a regular surrogate is being appointed. Due to their more limited role, appropriate candidates for temporary surrogates include staff of emergency shelters, transitional shelters, independent living programs, and street outreach programs, as well as McKinney-Vento liaisons or other school district staff. 34 CFR §300.519(f); 71 Fed. Reg. 46712 (August 14, 2006).

A more detailed explanation of special education decision-making for unaccompanied youth is available in the NASDSE/NAEHCY publication “Surrogate Parents and Unaccompanied Homeless Youth Under the Individuals with Disabilities Education Act”, available at <http://naehcy.org/sites/default/files/dl/legis/uhsurrogateparents.pdf>.

104. If a student’s poor academic achievement may be attributable to his or her homelessness, does that mean that an LEA should not evaluate for special education?

A: No. Students experiencing homelessness may miss school, have poor physical health, and struggle with behavior issues related to the stress of losing their housing. IDEA cautions that students should not be found eligible for special education if their difficulties are caused by lack of instruction or environmental, cultural, or economic disadvantage. At the same time, IDEA places clear obligations on LEAs to conduct special education evaluations upon a parent’s request. Only through conducting evaluations and analyzing the results will a school district be able to determine if a student has a disability requiring special education and related services or is merely reacting to the realities of homelessness. Therefore, IDEA requires schools to determine whether lack of instruction is causing a child’s disabilities “upon completion of the administration of assessments and other evaluation measures.” The law similarly requires schools to consider environmental, cultural, or economic disadvantage “as part of the evaluation.” These considerations are part of the evaluation and eligibility determination process; they do not substitute for the process or eliminate an LEA’s responsibilities to engage in the process.

In many cases it will be appropriate for the school to put interventions and services in place for such students, to support their achievement and avoid unnecessary special education services. This often is referred to as a Response to Intervention (RTI) process. The U.S. Department of Education has emphasized that an RTI process cannot be used to delay or deny special education evaluations. “The regulations at 34 CFR §§300.301(b) allow a parent to request an initial evaluation at any time to

determine if a child is a child with a disability. The use of RTI strategies cannot be used to delay or deny the provision of a full and individual evaluation....” U.S. Department of Education, Office of Special Education and Rehabilitative Services, January 21, 2011 Memorandum, *available at* <http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/osep11-07rtimemo.pdf>. In addition, for children who change LEAs during the evaluation process, “the new school district may not delay the evaluation or extend the evaluation time frame in order to implement an RTI process.” U.S. Department of Education, Office of Special Education and Rehabilitative Services, August 5, 2013 letter to State Directors of Special Education (available by contacting pjulianelle@naehcy.org). Instead, such interventions should be provided while the evaluation is in progress. 20 USC §§1414(b)(4)-(5); 34 CFR §§300.306, 300.309(b)-(c).

105. If a student who is in a private day placement pursuant to an IEP becomes homeless and moves into temporary housing in a neighboring LEA, which LEA must pay for the placement? What if the LEA where the student has moved does not believe the placement is necessary?

A: A student experiencing homelessness has rights under both IDEA and the McKinney-Vento Act. In this situation, IDEA gives the child the right to receive a free, appropriate public education consistent with his or her IEP. The McKinney-Vento Act entitles the student to remain in the school of origin. Therefore, the student has the right to remain in the private day placement. (If it were a public placement, such as a county special education program or other program, the answer would be the same.) Neither IDEA nor the McKinney-Vento Act assign fiscal responsibility. Typically, the LEA that developed the IEP and made the placement will continue to pay for the placement. That district is also likely receiving federal and state funds for the pupil. However, if state law, the state education agency or the LEAs determine that a different financial arrangement is appropriate, federal law does not prevent an alternative arrangement. If the allocation of fiscal responsibility is in dispute, the student’s education and services must not be interrupted or disturbed while the dispute is resolved. 20 U.S.C. §1412(a)(11)(A)(iii); 34 CFR §300.149(a)(3); U.S. Department of Education Office of Special Education and Rehabilitative Services (February 2008). “Questions and Answers on Special Education and Homelessness”, E-2.