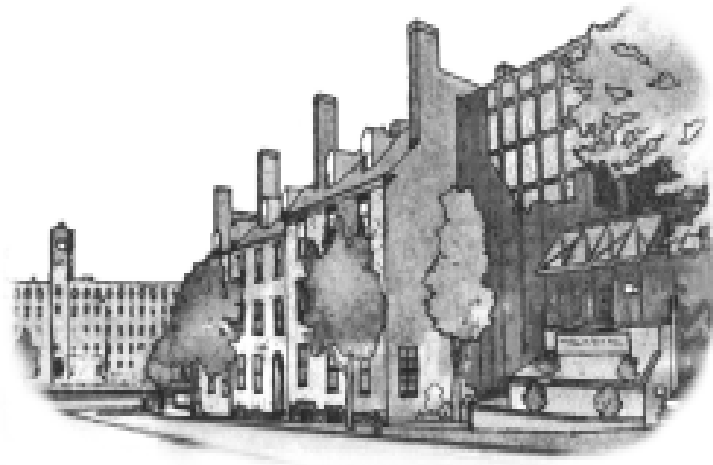


Providing Special Education Services to Children and Youth in Homeless Situations

April 16, 2004



***Wadleigh, Starr & Peters, P.L.L.C.
Serving New Hampshire since 1899***

**By: Dean B. Eggert, Esquire
WADLEIGH, STARR & PETERS, P.L.L.C.
95 Market Street
Manchester, New Hampshire 03101
Telephone: 603/669-4140
Facsimile: 603/669-6018
E-Mail: deggert@wadleighlaw.com
Website: www.wadleighlaw.com**

About the Author

Dean B. Eggert, Esquire (JD., UCLA; B.A., Wheaton College) is a partner in the firm of Wadleigh, Starr & Peters, P.L.L.C. Mr. Eggert is a jury trial attorney. Over the last 18 years he has had extensive experience representing school districts in their legal matters at the administrative and appellate levels. He has also provided in-service seminars to school districts on issues of risk management in the field of special education law.

A Word of Caution

No two cases are exactly alike. This material is designed to provide special educators with a general understanding of their obligation to provide special education services to children and youth in homeless situations. You are strongly encouraged to seek a legal opinion from your school district's legal counsel regarding any specific matter.

I. Overview

The purpose of this material is to equip the special education administrator to understand the legal requirements of the McKinney-Vento Homeless Assistance Act as amended by the No Child Left Behind Act of 2001, and reauthorized in January 2002. It is our goal to equip the administrator to address the particularly unique challenges presented with the education of homeless children and youth.

II. The McKinney-Vento Homeless Assistance Act

The McKinney-Vento Homeless Assistance Act which first passed in 1987 exists to provide a federal response to the national problem of homelessness. The Act contains education provisions which were most recently reauthorized in 2002 to ensure educational rights and protections for children and youths experiencing homelessness. See 42 U.S.C. §11431-11433(a). Sections 11431 through 11433(a), collectively, are referred to as “Subtitle B - Education for Homeless Children and Youths.”

III. Statement of Policy

Congress has articulated a four-part policy with regard to the provision of an education for homeless children and youths. The four parts are as follows:

1. Each SEA shall ensure that each child of a homeless individual and each homeless youth has equal access to the same Free Appropriate Public Education, including a public preschool education, as provided to other children and youths.

2. States with a compulsory residency requirement as a component to their attendance laws and similar regulatory requirements must review and revise their laws to ensure that homeless children and youths are afforded the same Free Appropriate Public Education as provided to other children and youths.

3. Homelessness alone is not a sufficient reason to separate students from the mainstream.

4. Homeless children and youths should have access to the education and other services that such children and youths need to ensure that they will have an opportunity to meet the same challenging state student academic achievement standards to which all students are held.

The fourth component to this policy was more particularly articulated in Title X of the No Child Left Behind Act, which provides that “Each state and local educational agency shall ensure that each child of a homeless individual and each homeless youth have equal access to the same Free Appropriate Public Education including a public preschool education provided to other children and youths. Further homeless children and youths shall have access to the education and other services needed to ensure that

they have an opportunity to meet the same challenging state student academic achievement standards to which all students are held.”

IV. Defining the Homeless Child and Youth: The Federal Definition

If the goal of this law is to ensure FAPE to homeless children and youth, the question then becomes, who is a homeless child or youth? Section 725 defines the term “Homeless Children and Youth” as:

“Individuals who lack a fixed, regular, and adequate nighttime residence.”

Which includes

-Children and youths who are:

-sharing the housing of other persons due to:

loss of housing;
economic hardship; or
a similar reason;

-living in motels, hotels, trailer parks or camping grounds due to lack of alternative adequate accommodations;

-living in emergency or transitional shelters;

-abandoned in hospitals; or

-awaiting foster care placement.

-Children and youths who have a primary nighttime residence that is a public or private place, not designed for or ordinarily used as a regular sleeping accommodation for human beings.

-Children and youths who are:

-living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations, or similar settings; and

-migratory children (as such term is defined in Section 1309 of the ESEA of 1965) who qualify as homeless because they are living in the circumstances described above.

The first difficult challenge is to determine whether or not a child or youth falls in the category of being homeless. Simply put, the determination whether a particular

child or youth fits within the definition of homeless must be made a case-by-case process. The first, and sometimes most difficult, question to answer is whether or not the nighttime residence is “fixed, regular and adequate.” The second particularly difficult challenge is the child who falls within the category of “awaiting foster care placement.” Attached as Appendix A is the homeless definition set forth by the 2003 Annual Meeting of State Coordinators for the Education of Homeless Children and Youth.

V. Defining the Homeless Child and Youth: The State Definition

New Hampshire has had a compulsory residency requirement as a component of the state’s compulsory school attendance laws. N.H. R.S.A. 193:12 provides in relevant part that, “Notwithstanding any other provision of law, no person shall attend school, or send a pupil to the school in any district, of which the pupil is not a legal resident, without consent of the district or of the school board except as otherwise provided in this section.” See N.H. R.S.A. 193:12. As a result, New Hampshire clearly had a compulsory residency requirement which presented a potential barrier to the enrollment of homeless children and youth.

N.H. R.S.A. 193:12 was amended (effective August 30, 2003) to incorporate the McKinney-Vento definition of homeless children and youth. The federal definition is incorporated into this statutory section verbatim.

Regrettably, the statute does not overtly address the tension between R.S.A. 193:12's residency requirement and the homeless child's right to enroll and attend a given school. Instead, the following clues are sprinkled throughout R.S.A. 193:12:

- ✓ The Commissioner of the Department of Education, or designee, shall decide residency issues for all pupils, including homeless children and youths in accordance with this section;
- ✓ If more than one school district is involved in a residency dispute, or the parents who live apart cannot agree on the residence of a minor child, the respective superintendents shall jointly make such decision;
- ✓ In those instances when an agreement cannot be reached, the Commissioner of the Department of Education, or designee, shall make a determination within fourteen (14) days of notice of the residency dispute and such determination shall be final;
- ✓ No school district shall deny a pupil attendance or implementation of an existing Individual Education Plan;
- ✓ A pupil shall remain in attendance in the pupil's school of origin during the pendency of a determination of residency;

- ✓ If a child does not have a school of origin within the state, the child shall be immediately admitted to the school in which enrollment is sought pending determination of the residency dispute, provided such school is in the school district in which the child “temporarily resides;”
- ✓ “School of origin” means the school the child attended when permanently housed or the school in which the child was last enrolled.

While New Hampshire has successfully defined the “homeless child and youth” in accord with McKinney-Vento, it is apparent that New Hampshire’s statutory law stopped short of clearly spelling out the details found in the McKinney-Vento Act. Most importantly, New Hampshire stops at the threshold of a right of enrollment and attendance, but does not direct the reader to the additional provisions and consequences of the McKinney-Vento Act.

VI. Federal Granting under the McKinney-Vento Act

Formula grants are made to the 50 states, the District of Columbia and Puerto Rico based on each state’s share of Title I funds. State education agencies then provide competitive subgrants to local school districts. States must make subgrants to districts to facilitate the enrollment, attendance and success in school of homeless children and youths. The focus of the subgrants may address problems caused by:

- Transportation issues;
- Immunization requirements;
- Residency requirements;
- Lack of birth certificates;
- Lack of school records; and
- Guardianship issues.

Some of the more particular examples of the use of subgrant funds include the following:

- Coordination and collaboration with other local agencies to provide comprehensive services to homeless children and youths and their families;
- Expedited evaluations of homeless children’s educational needs to help facilitate enrollment, attendance and success in school;
- Tutoring, supplemental instruction and enriched educational services;
- Professional development designed to raise awareness of the needs of homeless children and youths;
- Referral of health services to homeless children and youths;

-Payment of the excess costs of transportation for homeless children and youths to attend their selected schools (that is not provided through other sources); and

-Developmentally appropriate preschool programs.

VII. LEA Enrollment and Attendance Requirements

A. “Best interest” determination.

Section 722 poses an obligation on the state education agency to ensure that each LEA serve homeless children and youths in accord with a “best interest,” standard. N.H. R.S.A. 193:12 is devoid of any statement with regard to the best interest of homeless children and youths. These duties exist regardless of whether or not an LEA receives a McKinney-Vento subgrant. Using the “best interest” standard means that the LEA must:

a) continue the child or youth’s education in the school of origin for the duration of homelessness when a family becomes homeless between academic years or during an academic year; or for the remainder of the academic year if the child or youth becomes permanently housed during an academic year; or

b) enroll the child or youth in any public school that non-homeless students who live in the attendance area in which the child or youth is actually living are eligible to attend.

The No Child Left Behind Act specifically requires that, pending resolution of a dispute about school placement, a school district must immediately enroll a homeless student in the student’s “school of origin,” or “other school selected on the basis of the child’s best interest.” In contrast, N.H. R.S.A. 193:13 limits the choice of enrollment to the school of origin or if there is no school of origin, the school in which the child seeks enrollment.

There is a presumption that in determining a child or youth’s best interest an LEA must, to the extent feasible, keep a homeless child or youth in the “school of origin,” unless doing so is contrary to the wishes of the child or youth’s parent or guardian. If an LEA wishes to send a homeless child or youth to a school other than the school of origin or a school requested by the parent or guardian, the LEA must provide a written explanation of its decision to the parent or guardian together with a statement regarding the right to appeal the placement decision.

Query: Does the LEA even have this option under R.S.A. 193:12?

There are a number of factors that should be weighed in determining whether or not it is feasible to educate a homeless child or youth in his or her “school of origin.”

According to the non-regulatory guidance issued by the U.S. Department of Education:

“The placement determination should be a student-centered, individualized determination. The factors that an LEA may consider include:

The age of the child or youth;

The distance of a commute and the impact it may have on the student’s education;

Personal safety issues;

A student’s need for special instruction (e.g., special education and related services);

The length of anticipated stay in temporary shelter or other temporary locations; and

The time remaining in the school year.”

B. The duty of immediate enrollment.

Once the best interest determination has been made, the school has a duty to immediately enroll the homeless child or youth even if the child or youth is unable to produce the records normally required for enrollment. The enrolling school also has a duty to immediately contact the school last attended by the child or youth to obtain relevant academic or other records.

VIII. Record Keeping Requirements

Any record ordinarily kept by a school, including immunization or medical records, academic records, birth certificates, guardianship records, and evaluations for special services or programs, regarding each homeless child or youth shall be maintained:

1. So that the records are available, in a timely fashion, when a child or youth enters a new school or school district; and
2. In a manner consistent with Section 444 of the General Education Provisions Act (20 U.S.C. §1232(g)).

IX. School Placement Choice

McKinney-Vento requires that “the choice regarding placement shall be made

regardless of whether the child or youth lives with homeless parents or has temporarily been placed elsewhere.” The pragmatic implications of this decision are significant. For example, the child who is temporarily removed from the district to live with relatives, may still have an entitlement to attend the school of origin. The law explicitly defines the term “school of origin” as “the school that the child or youth attended when permanently housed or the school in which the child or youth was last enrolled.” The federal definition of “school of origin” is identical to the state statutory definition.

X. The Comparable Service Requirement

The district has the duty to ensure that each homeless child or youth eligible under McKinney-Vento is provided services comparable to services offered to other students in the school selected to have been in the best interest of the child. These include the following:

- Transportation services;
- Educational services for which the child or youth meets eligibility criteria, such as services provided under Title I for similar state or local programs, educational programs for children with disabilities, and educational programs for student with limited English proficiency;
- Programs of vocational and technical education;
- Programs for gifted and talented students; and
- School nutrition programs.

XI. The Local Educational Agency Liaison.

The local school district is required to identify a liaison for homeless children and youths. The New Hampshire Department of Education has posted the designated liaison for each school district on its web site. The tasks of the liaison include ensuring that:

1. Homeless children and youths are identified by school personnel through coordination activities with other entities and agencies;
2. Homeless children and youths are enrolled in and have a full and equal opportunity to succeed in the schools of the LEA;
3. Homeless families’ children and youths receive educational services for which the families’ children and youths are eligible;
4. The parents or guardians of homeless children and youths are informed of

the educational related opportunities available to their children and “provided with meaningful opportunities to participate in the education of their children;”

5. Public notice of the educational rights of homeless children and youths are disseminated where such children and youths receive services under the Act;
6. Enrollment disputes are mediated in accord with McKinney-Vento; and
7. The parent or guardian of a homeless child or youth and any unaccompanied youth is fully informed of all transportation services including transportation to the school of origin and is assisted in accessing transportation to the school.

XII. Transportation Challenges

At a parent or guardian’s request, homeless students must be provided with transportation to and from their school of origin. Interestingly enough, N.H. R.S.A. 193:12 provides that “nothing in this section shall require a district to provide transportation for a student beyond the geographical limits of that district.” In the case of homeless children, this limitation is trumped by McKinney-Vento’s transportation requirement. For “unaccompanied youth,” that is, children who do not have parents or guardians in proximity, the transportation to and from the school of origin must be provided by the district at the liaison’s request.

The following rules apply to transportation:

- 1) If the temporary residence and the school of origin are in the same district, the LEA must provide transportation to and from the “school of origin.”
- 2) If the student is residing in a district outside the school of origin’s district, the LEA of origin and the LEA in which the child lives, must determine how to apportion the responsibility and cost of providing transportation.
- 3) If the LEA’s cannot agree, the costs for transportation must be shared equally.

XIII. Confidentiality

A district is required to preserve a student’s status of “homeless” as confidential. If a parent or unaccompanied youth does not want to be identified as homeless, and therefore, does not wish to receive services available under McKinney-Vento, the district must honor the wishes of the homeless individuals who desire their status to be kept confidential and who choose not to participate in the district’s homeless services.

XIV. The Possible Duty to Report

Districts should be mindful that the identification of an “unaccompanied youth,” that is a “youth not in the physical custody of a parent or guardian,” may trigger a reporting requirement under the abuse and neglect statutes. A youth under 18 years of age is considered a minor. Therefore, district homeless liaisons and other school staff will need to keep this mandatory reporting requirement in mind while working with unaccompanied youths.

XV. Interaction with IDEA

The thrust behind McKinney-Vento of immediate enrollment and comparable service means that districts are essentially required to adopt an accelerated record acquisition and evaluation process. If the student services director is not the LEA liaison, the LEA liaison and director need to develop a pre-screening process and accelerated admission process which quickly triggers a determination as to whether or not the student is eligible for IDEA services. However, the comparable services standard also should and can be reasonably interpreted to require that the district also give full faith and credit to the evaluations and IEP’s developed by other districts. It may very well be a high risk practice to suggest that the homeless child be subjected to another battery of assessments or evaluations if the parents represent that evaluations have already been done and are available. This may be a circumstance under which districts find themselves having to provide interim services without the benefit of an IEP if they fail to promptly obtain records.

XVI. Interrelationship with No Child Left Behind

It is clear from No Child Left Behind that homeless children and youths are required to participate in all standardized assessments. In fact, it is unlikely a district will be able to excuse a child from a standardized assessment if the child lacks an IEP which exempts the child from participation. Therefore, the presumption is that homeless children will participate in NCLB driven assessments.

XVII. Sending/Receiving District Liability and McKinney-Vento

In some respects, McKinney-Vento is inconsistent with the model used in New Hampshire for sending/receiving district liability. For example, a child can relocate to another district, but if falling within the category of homeless, the district with the “school of origin,” may find itself in a transportation sharing arrangement. The district with the school of origin and not the “receiving district” may remain liable for program since McKinney-Vento returns the child to the district.

Similarly, the child designated under McKinney-Vento as “awaiting foster placement” and thus, homeless, may not necessarily fully become the liability of the district into which the

child is temporarily located. Suffice it to say, judgments made as to the interrelationship between McKinney-Vento and New Hampshire's sending/receiving district paradigm will often be fact-specific and require the assistance of legal counsel.