

# Student Residency and Enrollment

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### A Word of Caution

No two legal matters are exactly alike. This material is designed to provide educators with information about the law pertaining to student residency and enrollment. This material does not cover every aspect of the law, and you are strongly encouraged to consult with your district's legal counsel regarding a specific case.

## **I. Overview**

This material is designed to provide educators with information about recent changes to the State law and regulations pertaining to seclusion and restraints. This material does not cover every aspect of the law, and you are strongly encouraged to consult with your district's legal counsel regarding a specific case.

## **II. Legal Residency**

### **A. Definitions**

New Hampshire's student residency statute provides that "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 the consent of the district or of the school board except as otherwise provided in this section or RSA 193:28." RSA 193:12, I.

A "legal resident of a school district" is "a natural person who is domiciled in the school district and who, if temporarily absent, demonstrates an intent to maintain a principal dwelling place in the school district indefinitely and to return there, coupled with an act or acts consistent with that intent. A married person may have a domicile independent of his or her spouse. If a person removes to another town with the intention of remaining there indefinitely, that person shall be considered to have lost residence in the town in which the person originally resided even though the person intends to return at some future time. A person may have only one legal residence at a given time." RSA 193:12, III.

Legal residence of a pupil is defined as follows:

- a. In the case of a minor, legal residence is where his or her parents reside, except that:
  1. If the parents live apart and are not divorced, legal residence is the residence with whom the child resides.
  2. In a divorce decree where the parents are awarded joint decision making responsibility or joint legal custody, the legal residency of a minor child is the residence of the parent with whom the child resides. In a divorce decree, or parenting plan developed pursuant to RSA 461-A, a child's legal residence for school attendance purposes may be the school district in which either parent resides, provided the parents agree in writing to the district the child will attend and each parent furnishes a copy of the agreement to the school district in which the parent resides. The parents shall update their parenting plan to reflect this agreement. If a parent is

awarded sole or primary residential responsibility or physical custody by a court of competent jurisdiction in this or any other state, legal residence of a minor child is the residence of the parent who has sole or primary residential responsibility or physical custody. If the parent with sole or primary physical custody lives outside the state of New Hampshire, the pupil does not have residence in New Hampshire. If the court order is for equal or approximately equal periods of residential responsibility, the child's legal residence for school attendance purposes shall be as stated in the order. If a child is in a court-ordered residential placement, foster home, or group home pursuant to RSA 169-B, RSA 169-C, RSA 169-D, RSA 170-C, or RSA 463, residence shall be determined in accordance with RSA 193:28.

- i. The statute goes on to state that "nothing in this subparagraph shall require a school district to provide transportation for a child to another school in the school district in which the child resides, or beyond the designated attendance area for the school to which the child is assigned, or beyond the geographical limits of the school district in which the child resides.
3. If the minor is in the custody of a legal guardian appointed by a New Hampshire court of competent jurisdiction or a court of competent jurisdiction in another state, territory, or country, legal residence is where the guardian resides. If the department of health and human services has been appointed legal guardian, the residence of the minor is where the child is placed by the department or the court. Legal guardianship shall not be appointed solely for the purpose of allowing a pupil to attend school in a district other than the district of residence of the minor's parent or parents. Whenever a petition for guardianship or legal custody is filed in a court of competent jurisdiction on behalf of a relative of a child, other than a parent, the child shall be permitted to attend school in the district in which the relative of the child resides pending a court determination relative to custody or guardianship.

*Practice Pointer: Verification of residency should include, for students with divorced parents, a request for a copy of the parenting plan or divorce decree.*

**Case Study:** Student/Northwood Sch. Board, SB-FY-11-08-002 (Sept. 2010).

Facts: This case involved a residency dispute brought pursuant to RSA 193:12. Parents were married and owned two houses, one in Deerfield and one in Northwood. The student resided with his parents; they spent part of the year in the Deerfield home and part of the year in the Northwood home. Parents sought to enroll Student in 9<sup>th</sup> grade at Coe Brown Academy, and the School Board in Northwood denied their request, on the basis that they resided in Deerfield and not Northwood.

Parents appealed to the State Board of Education.

At the hearing, the Hearing Officer Found the following facts:

- In October 2009, Parents submitted a “Coe Brown Northwood Academy Assignment Form to the Northwood School district” for their child to attend Coe Brown during the 2010-2011 school year.
- At that time, student was attending Deerfield Community School as a Deerfield resident. He attended Deerfield schools from 5-8 grade.
- In January 2010, the Northwood Superintendent informed the parents that the school board had denied their request to attend Coe Brown as a resident, and told them that they could resubmit if they changed their primary residence to Northwood.
- Parents resubmitted the request over the summer, and it was again denied, on the basis that their home in Northwood was seasonal.
- Parents and student spend “the winter months in Deerfield and the other months in Northwood.”
- For the 2010-2011 school year, parents planned to live in Northwood from September through Thanksgiving weekend in November, then return to Northwood on Easter weekend in April and remain there until the following Thanksgiving. Parents stated that they leave Northwood in the winter because they live on a long dirt road and do not wish to maintain the road.
- The Northwood home is assessed as a year round house.

- Parents submitted the following documentation of their residency in Northwood:
  - Car registrations
  - Driver's license
  - Cable bills
  - Bank statements
  - IRS 1040 forms for 2009
  - Electrical records (showing little to no electricity usage in Northwood from December-April for 2008, 2009 and part of 2010)
  - Credit card statements
  - Homeowners and auto insurance documents
- Parents testified that they consider Northwood to be their primary residence, do their shopping in Northwood, and intend to reside there until death.

*Where do the parents reside?*

Another case study...

*Query: Student's parents are divorced. Mom lives in District A, Dad lives in District B. Parents have joint decision-making and joint residential responsibility. The parenting plan specifies that since parents have 50/50 custody, the Student's residence for the purposes of school attendance shall be with his grandparents in District C.*

*Where does this student reside for purposes of school attendance?*

## **B. Establishing Residency**

When a parent seeks to enroll a minor student in a school in the District, you should request that the parent provide documentation sufficient to establish that he/she is a legal resident of the District. This could include, but would not be limited to:

- A driver's license or identification listing an address within the District;
- Deeds or lease agreements;
- Recent utility bills in the parent's name, showing an address within the District;
- Proof of voter registration; or,

- Court order(s).

In addition to the above, when a divorced parent seeks to enroll a minor student, you should also request a copy of (the relevant portions of) the court order that establishes that the parent has custody over the child, or where the student resides for school attendance purposes.

When an individual other than a parent seeks to enroll a minor student in the District, then in addition to establishing that the individual resides in the District, you should also request a copy of the court order establishing that the individual is the minor student's guardian, or if the proceeding is ongoing, a copy of the petition for legal guardianship. RSA 193:12, II(a)(2)(A).

RSA 193:12 is silent as to residency for adult students, and speaks only to establishing residency of minor students. See RSA 193:12, I, II. The inference then is that adult students can establish their own residence, separate from that of their parents. Therefore, if a parent of an adult student seeks to enroll the student in the District, then, in addition to obtaining documentation that the parent resides in the District, you should also request documentation establishing that the student resides in the District as well.

### **III. Attendance without Residency**

Under certain circumstances, non-resident students may be permitted to attend school in the district. For example, the local school board may authorize a non-resident student to attend school in the District. See RSA 193:12. In addition, a non-resident student may be admitted due to a manifest educational hardship, or in response to a request for a change in school assignment, or upon parental application. See RSA 193:3. When a student has been placed by the Department of Health and Human Services (DHHS) or the court in a home for children in the District or in the home of a relative or friend who resides in the District, then that student may attend school within the District, even if the student is not a legal resident of the District. RSA 193:12, V.

In addition, when a parent or guardian voluntarily places a child with a relative at the recommendation or request of DHHS, that child must be permitted to attend school in the district where the relative resides, provided that:

- At the request of the District, DHHS shall confirm that the department recommended or requested that the child be placed with the relative to promote the child's well-being, and not for the purpose of allowing the child to attend school in the district where the relative resides, and

- Upon request of the school district, the relative shall take reasonable steps to secure a court award of guardianship over the child. The child can continue to attend school with the guardianship matter is pending.

#### **A. NH RSA 193:28, Right of Attendance**

Although not a “residency” statute, RSA 193:28 is specifically referenced in the residency law. The statute provides:

Whenever any child is placed and cared for in any home for children, or is placed by the department of health and human services in the home of a relative or friend of such child pursuant to RSA 169-B, RSA 169-C, RSA 169-D, RSA 170-C, or RSA 463, such child, if or school age, shall be entitled to attend:

1. The public schools of the school district that the child attended prior to placement, if continuing in the same school district is in the best interest of the child as determined by the court, if the home is within a reasonable distance of the school to be attended, and if suitable transportation can be arranged without imposing additional transportation costs on a school district or the department of health and human services; or
2. The public schools of the school district in which said home is located, unless such placement was solely for the purpose of enabling a child residing outside said district to attend such schools, provided that the school district for a child placed in a group home, as defined in RSA 170-E:25, II(b), within a cooperative school district, shall be the cooperative school district, not the pre-existing district within the cooperative.

Another state statute, RSA 193:29, outlines which school district is responsible for the costs associated with educating such students.<sup>1</sup>

NH RSA 193:12, II(b) clarifies that when a minor is placed in a home for children or health care facility by another state that charges the State of New Hampshire, a political subdivision of the State of New Hampshire, or a New Hampshire school district, for the regular or schedule education costs for New

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<sup>1</sup> There are numerous cases discussing the obligations of “sending/receiving” districts when students are placed by courts or a state agency. As these cases do not pertain to residency/enrollment, they are not discussed in these materials. The cases do, however, indicate that for the purposes of a determination about the district of liability pursuant to RSA 193:27 and RSA 193:29, the determination of liability is “based upon when the child is actually ‘placed and cared for in any home for children or health care facility,’” and that the term “resided” in the context of the sending/receiving district paradigm means “the place where a child actually lived, rather than to legal residence or domicile.” See In re Juvenile, 153 NH 332 (2006).

Hampshire children placed in that state, shall not be deemed a legal resident for purposes of school assignment, unless the sending state agrees to reimburse the receiving district for regular education and special education costs.

## **B. Interstate Compact on Educational Support for Military Children**

This year, the New Hampshire legislature passed a bill known as the Interstate Compact on Educational Support for Military Children (“Compact”). This law takes effect on September 30, 2014. N.H. Session Law Ch. 308 (2014). Among other things, this law includes an exception to the “residency” requirements set forth in RSA 193:12.

### **1. Purpose**

The stated purpose of the Compact is “to remove barriers to educational success imposed on children of military families because of frequent moves and deployment of their parents by:

- Facilitating the timely enrollment of children of military families and ensuring that they are not placed at a disadvantage due to difficulty in the transfer of education records from the previous school district or districts or variations in entrance/age requirements;
- Facilitating the student placement process through which children of military families are not disadvantaged by variations in attendance requirements, scheduling, sequencing, grading, course content, or assessment;
- Facilitating the qualification and eligibility for enrollment, educational programs, and participation in extracurricular academic, athletic, and social activities;
- Facilitating the on-time graduation of children of military families;
- Providing for the adoption and enforcement of administrative rules implementing the provisions of this compact;
- Providing for the uniform collection and sharing of information between and among member states, schools, and military families under this compact;
- Promoting coordination between this compact and other compacts affecting military children;

- Promoting flexibility and cooperation between the educational system, parents, and the student in order to achieve educational success for the student.

N.H. Session Laws Ch. 308 (2014) (N.H. RSA 110-D:2).

## 2. Definitions

The new law contains several definitions, including, but not limited to:

- Active Duty: Full-time duty status in the active uniformed service of the United States including members of the National Guard and Reserve on active duty orders pursuant to 10 U.S.C. sections 1209 and 1211.<sup>2</sup>
- Children of Military Families: A school- aged child or school- aged children, enrolled in kindergarten through grade 12, in the household of an active duty member.
- Cocurricular: include those activities which are designed to supplement and enrich regular academic programs of study, provide opportunities for social development, and encourage participation in clubs, athletics, performing groups, and services to school and community, as defined in RSA 193:1-c.<sup>3</sup>
- Deployment: The period one month prior to the service members' departure from their home station on military orders through 6 months after return to their home station.
- Education records: Those official records, files, and data directly related to a student and maintained by the school or local education agency, including but not limited to records encompassing all the material kept in the student's cumulative folder such as general identifying data, records of attendance and of academic work completed, records of achievement and results of evaluative tests, health data, disciplinary status, test protocols, and individualized education programs.

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<sup>2</sup> 10 U.S.C. 1211 pertains to service members who are "on the temporary disability retired list."

<sup>3</sup> "Cocurricular shall include those activities which are designed to supplement and enrich regular academic programs of study, provide opportunities for social development, and encourage participation in clubs, athletics, performing groups, and service to school and community." RSA 193:1-c.

- Local education agency: A public authority legally constituted by the state as an administrative agency to provide control of and direction for kindergarten through grade 12 public educational institutions.
- Military installation: A base, camp, post, station, yard, center homeport facility for ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility, which is located within any of the several states, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Northern Marianas Islands, and any other U.S. territory. Such term does not include any facility used primarily for civil works, rivers and harbors projects, or flood control projects.
- Receiving state: The state to which a child of a military family is sent, brought, or caused to be sent or brought.
- Sending state: The state from which a child of a military family is sent, brought, or caused to be sent or brought.
- Student: The child of a military family for whom the local education agency receives public funding and who is formally enrolled in kindergarten through grade 12.
- Transition: (a) The formal and physical process of transferring from school to school; or (b) the period of time in which a student moves from one school in the sending state to another school in the receiving state.
- Uniformed Service(s): The Army, Navy, Air Force, Marine Corps, Coast Guard, as well as the Commissioned Corps of the National Oceanic and Atmospheric Administration, and Public Health Services.
- Veteran: A person who served in the uniformed services and who was discharged or released there from under conditions other than dishonorable.

N.H. Session Laws Ch. 308 (2014) (N.H. RSA 110-D:3).

### **3. Applicability**

The Compact applies to the children of:

- Active duty members of the uniformed services as defined in this compact, including members of the National Guard and Reserve on active duty orders pursuant to 10 U.S.C. section 1209 and 1211;
- Members or veterans of the uniformed services who are severely injured and medically discharged or retired for a period of one year after medical discharge or retirement; and
- Members of the uniformed services who die on active duty or as a result of injuries sustained on active duty for a period of one year after death.

The Compact does not apply to:

- Inactive members of the national guard and military reserves;
- Members of the uniformed services now retired, except as provided above;
- Veterans of the uniformed services, except as provided above; and
- Other United States Department of Defense personnel and other federal agency civilian and contract employees not defined as active duty members of the uniformed services.

N.H. Session Laws Ch. 308 (2014) (N.H. RSA 110-D:4).

#### **4. Educational Records and Enrollment**

##### **a. Educational Records**

If an official education record cannot be released to the parents for the purpose of the transfer, then the custodian of records in the sending state shall prepare and furnish to the parent a complete set of unofficial educational records containing uniform information as determined by the Interstate Commission. Upon receipt of the unofficial education records by a school in the receiving state, the school shall enroll and appropriately place the student based on the information provided in the unofficial records pending validation by the official records, as quickly as possible.

Simultaneous with the enrollment and conditional placement of the student, the school in the receiving state shall request the student's official

education record from the school in the sending state. Upon receipt of this request, the school in the sending state will process and furnish the official education records to the school in the receiving state within 10 days or within such time as is reasonably determined under the rules promulgated by the Interstate Commission.

#### **b. Immunizations**

The State may give 30 days from the date of enrollment, or within such time as is reasonably determined under rules promulgated by the Interstate Commission, for students to obtain any required immunizations in accordance with RSA 141-C:20-a. For a series of immunizations, initial vaccinations shall be obtained within 30 days or within such time as is reasonably determined under rules promulgated by the Interstate Commission.

#### **c. Kindergarten and First Grade Entrance Age**

The Compact provides that students “shall be allowed to continue their enrollment at grade level in the receiving state commensurate with their grade level, including kindergarten, from a local education agency in the sending state at the time of transition, regardless of age. A student that has satisfactorily completed the prerequisite grade level in the local education agency in the sending state shall be eligible for enrollment in the next highest grade level in the receiving state, regardless of age. A student transferring after the start of the school year in the receiving state shall enter the school in the receiving state on their validated level from an accredited school in the sending state.”

N.H. Session Laws Ch. 308 (2014) (N.H. RSA 110-D:5).

### **5. Placement and Attendance**

When a student transfers before or during the school year, the receiving state school shall initially honor placement of the student in educational courses based on the student’s enrollment in the sending state school and/or educational assessments conducted at the school in the sending state if the courses are offered. Course placement includes, but is not limited to “Honors, International Baccalaureate, Advanced Placement, vocational, technical, and career pathways courses.” Continuing the student’s academic program from the previous school and promoting placement in academically and career challenging courses should be paramount when considering placement. This does not preclude the school in the receiving state from performing subsequent evaluations to ensure appropriate placement and continued enrollment of the student in the course or courses.

The receiving state school shall initially honor placement of the student in educational programs based on current educational assessments conducted at

the school in the sending state or participation/placement in like programs in the sending state. Such programs include, but are not limited to, gifted and talented programs, remedial services, and English Language Learner (ELL). This does not preclude the school in the receiving state from performing subsequent evaluations to ensure appropriate placement of the student. The school placement process should promote and measure knowledge and skills that lead students to meet learning competencies across content domains.

If a student has been identified under the IDEA, the receiving state “shall initially provide comparable services to a student . . . based on his or her current Individualized Education Program.” The receiving state must also make reasonable accommodations and modifications to address the needs of incoming students with disabilities who have an existing Section 504 plan. “This does not preclude the school in the receiving state from performing subsequent evaluations to ensure appropriate placement of the student.”

Local education agency administrative officials “shall have flexibility in waiving course/program prerequisites, or other preconditions for placement in courses/programs offered under the jurisdiction of the local education agency.”

A student whose parent or guardian is an active duty member of the uniformed services and has been called to duty for, is on leave from, or immediately returned from deployment to a combat zone or combat support posting, shall be granted additional excused absences at the discretion of the local education agency superintendent to visit with his parent/guardian relative to such leave or deployment.

N.H. Session Laws Ch. 308 (2014) (N.H. RSA 110-D:6).

## **6. Eligibility for Enrollment**

The Compact makes clear that a “Special power of attorney, relative to guardianship of a child of a military family and executed under applicable law, shall be sufficient for the purposes of enrollment and all other actions requiring parental participation and consent.”

Districts are prohibited from charging tuition to a transitioning military child placed in the care of a non-custodial parent or other person standing in loco parentis who lives in a jurisdiction other than that of the custodial parent.

A transitioning military child, placed in the care of a noncustodial parent or other person standing in loco parentis who lives in a jurisdiction other than that of the custodial parent, may continue to attend the school in which he/she was enrolled while residing with the custodial parent.

State and local education agencies are required to facilitate the opportunity for transitioning military children’s inclusion in cocurricular activities, regardless of application deadlines, to the extent they are otherwise qualified and eligible.

N.H. Session Laws Ch. 308 (2014) (N.H. RSA 110-D:7).

The Compact provides another exception to the “residency” requirements set forth in RSA 193:12, by allowing for a “special power of attorney” for purposes of student enrollment.

### **C. 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.<sup>4</sup> See 42 U.S.C. §11431-11434(a). Sections 11431 through 11434(a), collectively, are referred to as “Subtitle B - Education for Homeless Children and Youths.”

One of the stated purposes of this law is to 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.

To that end, 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.

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.

42 U.S.C. § 11431.

#### **1. Defining the Homeless Child and Youth: The Federal Definition**

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<sup>4</sup> The free, appropriate public education provisions of the McKinney-Vento Homeless Act apply only to states that file plans agreeing to comply with such provisions. See 42 U.S.C. § 11432(a), (b), (g)(1), (3).

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 youths? 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.

42 U.S.C. § 11434a.

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.”

## 2. Defining the Homeless Child and Youth: The State Definition

As indicated above, New Hampshire has a compulsory residency requirement as a component of the state's compulsory school attendance laws. See N.H. R.S.A. 193:1.

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. See N.H. R.S.A. 193:12, IV.

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.

Regrettably, the State 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 statute authorizes the Commissioner of the Department of Education, or designee, to decide residency issues for all pupils, except those disputes involving homeless children and youths. N.H. R.S.A. 193:12, VI(a).

The New Hampshire Department of Education has adopted a dispute resolution process pertaining to homeless students.<sup>5</sup> See McKinney-Vento School Enrollment Requirements and New Hampshire Department of Education Homeless Education Dispute Resolution Process, available at: [http://www.education.nh.gov/instruction/integrated/documents/homeless\\_dispute\\_process.pdf](http://www.education.nh.gov/instruction/integrated/documents/homeless_dispute_process.pdf), Revised December 2011 (accessed August 20, 2014).

The DOE has adopted a three-step process:

- **Step One: School Enrollment.** School enrollment of a homeless child or youth shall be determined by the parent, guardian, student of lawful age, or unaccompanied youth. To the extent feasible, the student will be enrolled in the school of origin. The school of origin is defined as: The school last attended by the child or youth when permanently housed or the last school in which the child or youth was enrolled. If placement in the school of origin is not feasible,

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<sup>5</sup> This process was last revised in December 2011; this version predates the revisions to RSA 193:12, IV(a).

or is against the wishes of the parent, guardian, student of lawful age, or unaccompanied youth, the student will be enrolled in the school serving the community where the child or youth temporarily resides.

- **Step Two: Enrollment Dispute.** Each District shall have a policy for the resolution of disputes pertaining to homeless children and youths. If an enrollment dispute develops regarding the enrollment options available under the McKinney-Vento Act, the child or youth shall be immediately admitted to the school in which enrollment is sought, pending resolution of the dispute.
  - Resolution of the dispute shall be facilitated by the Superintendent or designee as expeditiously as possible in accord with the McKinney-Vento requirements and the district's dispute policy.
  - If more than one school district is involved, the Superintendents shall jointly make the decision.
  - A written explanation of the decision regarding school enrollment shall be provided to the parent, guardian, student of lawful age, or unaccompanied youth, including a statement regarding the right to appeal the decision to the New Hampshire Department of Education.
- **Step Three: Appeal Process.** When an agreement cannot be reached, the aggrieved party shall submit a written request for dispute resolution to the New Hampshire Department of Education. The Commissioner of the Department of Education, or designee, shall make a temporary order within 14 days of the notice of the residency dispute. Such determination shall remain in effect pending the determination of the State Board of Education.

### 3. 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. 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.

42 U.S.C. § 11432(g)(3)(A).

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. 42 U.S.C. § 11432(g)(3)(B).

*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.”

See Education for Homeless Children and Youth Programs, Title VII-B of the McKinney-Vento Homeless Assistance Act, as amended by the No Child Left Behind Act of 2011, Non-Regulatory Guidance. U.S. Department of Education, July 2004 at 14, available at: <http://www2.ed.gov/programs/homeless/guidance.pdf> (accessed Aug. 20, 2014).

#### **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.

#### **4. 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.” 42 U.S.C. § 11432(g)(3)(F). 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.” 42 U.S.C. § 11432(g)(3)(G).

The State Attorney General has opined that a homeless student who does not live with his/her parents/guardians may attend school in the district that he/she is “actually living,” regardless of whether his/her parents are also living in that district. See Office of the Attorney General, Opinion No. 90-010 (N.H. April 10, 1991). The opinion notes that “a school district must educate a [homeless] student who is actually living within the district, (that is, eating and sleeping) regardless of whether the student is living with a parent.”

#### **5. 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, VII 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.

42 U.S.C. § 11432(g)(3)(J).

Recently, the Office of Special Education Programs ("OSEP") opined that if a homeless child has a disability under the IDEA, and requires transportation as a related service, than IDEA funds can be utilized to provide transportation to that child. See Letter to Bowman, 61 IDELR 233 (OSEP Aug. 5, 2013). OSEP also opined that homeless students – without disabilities – could be transported on "special education" buses, provided that there is sufficient space on the buses, and that the buses are not purchased with the intent to provide transportation to non-special education students. OSEP stated "[u]nder circumstances in which buses are purchased exclusively to transport children with disabilities but 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, buses purchased with IDEA funds may be used to transport nondisabled homeless children under the permissive use of funds provision because the use of IDEA Part B funds in this situation would confer an incidental benefit on the nondisabled homeless children."

## **6. 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.

#### **IV. Resolving Residency Disputes**

The Commissioner of the DOE is responsible for deciding residency disputes for all pupils, excluding homeless children and youths. If more than one school district is involved, or the parents cannot agree on the residence of a minor child, the respective superintendents shall jointly make the decision. If an agreement cannot be reached, the Commissioner shall make a determination within 30 days of receipt of notice of the dispute. The time for determination of the dispute may be extended with agreement of the parties involved. During the pendency of the dispute, districts are prohibited from denying a pupil attendance or implementation of an existing IEP. RSA 193:12, VI(a). The pupil must be permitted to remain in attendance in the school of origin during the pendency of the dispute; if the child does not have a school of origin located in NH, then he/she must be admitted to the district where she/he is temporarily resided. RSA 193:12, VI(b).

When a dispute arises regarding the residency of a child who is in the legal custody or guardianship of DHHS, or who has been placed pursuant to a court order, DHHS shall request (in writing) that the superintendents involved resolve the dispute. If the issue remains unresolved after 10 days, then DHHS shall request that the Commissioner of the Department of Education (DOE) determine the residence of the child. The child must be permitted to attend school in the district where the child has been placed, pending the resolution of the dispute. RSA 193:12, V-b.

A pupil who, after notice, attends or visits a school which the pupil has no right to attend, or interrupts or disturbs such school, shall be guilty of a violation (first offense) or a misdemeanor (any subsequent offense). RSA 193:15.

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