# A Closer Look at the Legal Requirements Pertaining to Residency and Transportation

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## A Word of Caution

No two cases are exactly alike. This material is designed to provide educators with a broad understanding of the law pertaining to residency requirements and transportation. This material does not include every aspect of the law. You are strongly encouraged to seek a legal opinion from your school district's legal counsel regarding any specific case.

## I. OVERVIEW

The purpose of this material is to provide the administrator with an overview of the law pertaining to residency for school attendance purposes, as well as the district's various transportation duties. This material does not cover all aspects of the law, and you are encouraged to seek advice from your district's legal counsel regarding any specific case.

## II. STUDENT RESIDENCY

### A. Defining Legal Residence

State law prohibits any person from "attend[ing] school, or sending a pupil to the school, in any district of which the pupil is not a legal resident, without the consent of the school district or of the school board," unless otherwise permitted by RSA 193:12 or RSA 193:28.[1] RSA 193:12, I. These exceptions are discussed in greater detail, below.

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.

A pupil's legal residence is as follows:

- If the student is a minor, legal residence is where his or her parents reside, except that:

[1] RSA 193:28 states: "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 of school age, shall be entitled to attend:

I. 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

II. 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.

- If the pupil's parents live apart and are not divorced, then the pupil's legal residence is with the parent with whom the child resides.

- If a divorce decree awards joint decision making responsibility or joint legal custody, the legal residence of the 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 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 parent has sole or primary residential responsibility, or physical custody, then the pupil resides with that parent.

    - If the parent with sole or primary residential responsibility or physical custody lives outside of the state of New Hampshire, then the pupil does not reside in New Hampshire.

- 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.

➢ 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. 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(s). 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.

RSA 193:12, II.

### 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.

#### 1. When Can a Non-Resident Student Attend School in the District?

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.

### 2. 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.

### C. Homeless Students

The McKinney-Vento Homeless Assistance Act exists to provide a federal response to the national problem of homelessness. The Act contains provisions 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."

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.

42 U.S.C. § 11431.

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."

### 1. 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? The term "Homeless Children and Youth" is defined 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(2).

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

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. RSA 193:12, IV.

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:

- ✓ 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;

- ✓ 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, 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.

The New Hampshire Department of Education has adopted a policy "to provide guidance to local school districts in implementing the dispute resolution process for homeless children and youths when that decision is not or cannot be made at the local level." 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, revised December 2011 (accessed June 17, 2013). The policy contains the following three step process:

1. School enrollment. School enrollment 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," which 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, or 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."

2. Enrollment dispute. Each school district must have a policy for the resolution of disputes involving 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.

    a. Resolution of the dispute shall be facilitated by the Superintendent or designee as expeditiously as possible in accord with McKinney-Vento requirements and the district's policy.

    b. If more than one district is involved, the Superintendents shall jointly make such a decision.

    c. In the case of an unaccompanied youth, the Local Homeless Education Liaison shall assist the youth in the dispute process.

    d. A written explanation of the Superintendent's decision regarding school enrollment shall be provided to the parent, guardian, student of lawful age, or unaccompanied youth, including a statement of the right to appeal to the DOE.

3. Appeal process. When an agreement cannot be reached, the aggrieved party shall submit a written request for dispute resolution to the DOE. The Commissioner shall make a temporary order within 14 days of notice of the residency dispute. The decision shall remain in effect pending the decision of the State Board of Education. In the case of an unaccompanied youth, the Local Homeless Education Liaison shall assist the youth in the appeal process. Any person aggrieved by the State Board's decision may appeal to a court of competent jurisdiction.

### 3. LEA Enrollment and Attendance Requirements

#### a. **"Best interest" determination**.

The law 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. 42 U.S.C. 11432(g)(3)(A). These duties exist regardless of whether or not an LEA receives a McKinney-Vento subgrant. 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:

- 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

- 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. 193:12 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."

See Education for Homeless Children and Youth Program, Title VII-B of the McKinney-Vento Homeless Assistance Act, As Amended by the No Child Left Behind Act of 2001, Non-Regulatory Guidance (U.S. DOE), July 2004, available at: http://www.ed.gov/programs/homeless/guidance.doc (accessed June 17, 2013).

#### 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." 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.

## III. TRANSPORTATION DUTIES

### A. Statutory Requirements

Districts are required to provide transportation to all pupils in grades 1 through 8 who live more than 2 miles from the school to which they are assigned. RSA 189:6.

Districts may provide transportation to kindergarten pupils, pupils in grades 8 through 12, or to pupils residing less than 2 miles from the school to which they are assigned, when providing transportation "is appropriate," or when the district has been "directed" to furnish transportation by the Commissioner of Education. RSA 189:6. Pupils attending approved private schools are entitled to the same transportation privileges within the town or district as are provided for pupils in public schools. RSA 189:9. In addition, Districts may provide transportation to pupils "between schools and legally-operated before-and after-school programs." RSA 189:6-b.

However, when a divorce decree provides for a child's residence, the school district is not required to transport "a child to another school in the school district in which the child resides or beyond the geographical limits of the school district in which the child resides." RSA 193:12, II(a)(2)(B). The New Hampshire Legislature has recently passed a bill, HB 160, which further clarifies that school districts are not required to transport students "beyond the designated attendance area for the school to which the child is assigned." See HB 160 (2013) (available at: http://www.gencourt.state.nh.us/legislation/2013/HB0160.html) (accessed June 17, 2013).

Transportation is a related service under the IDEA. 20 U.S.C. 1401(26)(A); 34 C.F.R. 300.34(a); RSA 186-C:2(V)(a)(1); Ed 1102.04(q). Therefore, in addition to the State transportation laws, districts must provide transportation to students with disabilities when their IEP teams determine that transportation is necessary to enable them to receive a free, appropriate public education [FAPE]. See 34 C.F.R. 300.34(a); IEP Teams are responsible for determine whether transportation is a necessary related service, and whether supports and/or modifications are needed in order for a child to be transported. Fed. Reg. Vol. 71, No. 156 (Aug. 14, 2006).

When a Team determines that a student requires transportation as a related service, the duty to transport includes: travel to and from school and between schools, travel in and around school buildings and specialized equipment (adapted buses, lifts, and ramps). 34 C.F.R. § 300.34(16).

Districts also have a transportation duty under Section 504. 34 CFR 104.33(c)(2). When a district places a qualified student with a disability out-of-district, or refers such student for aid, benefits, or services not operated or provided by the district, then the district must ensure that adequate transportation to and from the aid, benefits, or services is provided at no greater cost than would be incurred by the person or his/her parents or guardian if the person were placed in the aid, benefits, or services operated by the district. However, when a parent declines FAPE, and instead opts to place a student privately, districts are generally not obligated to provide transportation under Section 504. See Hinds County (MS) School District, 20 IDELR 1175 (OCR 1993).

## B. The Regulatory Requirements

The 2008 amendments to the New Hampshire Rules for the Education of Children with Disabilities altered the requirements pertaining to transporting students with disabilities. See Ed 1109.02. The requirements of Ed 1109.02 apply whenever a child is transported to or from school or a school activity by someone, other than his or her parent, who is under contract or a reimbursement agreement with the District. Ed 1109.02(d) (emphasis added). Parents who are transporting their own children are not required to meet the standards of Ed 1109.02(a) – (b). Ed 1109.02(c).

Pursuant to Ed 1109.02, "[a]ll vehicles[2] used to transport children with disabilities provided by or on behalf of a school district shall be maintained in safe working order and be inspected and licensed according to the New Hampshire Department of Safety Rules as provided in Saf-C 1307[3] and RSA 266:7.[4]" Ed 1109.02(a). In addition, "[a]ll drivers of such vehicles shall be licensed according to department of safety rules." Ed 1109.02(b).

These requirements apply to "[a]ny contracted providers of transportation for children with disabilities." Ed 1109.02(d) (emphasis added). However, "[e]ach person who transports children other than their own in a private passenger vehicle to or from school or a school related activity shall not be required to obtain a school bus driver's certificate pursuant to RSA 263:29[5] and these rules, as long as he/she is not under

[2] A vehicle is a "mechanical device in, upon or by which any person or property is or may be transported or drawn upon a way, excepting devises used exclusively upon stationary rails or tracks." RSA 259:122.

[3] Saf-C 1307 contains rules pertaining to school bus vehicle maintenance and inspection. A school bus is "a vehicle owned by a public or governmental agency, or a privately owned vehicle, including a station wagon, suburban, panel body vehicle and vehicle converted to a school bus, but excluding a passenger vehicle, employed solely in transporting school children to and from school or school activities by virtue of a contract with a municipality, municipal board or school board authorities." RSA 259:96; see also Saf-C 1302.14 (defining school bus by reference to RSA 259:96).

[4] Pursuant to RSA 266:7, "[t]he director [of the division of motor vehicles of the department of safety] shall have authority, through his duly authorized agents, to inspect any motor vehicle used for the purpose of transporting school children to any school to determine its fitness for such purpose, and if he finds that such vehicle is unfit, he may refuse to permit it to be designated as a school bus. Said inspection shall be made before any motor vehicle transporting school children to any school is used for said transportation. The director shall cause to be issued some identification if such vehicle is approved as a school bus." (Emphasis added).

[5] RSA 263:29 states:

> The owner of any school bus transporting children to and from any private or public school . . . shall submit to the authorities in the town or city or to the organization which pays for said transportation a list of names of the persons who are to drive the buses used in such transportation. . . . No person shall drive a school bus unless he has satisfactorily passed the special examination for said driving and received from the division a special school bus driver's certificate. . . .

contract or reimbursement agreement with a municipality." Ed 1109.02(e) (emphasis added); see also Saf-C 1304.05(b) (Individuals who transport children in a private passenger vehicle to or from school or a school related activity are not required to obtain a school bus driver's certificate, provided that they are not under contract or reimbursement agreement with a municipality).

Thus, pursuant to Ed 1109.02, the transportation rules apply to the following individuals:

- Contracted providers of transportation for children with disabilities;
- Individuals who transport children in a private passenger vehicle to or from school, who are under contract with a municipality; and,
- Individuals who transport children in a private passenger vehicle to or from school related activities, who are under a reimbursement agreement with a municipality.

When the transportation regulations apply, districts must ensure that all drivers obtain a school bus driver's certificate pursuant to RSA 263:29, and that the vehicles used to transport the children are inspected and licensed in accord with Saf-C 1307 and RSA 266:7.

Private schools and non-district programs must "provide all transportation required for the implementation of any IEP, or portion of any IEP, which the program has agreed to implement."[6] Ed 1114.06(c). When private schools and non-district programs provide transportation, they must comply with Ed 1109.02. Ed 1114.06(d).

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:

[6] It is worth noting that the definition of "services plan," includes "any transportation necessary consistent with 34 CFR 300.132." Ed 1102.05(e). Thus, in some cases, the duty to transport may turn on the contents of a services plan.

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.

## C. Transportation Duties for Students with Disabilities

### 1. Case Studies

#### a. After-School Activities

As indicated above, school districts are permitted to transport all pupils between schools and legally-operating before-and-after-school programs, upon the approval of the school district. See RSA 189:6-b (this provision requires approval by the legislative body at an annual meeting). In the event that the district has not adopted this provision, it may still be obligated to provide specialized transportation to students with disabilities.

The laws and regulations pertaining to transportation in a school bus apply when transporting students to and from school or school activities. See e.g. RSA 259:96; Ed 1109.02(e); Saf-C 1304.05(b). A school activity is "an event or sports activity involving pupils, to include intramural events, sponsored or approved by a school, school district, school board or school administrative unit." Saf-C 1302.17. When off-site extracurricular, transition or community activities are part of an IEP, they would very likely be considered "school activities," and the transportation laws and regulations would apply.

In the case of Bethpage (NY) Union Free School District, 16 IDELR 1086 (OCR 1990), a parent complained that a district discriminated against her son by failing to provide late bus transportation that would enable him to participate in after-school activities at his out-of-district placement. The student had been placed by the district in a private, out-of-district placement. Parent requested that the district provide late bus transportation to the student so that he could participate in the services offered at the out-of-district placement. The district denied that request, and the parent filed a complaint with the Office for Civil Rights ("OCR").

OCR found that the district had a policy that it would provide after-school late bus transportation to students who participated in extracurricular activities at public and/or private schools, if at least 5 students requested transportation. However, the policy did not apply because less than 5 students were requesting transportation. In addition, participation in after-school activities was not a component of the student's IEP.

Nevertheless, OCR determined that the district's failure to provide the student with late bus transportation violated Section 504 by denying him an equal opportunity to participate in extracurricular services and activities.

Similarly, in the case of Board of Education of the Roslyn Union Free School District, 27 IDELR 1113 (NY SEA 1998), the State Educational Agency reversed a decision of a hearing officer, and held that a district was obligated to provide transportation from his out-of-district placement to an after-school program, and from the after-school program to his home. The SEA found that the district offers late bus services to students who attend its after-school programs. The SEA also found that the student had been placed by the district, and that the out-of-district placement could not be used to deny the student transportation services that he would have received had he been attending the district schools.

> *Key Point: These cases illustrate that districts cannot place a student out-of-district, and then deny the student the opportunity to participate in after-school activities by refusing to provide late-bus transportation, which was offered to other students attending district schools.*

In the case of Department of Education, State of Hawaii, 46 IDELR 266 (HI SEA 2006), the parents requested due process, alleging that their child's IEP did not offer a FAPE because it did not include appropriate transportation to and from after school programming. The Hearing Officer found that the district had provided transportation to the student, but that the student's team met on September 26, 2005, and rejected the yellow school bus as a method of transportation because it was not age appropriate for the 17-year old student. However, following that meeting, the student's transportation plan was not altered. Thus, the student was denied a FAPE.

The Hearing Officer ordered that the team convene to determine an appropriate mode of transportation, that was age appropriate and "that individualized sites to address the issues in the student's behavior plan."

Finally, in the case of Orange Grove (TX) Independent School District, 25 IDELR 991 (OCR 1996), OCR concluded that the district was not obligated to provide evening transportation to a student with a disability. Parents filed a complaint with OCR, alleging that the district violated section 504 by failing to provide evening bus transportation to her son on two days a week, when he attended school sponsored tutoring services related to his disability. OCR found that the student received tutoring during the school day, and not after school. Thus, there was no educational basis for the parents' request for evening transportation, and the district did not violate Section 504.

### b. Transportation During the Summer Months

Transportation obligations for students with disabilities do not end at the end of the school year. In the case of Walnut Valley Unified School District, 22 IDELR 1169

(Ca SEA 1995), the district placed a student at a day treatment program for mental health services. The program was scheduled for six months, commencing on May 15, 1995. The district agreed to provide transportation to and from the program during the regular school year, but informed the parents that it would not transport during the summer months. The parents requested due process, and the hearing officer found that the district was required to provide transportation. This decision was based on the fact that the student required the program, and that she was not able to participate in the program unless she received transportation from the district. Thus, the district was obligated to provide transportation to and from the program.

### c. Transportation to Locations Other than Home

In the case of Fick v. Sioux Falls Sch. Dist., 39 IDELR 151, 337 F.3d 968 (8th Cir. 2003), the court held that the district did not have a duty to transport a student to a day care center, because transportation to that location was not necessary for the student to benefit from her IEP. In that case, parent requested transportation to a day care center (rather than the child's home), and the district refused, indicating that the requested location did not comply with its transportation policies. The parent renewed the request at an IEP meeting; that request was again denied, and ultimately, the matter went to due process.

Pursuant to its policies, the district had created "geographical 'cluster sites'" which allowed children residing within the cluster sites to be with the same neighborhood peer group as they moved through school. The district used those cluster sites to establish transportation policies for all children who were eligible for transportation to/from school. Students were allowed one designated pick-up site before school and one drop-off site after school. The addresses did not have to be the same, but they had to be within the child's cluster site. However, if required by the child's IEP, the district would transport a child outside of the cluster site.

In this case, the day care center was located outside of the child's cluster site, and the request to change the drop-off location was made for personal, rather than educational, reasons. Thus, the court held that the district did not deny the student a FAPE by refusing to transport the student to a location outside of her cluster site.

> *Key Point: Districts may apply facially neutral policies, including transportation policies to children with disabilities, without violating the law, if the reason for the request to deviate from a policy is not based on the child's educational needs. It is likely that the outcome of this case would have been different if the parents' request was based on the student's educational needs.*

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