

August 24, 2008

Response to “Questions and Answers on Special Education and Homelessness”
of the U.S. Department of Education’s
Office of Special Education and Rehabilitative Services (OSERS)

In February 2008, OSERS published a Question and Answer document regarding special education and homelessness. The document is available at <http://www.naehcy.org/guidance.html> or <http://wiki.nlchp.org/display/Manual/Education+Statutory+Framework>

It is our hope that the OSERS Q&A will address many of the challenges schools have encountered in ensuring that students with disabilities in homeless situations receive a free, appropriate public education. However, there are several areas where the Q&A could be clarified to avoid confusion and the denial of rights provided to students and parents under the McKinney-Vento Act and the Individuals with Disabilities Education Act (IDEA). There are also several areas where further guidance would be helpful.

To bring these concerns to the attention of OSERS, NAEHCY and NLCHP submitted comments to the Q&A in August 2008. It is our hope that OSERS will consider our comments and revise the Q&A. The substance of our comments and concerns is outlined below. For more information, please contact Patricia Julianelle at pjulianelle@naehcy.org or Eric Tars at etars@nlchp.org or 202-638-2535.

Comments on the Question and Answer document

1. Question D-7, pages 22-23

This question discusses how schools respond to a lack of records for a student with disabilities who is homeless. It includes the following statement:

“If, after taking these reasonable steps [to obtain records], the new public agency is not able to obtain the IEP [Individualized Education Program] from the previous public agency or from the parent, the new public agency is not required to provide services to the child pursuant to 34 CFR §300.323(f)(2). This is because the new public agency, in consultation with the parents, would be unable to determine what constitutes comparable services for the child, since that determination must be based on the services contained in the child's IEP from the previous public agency. However, the new public agency must place the child in the regular school program and conduct an evaluation and eligibility determination pursuant to 34 CFR §§300.304 through 300.306, if determined to be necessary by the new public agency.”

This guidance has the potential to result in many students with current IEPs not receiving services. Unfortunately (and despite legal requirements in both IDEA and McKinney-Vento), it is common for records transfers to be delayed for children and youth experiencing homelessness. To avoid students being placed in inappropriate classrooms, many school districts employ interim IEPs and/or provide special education and related services based upon oral reports from parents and previous teachers of what the current IEP requires. This challenge is particularly acute for survivors of natural disasters (where school records may have been destroyed) and domestic violence (where parents may be fearful that abusers will follow records transfers to find victims).

We suggest that the Q&A address these issues and specify that school districts should develop interim IEPs when school records are not forthcoming. For example, after Hurricane Katrina, many school districts developed and implemented interim IEPs in a matter of hours or days. School districts have reacted similarly to mudslides, tornados, and other situations where school records have been destroyed or delayed. As written, the Q&A could be interpreted to imply that a student with a severe disability and a current (but lost or delayed) IEP could sit in a regular classroom for the entire assessment period—in some states, that could be up to 120 school days. Such an outcome would be highly detrimental to the special needs student, his or her classmates, and his or her teachers.

2. Question A-1, page 4

This question describes some of McKinney-Vento’s basic provisions, including the right to immediate enrollment. We suggest specifically mentioning unaccompanied youth’s right to immediate enrollment without proof of guardianship, along with the other immediate enrollment information in this section. Many special education staff will not be aware of this requirement and, given IDEA’s strong provisions about parental rights, might deny enrollment for unaccompanied youth.

3. Question E-1, page 25

This question addresses how best interest determinations should be made to determine if a student with a disability who is homeless should attend the school of origin. It states:

“Under 34 CFR §300.116(a)(1), in determining the educational placement of a child with a disability, including a preschool child with a disability, each child’s placement decision must be made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of evaluation data, and placement options. Further, under 34 CFR §300.116(b)(1)-(2), the child’s placement is determined at least annually and is based on the child’s IEP. Therefore, the placement group from the public agency responsible for providing

FAPE to a homeless child with a disability would need to determine whether it would be appropriate to continue the child's placement in his or her school of origin or place the child in a new school."

This guidance does not provide information about the role of the parents, youth, and the McKinney-Vento homeless liaison in making best interest determinations and determining the school of attendance for students experiencing homelessness. It also does not explain the parent's or youth's right to dispute the determination and to be enrolled immediately in the school in which enrollment is sought while the dispute is resolved.

We have been informed of many cases in which special education teams unaware of the McKinney-Vento Act's requirements have refused to allow children experiencing homelessness to remain in their schools of origin. If IEP teams are allowed to make placement determinations for homeless students without the input of McKinney-Vento liaisons, as this guidance suggests, it is likely that many students' rights to attend the school of origin will not be honored. This will result in schools violating the McKinney-Vento Act and students being forced to transfer schools, sometimes multiple times in a single school year.

In addition, we have gathered information about confusion related to how McKinney-Vento's school of origin provisions interact with IDEA's requirement that students be educated in the least restrictive environment. It would be very helpful for the guidance to clarify that students who are homeless always have the right to attend the school of origin if that is in their best interest.

4. Question F-1, page 28

This question helps clarify the rights of unaccompanied youth. However, it provides incomplete information about who can serve as a temporary surrogate parent for unaccompanied youth:

"However, under 34 CFR §300.519(f), in the case of a child with a disability who is an unaccompanied homeless youth, appropriate staff of emergency shelters, transitional shelters, independent living programs and street outreach programs that are involved in the education or care of the child may be appointed as temporary surrogate parents without regard to the non-employee requirement in §300.519(d)(2)(i) until a surrogate parent can be appointed who is not an employee of an agency that is involved in the education or care of the child."

The preamble to the U.S. Department of Education's (USED) regulations clarified that State education agency (SEA) and Local education agency (LEA) employees are also included in this exception and can serve as temporary surrogates. (71 Fed. Reg. 46712) However, the guidance does not include that exception. We are aware of many school districts where

homeless liaisons are serving as temporary surrogates, using the preamble to the regulations as authority. This practice has proven highly successful in ensuring that unaccompanied youth receive timely evaluations and services. As written, the Q&A may undermine this successful practice.

5. Question E-2, pages 25-26

This question suggests that SEAs determine financial responsibility for children with disabilities who are attending the school of origin. It is likely to be of great assistance to school districts facing this issue. However, the Q&A does not clearly explain whether SEAs should address the issue on a case-by-case basis or establish generally-applicable policies. We suggest the answer be clarified to encourage SEAs to develop clear policies and that the answer explain any circumstances in which a case-by-case decision would be appropriate.

It would also be helpful for this question to address financial responsibility in cases where a school district has placed a student in a non-public school. The guidance should clarify that the non-public placement would then be considered the student's school of origin, and we would suggest the same role for the SEA in assigning fiscal responsibility for the placement.

2. Question D-4, page 19

This question addresses what steps schools must take to ensure parent participation in IEP meetings. Given the extreme poverty of homeless families and their high mobility, homeless parents confront greater challenges than most parents in attending IEP meetings. Therefore, we suggest that the guidance encourage schools to provide homeless parents with transportation to IEP meetings, offer flexible scheduling to accommodate work schedules and other obligations (such as searching for housing and other basic needs), and consider holding IEP meetings at locations in the community that are accessible by public transportation.

Areas for additional guidance

1. The Q&A does not address one complex and critical issue for students with disabilities experiencing homelessness: How to ensure that highly mobile students receive timely evaluations and services in light of IDEA's provisions that are designed to ensure that students found eligible for special education indeed need such services due to a disability. The provisions in question include requirements to consider a student's Response to Intervention (RTI), lack of appropriate instruction in reading or math, and economic, environmental or economic disadvantage in eligibility determinations. Although IDEA and regulations address schools' obligations to proceed with evaluations and services in these cases, confusion among

special education professionals about how to apply these rules to highly mobile students has resulted in countless students being denied a free, appropriate public education.¹

Unfortunately, many school districts refuse to evaluate students who have not attended school in their district for a set period of time or who have missed a certain number of school days, citing IDEA's provisions on lack of adequate instruction in reading and math. We have also heard of cases where school districts have refused to evaluate students experiencing homelessness until after they find permanent housing, citing the students' economic and environmental disadvantage as impediments to initiating the evaluation process. Finally, in many cases, the high mobility of students experiencing homelessness has resulted in evaluation delays of months or years; as students change schools, each successive school elects to provide interventions for a set period of time prior to conducting evaluations, but the student never completes the intervention period before moving on to a new school.

Such decisions to delay or deny evaluations and services are often made as a matter of policy, rather than as the result of a careful consideration of the individual student's circumstances. We are aware of countless cases of homeless students who have ultimately been evaluated and found eligible for special education and related services one or more school years after parental

¹ For example, a school district cannot find a student eligible for special education "if the determinant factor for such determination is lack of appropriate instruction in reading... [or] lack of instruction in math..." 20 USC 1414(b)(5); 34 CFR 300.306. However, IDEA clearly states that such issues must be considered "**upon completion of the administration of assessments and other evaluation measures.**" 20 USC 1414(b)(4).

Similarly, the definition of learning disability specifically does not include "a learning problem that is primarily the result of ... environmental, cultural, or economic disadvantage." 20 USC 1401(30). The evaluation process also must include a consideration of "data that demonstrate that prior to, or as a part of, the referral process, the child was provided appropriate instruction... and ...documentation of repeated assessments of achievement at reasonable intervals..." 34 CFR §300.309(b). However, environmental, cultural and economic disadvantage and lack of instruction must be considered "**as part of the evaluation.**" 34 CFR §300.309(b). Further, the regulations specify that the student must receive appropriate instruction "prior to, **or as a part of**, the referral process..." Even if a student has not attended enough school to receive appropriate instruction prior to the evaluations, that instruction can be provided during the evaluation process. Therefore, sporadic attendance prior to evaluations alone is not reason to deny evaluations.

Even students receiving RTI services have the right to be evaluated if requested by a parent. This requirement is clarified in the regulations, which state that: "The public agency must promptly request parental consent to evaluate the child to determine if the child needs special education and related services, and must adhere to the timeframes described in §§300.301 and 300.303... **whenever a child is referred for an evaluation.**" 34 CFR §300.309(c).

consent for evaluations was granted, due to such formulaic applications of RTI and the concepts of lack of instruction and environmental or economic disadvantage.

There are many practices that can ensure that highly mobile students who are eligible for special education and related services receive an appropriate education on a timely basis. For example, interventions can be instituted while evaluations are being conducted. Information about the student's performance in previous schools can be obtained from prior teachers. Classroom observations can be performed while evaluations are in process.

USED has issued a Q&A on RTI that provides helpful guidance on this issue. However, additional guidance specific to homeless students is essential to ensure that students with disabilities who are homeless receive a free, appropriate public education. Therefore, we suggest that the Q&A reiterate previous USED guidance on this issue. For example, the Q&A could reiterate that:

- a. Lack of appropriate instruction in reading or math must be considered “**upon completion of the administration of assessments and other evaluation measures,**” rather than operate as a gate-keeper to delay or deny evaluations.
- b. To ensure timely evaluation of highly mobile students, such students can receive appropriate instruction “**as a part of,** the referral process....”
- c. Environmental, cultural and economic disadvantage and lack of instruction must be considered “**as part of the evaluation,**” rather than operate as a gate-keeper to delay or deny evaluations.
- d. Particularly for highly mobile and homeless children, “although there are additional criteria and procedures for evaluating and identifying children suspected of having SLD [specific learning disability], the group must also comply with the procedures and timelines that apply to all evaluations, including evaluations for SLD. Evaluation of children suspected of having SLD must follow the same procedures and timeframes required in §§300.301 through 300.306, in addition to those in §§300.307 through 300.311.” 71 Fed. Reg. 46659
- e. For students with sporadic or sparse attendance due to homelessness, school districts should employ procedures similar to those suggested for home-schooled or private school students: “For children who attend private schools or charter schools or who are home-schooled, it may be necessary to obtain information from parents and teachers about the curricula used and the child's progress with various teaching strategies. The eligibility group also may need to use information from current classroom-based assessments or classroom observations. On the basis of the available information, the eligibility group may identify other information that is needed to determine whether the child's low achievement is due to a disability, and not primarily the

result of lack of appropriate instruction.... That could include evidence that the child was provided appropriate instruction either before, or as a part of, the referral process.” 71 Fed. Reg. 46656.

f. It is critical that evaluations be conducted in an expedited manner for homeless and highly mobile students, even when students are being provided RTI services:

“We also understand the commenters’ concerns that the requirements in §300.309(b) may result in untimely evaluations or services and that parents must be fully informed about the school’s concerns about their child’s progress and interventions provided by the school. Therefore, we will combine proposed §300.309(c) and (d), and revise the new §300.309(c) to ensure that the public agency promptly requests parental consent to evaluate a child suspected of having an SLD who has not made adequate progress when provided with appropriate instruction, which could include instruction in an RTI model, and whenever a child is referred for an evaluation. **We will also add a new §300.311(a)(7)(ii) to ensure that the parents of a child suspected of having an SLD ...are notified about ... their right to request an evaluation at any time. If parents request an evaluation and provide consent, the timeframe for evaluation begins and the information required in §300.309(b) must be collected (if it does not already exist) before the end of that period.**” 71 Fed. Reg. 46658.

g. Students who participate in RTI should be evaluated in shorter time frames, due to the quantity of data and information generated by the RTI process itself. “Models based on RTI typically evaluate the child’s response to instruction prior to the beginning of the evaluation time period described in 34 CFR §300.301(c)(1), and **generally do not require as long a time to complete an evaluation because of the amount of information already collected on the child’s achievement, including observation data.**” OSERS Questions and Answers on Response to Intervention (RTI) and Early Intervening Services (EIS).

h. States’ requirements to identify, evaluate and serve children with disabilities, particularly those who are homeless, must be executed expeditiously:

“However, the child find requirements in 34 CFR §300.111 and section 612(a)(3)(A) of the Act require that all children with disabilities in the State who are in need of special education and related services be identified, located, and evaluated. Therefore, it generally would not be acceptable for an LEA to wait several months to conduct an evaluation or to seek parental consent for an initial evaluation if the public agency suspects the child to be a child with a disability. If it is determined through the monitoring efforts of the Department or a State that there is a pattern or practice within a particular State or LEA of not conducting evaluations and making eligibility determinations in a timely manner, this could raise questions as to whether the State or LEA is in compliance with the Act.” OSERS Topic Brief: Identification of Specific Learning Disabilities.

Reiterating the statutes, regulations and guidance related to these issues, in the specific context of students experiencing homelessness, would help school districts execute their obligations efficiently and effectively and ensure that all students with disabilities receive a free, appropriate public education.

2. Confusion has arisen in disputes involving students with disabilities experiencing homelessness. Since both IDEA and McKinney-Vento have specific dispute resolution procedures and rights, it would be helpful for school districts to have guidance explaining how they should apply both processes and clarifying that students must receive their rights under both laws. For example, IDEA includes the “stay put” provision to maintain the child’s current placement while disputes are pending, while the McKinney-Vento Act gives students the right to be enrolled immediately in the school in which enrollment is sought while the dispute is resolved. These and other inconsistencies between dispute procedures can cause confusion, and additional guidance would assist school districts to resolve disputes involving children with disabilities who are homeless.