



IDEA Legal Issues: Corrections, Homeless, Foster Children

Presented by

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Overview of Presentation

- Given complex nature of issues related to children in foster care under ESSA, Fostering Connections Act, and Uninterrupted Scholars Act, presentation is a broad overview
- Also will touch on homeless student issues
- And, issues related to incarcerated youth

IDEA Students in Foster Care

- **Introductory Data (2013 USDOE/HHS Webinar):**

About 415,000 students in US

Average of 1-2 home changes per year

3/5 may have more than 5 school changes

More likely to be in low-achieving schools

Score more poorly on statewide tests

Tend to be behind-grade-level readers

Tend to be retained

IDEA Students in Foster Care

- **2008—Fostering Connections Act (42 U.S.C. §621)**

Requires child welfare agencies to ensure children in foster care who change schools are promptly enrolled in a new school with relevant school records

See USDOE/HHS's Guidance—*Ensuring Educational Stability for Children in Foster Care*, 116 LRP 27371 (June 23, 2016)

- **2008—Fostering Connections Act (42 U.S.C. §621)**

“Foster care” means 24-hr substitute care for children placed away from their parents and for whom a child welfare agency has placement and care duties

Includes tribal agencies if they have placement and care duties

- **2013—Uninterrupted Scholars Act (USA, 20 U.S.C. §1232g)**

Law amends FERPA:

Allows LEAs to disclose student education records, without parent consent, to a rep of a state or local child welfare agency responsible for care

Allows LEAs to disclose student education records, without parent notice, pursuant to court orders or subpoenas in specified types of legal cases (1232g(b)(2))

- **2013—Uninterrupted Scholars Act (USA, 20 U.S.C. §1232g)**

No written agreements needed between SEAs, LEAs, and child welfare agencies for records disclosure purposes (but may be considered for FERPA compliance)

Amendments apply to IDEA students

See Guidance on Amendments to the Family Educational Rights and Privacy Act by the Uninterrupted Scholars Act (FPCO/OSERS 5/21/2014)

- **2015—Every Student Succeeds Act (ESSA, 20 U.S.C. §6301, et seq.)**

Requires LEAs to work with child welfare agencies to ensure that foster children who change schools are promptly enrolled in new schools with records

Educational stability provisions take effect on December 10, 2016

Foster children are no longer within the definition of “homeless” under McKinney-Vento Act

- **2015—Every Student Succeeds Act (ESSA, 20 U.S.C. §6301, et seq.)**

ESSA requires SEAs to ensure that:

Child remains in “school of origin,” unless not in their best interest

“School of origin” is the school in which a child is enrolled at the time of placement in foster care

Can change with successive foster placements...

- **2015—Every Student Succeeds Act (ESSA, 20 U.S.C. §6301, et seq.)**

“Best interest” is determined based on the following factors:

- Appropriateness of current setting
- Proximity
- Child’s preference
- Parents’ preference
- Child’s attachment to school
- Placement of siblings
- Availability of needed services

- **2015—Every Student Succeeds Act (ESSA, 20 U.S.C. §6301, et seq.)**

How is “best interest” determined?

SEAs and LEAs are told to create a process for parties to participate in the best interest determination

Decision must be provided in writing to all relevant parties, in collaboration with child welfare agencies

Protocol should be created on how to make the determination

- **2015—Every Student Succeeds Act (ESSA, 20 U.S.C. §6301, et seq.)**

How is “best interest” determined?

For IDEA or §504 students, the relevant staff members should participate in the best interest process

And, LEA must ensure compliance with the LRE requirements (*Question*—Does the LEA have superior authority on determination in light of LRE mandate?...)

- **2015—Every Student Succeeds Act (ESSA, 20 U.S.C. §6301, et seq.)**

What if parties do not agree on best interest determination?

If there is disagreement, “the child welfare agency should be considered the final decision-maker in making the best interest determination (unless State law or policy states otherwise)

Question—If this creates an LRE violation, is LEA absolved?...

- **2015—Every Student Succeeds Act (ESSA, 20 U.S.C. §6301, et seq.)**

What if parties do not agree on best interest determination?

The guidance recommends a dispute resolution process be developed between SEA, LEA, and child welfare agencies

- **2015—Every Student Succeeds Act (ESSA, 20 U.S.C. §6301, et seq.)**

ESSA requires SEAs to ensure that:

When determined that school of origin is not in child's best interest, the child is "immediately enrolled" in a new school

Even if the child does not have the records normally required to enroll

- **2015—Every Student Succeeds Act (ESSA, 20 U.S.C. §6301, et seq.)**

ESSA requires LEAs to:

Collaborate with State and tribal child welfare agencies

Tailor procedures to unique local context (e.g., records-sharing, decision-making criteria, regular meetings)

- **2015—Every Student Succeeds Act (ESSA, 20 U.S.C. §6301, et seq.)**

ESSA educational stability provisions apply to **preschool** children in foster care (if the LEA offers preschool)

- **2015—Every Student Succeeds Act (ESSA, 20 U.S.C. §6301, et seq.)**

Special considerations for IDEA and §504 students (foster kids are about 3 times more likely to be in sp ed than non-foster peers):

- Timely and expedited evaluations and eligibility determinations
- Comparable services, including ESY (based on IDEA transfer student provisions)

- **2015—Every Student Succeeds Act (ESSA, 20 U.S.C. §6301, et seq.)**

Special considerations for IDEA and §504 students (foster kids are about 3 times more likely to be in sp ed than non-foster peers):

- Parent definition of IDEA includes foster parents, unless states or local entities prohibit the practice
- All requirements of IDEA and §504 otherwise apply

- **2015—Every Student Succeeds Act (ESSA, 20 U.S.C. §6301, et seq.)**

ESSA educational stability provisions do not apply once a student has exited foster care

But, SEAs and LEAs are encouraged to let kids stay in their existing school through at least the end of the academic year

- **2015—Every Student Succeeds Act (ESSA, 20 U.S.C. §6301, et seq.)**

Transportation Issues

Kids will often need transportation to remain in school of origin, or to go to “best interest” school

A potentially complicated issue...

ESSA encourages collaborative solutions among agencies

- **2015—Every Student Succeeds Act (ESSA, 20 U.S.C. §6301, et seq.)**

Transportation Issues

A dispute resolution process should be created for these problems

Procedures should be developed by 12/10/16 on how transporting will happen and how it will be funded

ESSA encourages collaborative solutions among agencies

- **2015—Every Student Succeeds Act (ESSA, 20 U.S.C. §6301, et seq.)**

Transportation Issues

Procedures must ensure transportation is “cost-effective”

In determining cost-effectiveness, LEA must consider reasonableness of costs, factoring distance, length of travel time, appropriate mode depending on child development

- **2015—Every Student Succeeds Act (ESSA, 20 U.S.C. §6301, et seq.)**

Transportation Issues (cost-effectiveness)

Parties could explore:

- Dropping off child at closest regular school bus stop
- Public transportation
- Parent transportation
- Special transportation (if proper under IDEA rules)

- **2015—Every Student Succeeds Act (ESSA, 20 U.S.C. §6301, et seq.)**

Transportation Issues

If additional costs are incurred, LEA will transport if (1) welfare agency agrees to reimburse LEA, (2) LEA agrees to pay, or (3) there is an agreement to share costs

Dispute resolution process for transportation disagreements should be established

- **2015—Every Student Succeeds Act (ESSA, 20 U.S.C. §6301, et seq.)**

Transportation Issues

LEAs may have to transport foster kids to schools of origin, *even if they do not normally offer transportation*

During disputes, LEA must provide or arrange for transportation

- **2015—Every Student Succeeds Act (ESSA, 20 U.S.C. §6301, et seq.)**

Records Issues

If a school or origin is not in child's best interest, SEAs and LEAs must ensure immediate enrollment in a new school even if student does not have regularly required records

LEAs/SEAs must revise records and enrollment policies accordingly

- **2015—Every Student Succeeds Act (ESSA, 20 U.S.C. §6301, et seq.)**

Records Issues

“Immediate enrollment” requirement means that it cannot be delayed due to records issues

Receiving LEA should immediately contact school of origin, and that school should immediately transfer the relevant records

- **2015—Every Student Succeeds Act (ESSA, 20 U.S.C. §6301, et seq.)**

Points of Contact

Assigned **SEA** staffperson to oversee implementation of State duties under ESSA educational stability provisions

LEAs must designate a local POC for child welfare agencies if the agency notifies the LEA in writing that it has designated a POC

- **2015—Every Student Succeeds Act (ESSA, 20 U.S.C. §6301, et seq.)**

LEA Points of Contact

- Coordinate with child welfare agency POC
- Lead development of process for best interest determinations
- Document determinations
- Facilitate records transfers and immediate enrollment
- Develop transportation processes

- **2015—Every Student Succeeds Act (ESSA, 20 U.S.C. §6301, et seq.)**

How are LEAs notified of foster children?

Not addressed in ESSA or FCA, but child welfare agencies are encouraged to notify LEAs

LEAs should work with agencies to establish formal mechanisms for notice

IDEA Student Transfer Rules

- **Intrastate Transfers (34 CFR 300.323(e))**

If a child with a disability who had an IEP transfers to a new LEA in the same State, the new LEA (in consultation with parents) must provide FAPE, including services comparable to those in the child's IEP from the previous LEA), until the new LEA either:

Adopts the old IEP, or

Properly develops a new IEP



- **Interstate Transfers (34 CFR 300.323(f))**

If a child who had an IEP in another State transfers to an LEA in a new State, within the same school year, the new LEA (in consultation with the parents) must provide a FAPE (including services comparable to those in the child's IEP from the previous LEA), until the new LEA:

Conducts an evaluation (if needed), and
Properly develops a new IEP

- **Interstate Transfers (34 CFR 300.323(f))**

Difference? With transfers from another state, it is not an option to adopt the previous LEA's IEP

Evaluation? Only if the receiving LEA determines it is necessary

Comparable Services? Not defined, but intended to have plain meaning of “similar” or “equivalent” (71 Fed. Reg. 46,681 (2006)), and depends on the case

- **Interstate Transfers (34 CFR 300.323(f))**

Comparable Services

School-based, rather than home-based, services to child with cochlear implants was OK (*Washoe Co. SD*, 51 IDELR 152 (D.Nev. 2008))

“Learning Strategies” class was similar to prior school’s resource reading class (*Metro Nashville PS*, 51 IDELR 116 (SEA Tennessee 2008))

- **Interstate Transfers (34 CFR 300.323(f))**

Comparable Services

But SDC classroom with lower level students was not comparable to prior placement, and provided no opportunity for exposure to typical peers (*Alvord USD, 50 IDELR 209 (SEA CA 2008)*)

Placement of student with Pica in isolated class comparable to prior in-home placement (*Palo Alto USD, 114 LRP 1431 (SEA CA 2013)*)

Homeless Students

- **McKinney-Vento Homeless Assistance Act (42 U.S.C. § 11431, et seq.)**

Youths “awaiting foster care” no longer within definition of “homeless” (per ESSA)

“Homeless” means with a lack of a fixed, regular, and adequate nighttime residence (see § 11434a(2))


LEA enrollment residency requirements do not apply to homeless students

Homeless Students

- **McKinney-Vento Homeless Assistance Act (42 U.S.C. §11431, et seq.)**

See *Dear Colleague Letter*, 114 LRP 21049 (OCR 2014)

L.R. v. Steelton-Highspire SD, 54 IDELR 155 (M.D.Pa. 2010)—Child living with relatives because grandmother's house burned down qualified as homeless due to loss of their own housing



- **McKinney-Vento Homeless Assistance Act (42 U.S.C. § 11431, et seq.)**

Homeless student rights:

1. Remain in school of origin
2. Transportation by school of origin
3. Immediate enrollment
4. Liaisons
5. Family can choose school
6. Equal access to FAPE under IDEA/504

- **McKinney-Vento Homeless Assistance Act (42 U.S.C. § 11431, et seq.)**

Homeless student rights:

ESSA—In case of dispute over choice of school or enrollment, student shall be immediately enrolled in the school chosen by family, until issue is resolved

Special child-find process deliberately seeking homeless IDEA students—See *Q & A on Special Education and Homelessness*, 110 LRP 212 (OSERS 2/1/08)

- **McKinney-Vento Homeless Assistance Act (42 U.S.C. § 11431, et seq.)**

LEA of financial responsibility for FAPE depends on State laws and regs (generally “school of origin”—school last attended when student had nighttime housing)

Transportation to and from school of origin cannot cut short a student’s school day (*In re: Student with a Disability*, 54 IDELR 240 (SEA Virginia 2010))

- **McKinney-Vento Homeless Assistance Act (42 U.S.C. § 11431, et seq.)**

For detailed guidance, see *Education for Homeless Children and Youths Program Non-Regulatory Guidance* (US Dept of Education—July 27, 2016)

Incarcerated Students

- **IDEA Provisions (20 USC §1414(d)(7))**

For students convicted as adults and incarcerated in adult prisons, there are some restrictions:

- No participation in state testing
- No transition services if they will age out before their release date
- IEPs can be modified due to “a bona fide security or compelling penological interest”

Incarcerated Students

- **IDEA Provisions (20 USC §1414(d)(7))**

For students convicted as adults and incarcerated in adult prisons, there are some restrictions:

- LRE does not apply
- But services still required on an individualized basis

See 34 C.F.R. §300.324(d)

- **IDEA Provisions (20 USC §1414(d)(7))**

For students **not** convicted as adults and **not** incarcerated in adult prisons, the requirements of IDEA apply fully

Whether SEA provides services directly, or through the LEAs, is left up to the States (71 Fed. Reg. 46,686 (2006))

Determination of bona fide security and penological interests depends heavily on policies and practices of prisons

- **IDEA Provisions (20 USC §1414(d)(7))**

For students convicted as adults and in adult prison, States are allowed to terminate parental IDEA rights when student reaches adulthood (34 C.F.R. §300.520(a)(2))

At times, prisons may have their own FAPE obligations under §504, if they receive federal funds

And, OCR says §504 may require FAPE in adult prisons (*Brandywine (DE) SD*, 16 IDELR 327 (OCR 1989))