

## **IDEA 2004 (Current Authorized Funding: \$12.36 billion)**

### **Nuts & Bolts of Homeless and Foster Care/Ward of the State Provisions**

*Prepared by NAEHCY and the ABA Center on Children and the Law*

#### **DEFINITIONS**

- IDEA now contains a definition of homeless children, to include any children or youth considered homeless under McKinney-Vento.<sup>1</sup>
- The definition of parent has been changed, so that the statute now contains a similar definition that the regulations have contained since 1997. The definition considers as parents the following people: biological, adoptive or foster parents, guardians, surrogate parents, individuals legally responsible for the child's welfare, or individuals acting in the place of a parent and with whom the child lives (specifically including grandparents, stepparents or other relatives).<sup>2</sup> One subtle difference is that "foster parent" is now listed on what appears to be an equivalent level as the natural or adoptive parent.
- IDEA now contains a definition of ward of the state.<sup>3</sup>

#### **IDENTIFICATION**

- The child find requirements in the statute now include a specific requirement that states ensure that children with disabilities experiencing homelessness or are wards of the state are identified, located and evaluated. This requirement has been in regulations specifying homeless children since 1997, but has never mentioned children in the child welfare system.<sup>4</sup>

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<sup>1</sup> "HOMELESS CHILDREN.—The term 'homeless children' has the meaning given the term 'homeless children and youths' in section 725 of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a)."

Section 602(11)

<sup>2</sup> "PARENT.—The term 'parent' means—

(A) a natural, adoptive, or foster parent of a child (unless a foster parent is prohibited by State law from serving as a parent);

(B) a guardian (but not the State if the child is a ward of the State);

(C) an individual acting in the place of a natural or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or

(D) except as used in sections 615(b)(2) and 639(a)(5), an individual assigned under either of those sections to be a surrogate parent."

Section 602(23)

<sup>3</sup> "WARD OF THE STATE.—

(A) IN GENERAL.—The term 'ward of the State' means a child who, as determined by the State where the child resides, is a foster child, is a ward of the State, or is in the custody of a public child welfare agency.

(B) EXCEPTION.—The term does not include a foster child who has a foster parent who meets the definition of a parent in paragraph (23)."

Section 602(36)

<sup>4</sup> "(a) IN GENERAL.—A State is eligible for assistance under this part for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions:...

## COORDINATION / COMPLIANCE WITH MCKINNEY-VENTO

- Any state receiving IDEA funds must ensure that the requirements of the McKinney-Vento Act are met for all children with disabilities in homeless situations in the state.<sup>5</sup>
- IDEA requires every state receiving IDEA funds to establish a State Advisory Panel, to advise the SEA on unmet needs in the state, to comment publicly on proposed rules and regulations, to advise the SEA on self-evaluation, data reporting and ensuring compliance, and to improve service coordination. IDEA now requires states to include state and local McKinney-Vento personnel on the Panel, as well as a representative of the state child welfare agency.<sup>6</sup>

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### (3) CHILD FIND.—

(A) IN GENERAL.—All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.”

Section 612(a)(3)(A)

<sup>5</sup>“(a) IN GENERAL.—A State is eligible for assistance under this part for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions:...

...(11) STATE EDUCATIONAL AGENCY RESPONSIBLE FOR GENERAL SUPERVISION.—

(A) IN GENERAL.—The State educational agency is responsible for ensuring that—...

(iii) in carrying out this part with respect to homeless children, the requirements of subtitle B of title VII of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11431 et seq.) are met.”

Section 612(a)(11)(A)(iii)

<sup>6</sup>“(a) IN GENERAL.—A State is eligible for assistance under this part for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions:...

...(21) STATE ADVISORY PANEL.—

“(A) IN GENERAL.—The State has established and maintains an advisory panel for the purpose of providing policy guidance with respect to special education and related services for children with disabilities in the State.

(B) MEMBERSHIP.—Such advisory panel shall consist of members appointed by the Governor, or any other official authorized under State law to make such appointments, be representative of the State population, and be composed of individuals involved in, or concerned with, the education of children with disabilities, including—

...(v) State and local education officials, including officials who carry out activities under subtitle B of title VII of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11431 et seq.);

...(x) a representative from the State child welfare agency responsible for foster care; ...

(D) DUTIES.—The advisory panel shall—

(i) advise the State educational agency of unmet needs within the State in the education of children with disabilities;

(ii) comment publicly on any rules or regulations proposed by the State regarding the education of children with disabilities;

(iii) advise the State educational agency in developing evaluations and reporting on data to the Secretary under section 618;

(iv) advise the State educational agency in developing corrective action plans to address findings identified in Federal monitoring reports under this part; and

(v) advise the State educational agency in developing and implementing policies relating to the coordination of services for children with disabilities.”

Section 612(a)(21)

## EVALUATIONS AND IEPS

- IDEA now requires LEAs to complete initial evaluations within 60 days of a parent’s request, or within time frames established by the state.<sup>7</sup>
- However, IDEA specifically states that the standard time frame does not apply if a child changes LEAs while the evaluations are pending, but ONLY IF the new LEA “is making sufficient progress to ensure a prompt completion of the evaluation, and the parent and LEA agree to a specific time when the evaluation will be completed.”<sup>8</sup>
- In addition, IDEA now specifically requires LEAs to ensure that assessments of children who change LEAs during the school year are coordinated with prior schools “as necessary and as expeditiously as possible, to ensure prompt completion of full evaluations.”<sup>9</sup>
- In the report that accompanies the statute, Congress stated that evaluations for students who change LEAs must be completed expeditiously, taking into consideration the date on which such children and youth were first referred for assessment in any LEA. These comments imply that barring extenuating circumstances, evaluations for mobile children should be completed within roughly the same time frames that apply to all children. Congress also stated that McKinney-Vento liaisons, foster parents, surrogate parents, CASAs, GALs, or judges when applicable, should be involved in the evaluation process.<sup>10</sup>

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<sup>7</sup> “EVALUATIONS, PARENTAL CONSENT, AND REEVALUATIONS.—

(1) INITIAL EVALUATIONS.—

...(C) PROCEDURES.—

(i) IN GENERAL.—Such initial evaluation shall consist of procedures—

(I) to determine whether a child is a child with a disability (as defined in section 602) within 60 days of receiving parental consent for the evaluation, or, if the State establishes a timeframe within which the evaluation must be conducted, within such timeframe; and

(II) to determine the educational needs of such child.”

Section 614(a)(1)(C)

<sup>8</sup> “EXCEPTION.—The relevant timeframe in subparagraph (i)(I) shall not apply to a local educational agency if –

(I) a child enrolls in a school served by the local educational agency after the relevant timeframe in clause (i)(I) has begun and prior to a determination by the child’s previous local educational agency as to whether the child is a child with a disability (as defined in section 602), but only if the subsequent local educational agency is making sufficient progress to ensure a prompt completion of the evaluation, and the parent and subsequent local educational agency agree to a specific time when the evaluation will be completed.”

Section 614(a)(1)(C)(ii)

<sup>9</sup> “(b) EVALUATION PROCEDURES.— ...

...(3) ADDITIONAL REQUIREMENTS.—Each local educational agency shall ensure that—...

(D) assessments of children with disabilities who transfer from 1 school district to another school district in the same academic year are coordinated with such children’s prior and subsequent schools, as necessary and as expeditiously as possible, to ensure prompt completion of full evaluations.”

Section 614(b)(3)(D)

<sup>10</sup> “The Conferees recognize that the high mobility rates of some children, including homeless children and youth and children and youth in the custody of a state child welfare agency, may cause delays in the assessment process and in the provision of a free appropriate public education. In order to minimize such

- When children with current IEPs change LEAs during the school year, the new LEA is now specifically required to provide the children with FAPE immediately, “including services comparable to those described” in the previous IEP, in consultation with the parents. The LEA can then either adopt the old IEP or implement a new IEP. If the LEA is in a new state, the LEA can conduct a new evaluation and develop a new IEP.<sup>11</sup>
- To facilitate provision of FAPE for children who change LEAs during the school year, IDEA now specifically requires enrolling schools to promptly obtain the child’s records from the previous school, and previous schools to promptly respond to such records requests.<sup>12</sup>
- Transition planning is now required to begin no later than age 16 (previously the age had been 14). The new provision does require appropriate measurable postsecondary goals to be specified.<sup>13</sup>

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delays, the Conferees intend that local education agencies ensure that assessments for these children and youth be completed expeditiously, taking into consideration the date on which such children and youth were first referred for assessment in any local educational agency. Such assessments shall be made in collaboration with parents (including foster parents) and, where applicable, surrogate parents, homeless liaisons designated under Section 723(g)(1)(j)(ii) of the McKinney-Vento Homeless Assistance Act, court appointed special advocates, a guardian ad litem, or a judge.”

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<sup>11</sup> “(d) INDIVIDUALIZED EDUCATION PROGRAMS...

(2) REQUIREMENT THAT PROGRAM BE IN EFFECT.—

...(C) PROGRAM FOR CHILDREN WHO TRANSFER SCHOOL DISTRICTS.—

(i) IN GENERAL.—

(I) TRANSFER WITHIN THE SAME STATE.—In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in the same State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with Federal and State law.

(II) TRANSFER OUTSIDE STATE.—In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in another State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency conducts an evaluation pursuant to subsection (a)(1), if determined to be necessary by such agency, and develops a new IEP, if appropriate, that is consistent with Federal and State law.”

Section 614(d)(2)(C)(i)

<sup>12</sup> “(ii) TRANSMITTAL OF RECORDS.—To facilitate the transition for a child described in clause (i)—

(I) the new school in which the child enrolls shall take reasonable steps to promptly obtain the child’s records, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child, from the previous school in which the child was enrolled, pursuant to section 99.31(a)(2) of title 34, Code of Federal Regulations; and

(II) the previous school in which the child was enrolled shall take reasonable steps to promptly respond to such request from the new school.”

Section 614(d)(2)(C)(ii)

<sup>13</sup> “(i) IN GENERAL — The term ‘individualized education program’ or ‘IEP’ means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes—

(VIII) beginning not later than the first IEP to be in effect when the child is 16, and updated annually thereafter—

(aa) appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills:

- Members of the IEP team may be excused upon the consent of both parties if the subject matter of the IEP does not involve that member's area of curriculum or services, or, if it does, that member may submit information in writing in advance of the meeting. The parent's consent to this must be in writing.<sup>14</sup>
- IEPs may be amended in writing without reconvening the IEP after the annual IEP has been held, if the parent and LEA agree (although nothing specifies need for written consent).<sup>15</sup>
- No more than 15 states may be selected to participate in a multi-year IEP demonstration program that would allow parents and LEAs to mutually agree to develop a multi-year IEP, not to exceed 3 years.<sup>16</sup>

(bb) the transition services (including courses of study) needed to assist the child in reaching those goals;  
 ... Section 614(d)(1)(A)(VIII).

<sup>14</sup> (C) IEP TEAM ATTENDANCE.--

(i) ATTENDANCE NOT NECESSARY.--A member of the IEP Team shall not be required to attend an IEP meeting, in whole or in part, if the parent of a child with a disability and the local educational agency agree that the attendance of such member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting.

(ii) EXCUSAL.--A member of the IEP Team may be excused from attending an IEP meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services, if--

(I) the parent and the local educational agency consent to the excusal; and  
 (II) the member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting.

(iii) WRITTEN AGREEMENT AND CONSENT REQUIRED.--A parent's agreement under clause (i) and consent under clause (ii) shall be in writing. Section 614(d)(1)(C).

<sup>15</sup> (D) AGREEMENT.--In making changes to a child's IEP after the annual IEP meeting for a school year, the parent of a child with a disability and the local educational agency may agree not to convene an IEP meeting for the purposes of making such changes, and instead may develop a written document to amend or modify the child's current IEP.

Section 614(d)(3)(D).

<sup>16</sup> (5) MULTI-YEAR IEP DEMONSTRATION.--

(A) PILOT PROGRAM.--

(i) PURPOSE.--The purpose of this paragraph is to provide an opportunity for States to allow parents and local educational agencies the opportunity for long-term planning by offering the option of developing a comprehensive multi-year IEP, not to exceed 3 years, that is designed to coincide with the natural transition points for the child.

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(ii) AUTHORIZATION.--In order to carry out the purpose of this paragraph, the Secretary is authorized to approve not more than 15 proposals from States to carry out the activity described in clause (i).

(iii) PROPOSAL.--

(I) IN GENERAL.--A State desiring to participate in the program under this paragraph shall submit a proposal to the Secretary at such time and in such manner as the Secretary may reasonably require.

(II) CONTENT.--The proposal shall include--

(aa) assurances that the development of a multi-year IEP under this paragraph is optional for parents;

(bb) assurances that the parent is required to provide informed consent before a comprehensive multi-year IEP is developed;

(cc) a list of required elements for each multi-year IEP, including--

- Parents and LEA can agree to use alternative means of meeting participation, such as video conferences and conference calls for IEP meetings, placement meetings and administrative matters.<sup>17</sup>

## UNACCOMPANIED YOUTH ISSUES

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(aa) measurable goals pursuant to paragraph (1)(A)(i)(II), coinciding with natural transition points for the child, that will enable the child to be involved in and make progress in the general education curriculum and that will meet the child's other needs that result from the child's disability; and

(bb) measurable annual goals for determining progress toward meeting the goals described in subitem (AA); and

(dd) a description of the process for the review and revision of each multi-year IEP, including--

(aa) a review by the IEP Team of the child's multi-year IEP at each of the child's natural transition points;

(bb) in years other than a child's natural transition points, an annual review of the child's IEP to determine the child's current levels of progress and whether the annual goals for the child are being achieved, and a requirement to amend the IEP, as appropriate, to enable the child to continue to meet the measurable goals set out in the IEP;

(cc) if the IEP Team determines on the basis of a review that the child is not making sufficient progress toward the goals described in the multi-year IEP, a requirement that the local educational agency shall ensure that the IEP Team carries out a more thorough review of the IEP in accordance with paragraph (4) within 30 calendar days; and

(dd) at the request of the parent, a requirement that the IEP Team shall conduct a review of the child's multi-year IEP rather than or subsequent to an annual review.

(B) REPORT.--Beginning 2 years after the date of enactment of the Individuals with Disabilities Education Improvement Act of 2004, the Secretary shall submit an annual report to the Committee on Education and the Workforce of the House of Representatives and the Committee on Health, Education, Labor, and Pensions of the Senate regarding the effectiveness of the program under this paragraph and any specific recommendations for broader implementation of such program, including--

(i) reducing--

(I) the paperwork burden on teachers, principals, administrators, and related service providers; and

(II) noninstructional time spent by teachers in complying with this part;

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(ii) enhancing longer-term educational planning;

(iii) improving positive outcomes for children with disabilities;

(iv) promoting collaboration between IEP Team members; and

(v) ensuring satisfaction of family members.

(C) DEFINITION.--In this paragraph, the term 'natural transition points' means those periods that are close in time to the transition of a child with a disability from preschool to elementary grades, from elementary grades to middle or junior high school grades, from middle or junior high school grades to secondary school grades, and from secondary school grades to post-secondary activities, but in no case a period longer than 3 years.

Section 614(d)(5).

<sup>17</sup> (f) ALTERNATIVE MEANS OF MEETING PARTICIPATION.--When conducting IEP team meetings and placement meetings pursuant to this section, section 615(e), and section 615(f)(1)(B), and carrying out administrative matters under section 615 (such as scheduling, exchange of witness lists, and status conferences), the parent of a child with a disability and a local educational agency may agree to use alternative means of meeting participation, such as video conferences and conference calls. Section 614(f).

- For unaccompanied youth, IDEA specifically requires LEAs to appoint surrogate parents, and to make reasonable efforts to complete the appointment process within 30 days. However, the wording of the statute makes it unclear under what circumstances LEAs are required to appoint surrogates for unaccompanied youth. It can be argued that LEAs must always appoint surrogates for unaccompanied youth, or that surrogates are only required when the LEA cannot find the parents or the youth is a ward of the state.<sup>18</sup>
- In its report, Congress specified that staff members of emergency shelters, transitional shelters, independent living programs, and street outreach programs can be surrogate parents for unaccompanied youth, when appropriate.<sup>19</sup>

## PARENTAL DECISION MAKING FOR WARDS OF THE STATE

- IDEA now specifies that when a child is a ward of the state and not living with their parents, the agency shall make reasonable efforts to obtain informed consent from the parents for the initial evaluation. However, IDEA now does not require an LEA to obtain parental consent for an initial evaluation, if the LEA cannot find the parent, the parent’s rights have been terminated, or a judge has removed the parent’s educational decision-making rights and appointed another person to represent the child.<sup>20</sup>

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<sup>18</sup> “TYPES OF PROCEDURES.—The procedures required by this section shall include the following: ...“(2)(A) Procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual to act as a surrogate for the parents, which surrogate shall not be an employee of the State educational agency, the local educational agency, or any other agency that is involved in the education or care of the child. In the case of—...

(ii) an unaccompanied homeless youth as defined in section 725(6) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(6)), the local educational agency shall appoint a surrogate in accordance with this paragraph.

(B) The State shall make reasonable efforts to ensure the assignment of a surrogate not more than 30 days after there is a determination by the agency that the child needs a surrogate.”

Section 615(b)(2)

Report language:

“In light of the fact that unaccompanied homeless youth are a particularly mobile population, once the school district has made a determination that such youth require a surrogate, the Conferees encourage States or local educational agencies where allowed by law to quickly appoint a surrogate or refer the child to the child welfare system if consistent with State law. The Conferees recognize that, because the parents of homeless unaccompanied youth may be unavailable or unwilling to participate in the youth’s education, homeless unaccompanied youth face unique problems in obtaining a free appropriate public education. Accordingly, the Conferees intend that the surrogate parent process be available for such youth, to ensure that they are provided with a free appropriate public education....”

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<sup>19</sup> “...Furthermore, the Conferees intend that appropriate staff members of emergency shelters, transitional shelters, independent living programs, and street outreach programs not be considered to be employees of agencies involved in the education or care of youth, for purposes of the prohibition of certain agency employees from acting as surrogates for parents as set forth in Sec. (b)(2)(A), provided that a such role is temporary until a surrogate can be appointed that meets the requirements and such role in no way conflicts with, or is in derogation of, the provision of a free appropriate public education to these youth.”

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<sup>20</sup> “(iii) CONSENT FOR WARDS OF THE STATE.—

- For wards of the state, IDEA now explicitly permits judges to appoint surrogate parents in addition to appointment procedures for surrogates provided by the LEA.<sup>21</sup> The state shall make reasonable efforts to ensure the appointment of a surrogate not more than 30 days after determination that one is needed.

## SERVICES

- IDEA now allows LEAs to use up to 15% of their grants to develop and implement early intervention services for students who have not been found eligible for special education but who need additional academic and behavioral support.<sup>22</sup>

## RESOLUTION OF DISPUTES

- When requesting a mediation or hearing under IDEA, families and youth experiencing homelessness do not need to provide a residence address; only available contact information is required.<sup>23</sup>

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(I) IN GENERAL.—If the child is a ward of the State and is not residing with the child’s parent, the agency shall make reasonable efforts to obtain the informed consent from the parent (as defined in section 602) of the child for an initial evaluation to determine whether the child is a child with a disability.

(II) EXCEPTION.—The agency shall not be required to obtain informed consent from the parent of a child for an initial evaluation to determine whether the child is a child with a disability if—

(aa) despite reasonable efforts to do so, the agency cannot discover the whereabouts of the parent of the child;

(bb) the rights of the parents of the child have been terminated in accordance with State law; or

(cc) the rights of the parent to make educational decisions have been subrogated by a judge in accordance with State law and consent for an initial evaluation has been given by an individual appointed by the judge to represent the child.”

Section 614(a)(1)(C)(iii)

<sup>21</sup> “(2)(A) ...In the case of—

“(i) a child who is a ward of the State, such surrogate may alternatively be appointed by the judge overseeing the child’s care provided that the surrogate meets the requirements of this paragraph....”

Section 615(b)(2)(A)(i)

<sup>22</sup> “EARLY INTERVENING SERVICES.—

(1) IN GENERAL.—A local educational agency may not use more than 15 percent of the amount such agency receives under this part for any fiscal year, less any amount reduced by the agency pursuant to subsection (a)(2)(C), if any, in combination with other amounts (which may include amounts other than education funds), to develop and implement coordinated, early intervening services, which may include interagency financing structures, for students in kindergarten through grade 12 (with a particular emphasis on students in kindergarten through grade 3) who have not been identified as needing special education or related services but who need additional academic and behavioral support to succeed in a general education environment.

(2) ACTIVITIES.—In implementing coordinated, early intervening services under this subsection, a local educational agency may carry out activities that include—

... (B) providing educational and behavioural evaluations, services, and supports, including scientifically based literacy instruction.”

Section 613(f)

<sup>23</sup> “TYPES OF PROCEDURES.—The procedures required by this section shall include the following:

...(7)(A) Procedures that require either party, or the attorney representing a party, to provide due process complaint notice in accordance with subsection (c)(2) (which shall remain confidential)—

(ii) that shall include—

(I) the name of the child, the address of the residence of the child (or available contact information in the case of a homeless child), and the name of the school the child is attending;

## INFANTS & TODDLERS: PART C

- Any state receiving a Part C grant must make early intervention services available to infants and toddlers with disabilities who are homeless and their families and wards of the state.<sup>24</sup>
- States must ensure that appropriate early intervention services based on scientifically based research are available, to the extent practicable, to infants and toddlers with disabilities who are homeless and their families (note: wards of the state are not mentioned).<sup>25</sup>
- States receiving Part C dollars must describe their policies and procedures that require referral for early intervention services for children under age 3 who are involved in a substantiated case of child abuse or neglect.<sup>26</sup>
- States must ensure the meaningful involvement of homeless families and wards of the state in the planning and implementation of the Part C program.<sup>27</sup>
- In the report accompanying Part C, Congress stated that states should conduct public awareness programs about the Part C program in homeless family shelters, health service offices, public schools and the child welfare system.<sup>28</sup>

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(II) in the case of a homeless child or youth (within the meaning of section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)), available contact information for the child and the name of the school the child is attending....”

Section 615(b)(7)(A)(ii)

<sup>24</sup> “In order to be eligible for a grant under section 633, a State shall provide assurances to the Secretary that the State—

(1) has adopted a policy that appropriate early intervention services are available to all infants and toddlers with disabilities in the State and their families, including Indian infants and toddlers with disabilities and their families residing on a reservation geographically located in the State, infants and toddlers with disabilities who are homeless children and their families, and infants and toddlers with disabilities who are wards of the State”

Section 634(1)

<sup>25</sup> “(a) IN GENERAL.—A statewide system described in section 633 shall include, at a minimum, the following components:...

(2) A State policy that is in effect and that ensures that appropriate early intervention services based on scientifically based research, to the extent practicable, are available to all infants and toddlers with disabilities and their families, including Indian infants and toddlers with disabilities and their families residing on a reservation geographically located in the State and infants and toddlers with disabilities who are homeless children and their families.”

Section 635(a)(2)

<sup>26</sup> (6) a description of the State policies and procedures that require the referral for early intervention services under this part of a child under the age of 3 who--

(A) is involved in a substantiated case of child abuse or neglect; Section 637(a)(6).

<sup>27</sup> “ASSURANCES.—The application described in subsection (a)—...

(7) shall provide satisfactory assurance that policies and procedures have been adopted to ensure meaningful involvement of underserved groups, including minority, low-income, homeless, and rural families and children with disabilities who are wards of the State, in the planning and implementation of all the requirements of this part.”

Section 637(b)(7)

<sup>28</sup> “The Conferees intend that the public awareness program include a broad range of referral sources such as homeless family shelters, clinics and other health service related offices, public schools and officials and staff in the child welfare system.”

- Any state receiving a Part C grant must establish a State Interagency Coordinating Council, which must include a representative of the State McKinney-Vento Coordinator and the state child welfare agency.<sup>29</sup>

## DISCIPLINE PROVISIONS

There have been significant changes in IDEA’s provisions regarding the extent to which students with disabilities can be disciplined in the same manner as other students. Generally, schools now have much more discretion to discipline students. In summary, students with disabilities may now be disciplined as follows.

1. Generally, a school may consider “any unique circumstances” on a case-by-case basis when determining whether to change the placement of a special education student who has violated the student conduct code. (new)
2. For up to 10 days in a school year, schools may move a special education student to an “appropriate interim alternative educational setting”, another setting, or suspension. (old)
3. If the school seeks to discipline the student for more than 10 days, the school must hold a manifestation determination review, to determine if the behavior was a “manifestation” of the student’s disability.
  - a. The behavior is a manifestation only if it was “caused by or had a direct and substantial relationship to” the disability or if was the “direct result of” the school’s failure to implement the student’s IEP. (new in that it is now much harder to prove that the behavior was a manifestation)
4. If the behavior was a manifestation of the disability, the school must do a behavior assessment, do/implement/modify a behavioral intervention plan, and return the child to his or her educational placement. (new in that previously, behavior assessments were required regardless of whether the behavior was a manifestation)
5. If the behavior was not a manifestation of the disability, the school can apply standard discipline procedures to the student, in the same way and for the same length of time, as long as the school provides a FAPE (which can be provided in an interim alternative educational setting) (old).
6. If a student possessed drugs or weapons on campus or at a school event, or inflicted serious bodily injury to someone at school, the school can put the student in an alternative setting for up to 45 days, regardless of whether the behavior was a manifestation of the disability, but must provide a FAPE, behavioral assessment, and behavioral intervention services. (the addition of serious bodily injury is new)

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<sup>29</sup> “IN GENERAL.—The council shall be composed as follows:...

(K) OFFICE OF THE COORDINATOR OF EDUCATION OF HOMELESS CHILDREN AND YOUTH.—Not less than 1 member shall be a representative designated by the Office of Coordinator for Education of Homeless Children and Youths

(L) STATE FOSTER CARE REPRESENTATIVE.—Not less than 1 member shall be a representative from the State child welfare agency responsible for foster care.”

Section 641(b)(1)(K) and (L)

7. A hearing officer may order a change in placement for up to 45 days if keeping the student in the current placement is “substantially likely to result in injury to the child or others.” (new in that this standard is lower than previously)
8. The discipline protections apply to students who have been found eligible for special education AND to students for whom the school has knowledge of their disability. The school is deemed to have knowledge if a parent has requested evaluations in writing or expressed an opinion that the student needs special services in writing, or if a teacher or school staff has directly told the director of special education or another LEA supervisor about a pattern of behavior demonstrated by the student. (new in that there is now less evidence of knowledge accepted, including striking the previous provision that knowledge could be imputed if the student’s behavior or performance demonstrated a need for special education)

#### Discipline provisions

##### “SEC. 612. STATE ELIGIBILITY.

“(a) IN GENERAL.—A State is eligible for assistance under this part for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions:

“(1) FREE APPROPRIATE PUBLIC EDUCATION.—

“(A) IN GENERAL.—A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

##### “SEC. 615. PROCEDURAL SAFEGUARDS.

“... (k) PLACEMENT IN ALTERNATIVE EDUCATIONAL SETTING.—

“(1) AUTHORITY OF SCHOOL PERSONNEL.—

“(A) CASE-BY-CASE DETERMINATION.—

School personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct.

“(B) AUTHORITY.—School personnel under this subsection may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives are applied to children without disabilities).

“(C) ADDITIONAL AUTHORITY.—If school personnel seek to order a change in placement that would exceed 10 school days and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child’s disability pursuant to subparagraph (E), the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner and for the same duration in which the procedures would be applied to children without disabilities, except as provided in section 612(a)(1) although it may be provided in an interim alternative educational setting.

“(D) SERVICES.—A child with a disability who is removed from the child’s current placement under subparagraph (G) (irrespective of whether the behavior is determined to be a manifestation of the child’s disability) or subparagraph (C) shall—

“(i) continue to receive educational services, as provided in section 612(a)(1), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child’s IEP; and

“(ii) receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

“(E) MANIFESTATION DETERMINATION.—

“(i) IN GENERAL.—Except as provided in subparagraph (B), within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student’s file, including the child’s IEP, any teacher observations, and any relevant information provided by the parents to determine—

“(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability; or

“(II) if the conduct in question was the direct result of the local educational agency’s failure to implement the IEP.

“(ii) MANIFESTATION.—If the local educational agency, the parent, and relevant members of the IEP Team determine that either subclause (I) or (II) of clause (i) is applicable for the child, the conduct shall be determined to be a manifestation of the child’s disability.

“(F) DETERMINATION THAT BEHAVIOR WAS A MANIFESTATION.—If the local educational agency, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child’s disability, the IEP Team shall—

“(i) conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such assessment prior to such determination before the behavior that resulted in a change in placement described in subparagraph (C) or (G);

“(ii) in the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as necessary, to address the behavior; and

“(iii) except as provided in subparagraph (G), return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan.

“(G) SPECIAL CIRCUMSTANCES.—School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child’s disability, in cases where a child—

“(i) carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency;

“(ii) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency; or

“(iii) has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency.

“(H) NOTIFICATION.—Not later than the date on which the decision to take disciplinary action is made, the local educational agency shall notify the parents of that decision, and of all procedural safeguards accorded under this section.

“(2) DETERMINATION OF SETTING.—The interim alternative educational setting in subparagraphs (C) and (G) of paragraph (1) shall be determined by the IEP Team.

“(3) APPEAL.—

“(A) IN GENERAL.—The parent of a child with a disability who disagrees with any decision regarding placement, or the manifestation determination under this subsection, or a local educational agency that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, may request a hearing.

“(B) AUTHORITY OF HEARING OFFICER.—

“(i) IN GENERAL.—A hearing officer shall hear, and make a determination regarding, an appeal requested under subparagraph (A).

“(ii) CHANGE OF PLACEMENT ORDER.—In making the determination under clause (i), the hearing officer may order a change in placement of a child with a disability. In such situations, the hearing officer may—

“(I) return a child with a disability to the placement from which the child was removed; or

“(II) order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others.

“(4) PLACEMENT DURING APPEALS.—When an appeal under paragraph (3) has been requested by either the parent or the local educational agency—

“(A) the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in paragraph (1)(C), whichever occurs first, unless the parent and the State or local educational agency agree otherwise; and

“(B) the State or local educational agency shall arrange for an expedited hearing, which shall occur within 20 school days of the date the hearing is requested and shall result in a determination within 10 school days after the hearing.

“(5) PROTECTIONS FOR CHILDREN NOT YET ELIGIBLE FOR SPECIAL EDUCATION AND RELATED SERVICES.—

“(A) IN GENERAL.—A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violates a code of student conduct, may assert any of the protections provided for in this part if the local educational agency had knowledge (as determined in accordance with this paragraph) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

“(B) BASIS OF KNOWLEDGE.—A local educational agency shall be deemed to have knowledge that a child is a child with a disability if, before the behavior that precipitated the disciplinary action occurred—

“(i) the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;

“(ii) the parent of the child has requested an evaluation of the child pursuant to section 614(a)(1)(B); or

“(iii) the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency.

“(C) EXCEPTION.—A local educational agency shall not be deemed to have knowledge that the child is a child with a disability if the parent of the child has not allowed an evaluation of the child pursuant to section 614 or has refused services under this part or the child has been evaluated and it was determined that the child was not a child with a disability under this part.

“(D) CONDITIONS THAT APPLY IF NO BASIS OF KNOWLEDGE.—

“(i) IN GENERAL.—If a local educational agency does not have knowledge that a child is a child with a disability (in accordance with subparagraph (B) or (C)) prior to taking disciplinary measures against the child, the child may be subjected to disciplinary measures applied to children without disabilities who engaged in comparable behaviors consistent with clause (ii).

“(ii) LIMITATIONS.—If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under this subsection, the evaluation shall be conducted in an expedited manner. If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency shall provide special education and related services in accordance with this part, except that, pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities.”