

July 29, 2016

Federal Register Number: 2016-12451

Docket ID ED-2016-OESE-0032

To Whom It May Concern:

The undersigned organizations are writing to express our grave concerns with ED's proposed regulation on the transportation of children in foster care.

In §299.13(c)(1)(ii), ED proposes the following regulation to the Title I state plan:

“The SEA will ensure that an LEA receiving funds under title I, part A of the Act will provide children in foster care transportation, as necessary, to and from their schools of origin, consistent with the procedures developed by the LEA in collaboration with the State or local child welfare agency under section 1112(c)(5)(B) of the Act, even if the LEA and local child welfare agency do not agree on which agency or agencies will pay any additional costs incurred to provide such transportation.”

This proposed regulation contradicts ESSA's statutory language by requiring LEAs to provide transportation when the agencies cannot agree on payment. The rule would have the effect of shifting the entire cost of transportation to LEAs unilaterally. If Congress had intended for LEAs to provide and pay for the transportation of all children in foster care, it would have passed statutory language assigning that responsibility. Instead, Congress passed language making LEAs responsible for additional transportation costs under only three specific conditions.¹

The proposed rule also undermines and defeats ESSA's requirement that LEAs and child welfare agencies develop transportation procedures collaboratively. It removes any incentive for child welfare agencies to collaborate or contribute to costs by creating a default position that permits, and even encourages, child welfare agencies to avoid costs simply by failing to come to an agreement. The proposed rule would harm children in foster care, by removing incentives for child welfare agencies to place students near their schools of origin, so students can maintain connections to their community. Such a policy ultimately relieves child welfare agencies of their

¹ “(B) by not later than 1 year after the date of enactment of the Every Student Succeeds Act, develop and implement clear written procedures governing how transportation to maintain children in foster care in their school of origin when in their best interest will be provided, arranged, and funded for the duration of the time in foster care, which procedures shall—

(i) ensure that children in foster care needing transportation to the school of origin will promptly receive transportation in a cost-effective manner and in accordance with section 475(4)(A) of the Social Security Act (42 U.S.C. 675(4)(A)); and

(ii) ensure that, if there are additional costs incurred in providing transportation to maintain children in foster care in their schools of origin, the local educational agency will provide transportation to the school of origin if—

(I) the local child welfare agency agrees to reimburse the local educational agency for the cost of such transportation;

(II) the local educational agency agrees to pay for the cost of such transportation; or

(III) the local educational agency and the local child welfare agency agree to share the cost of such transportation;

statutory requirements related to ensuring educational stability for children in foster care, and discourages the allowable use of Title IV-E funds to support school of origin transportation.

These are not hypothetical concerns. The past ten years have demonstrated that the phrase “awaiting foster care placement” in the McKinney-Vento Act’s definition of homelessness has allowed child welfare agencies to evade their responsibilities and shift costs to local school districts, who are mandated to provide transportation to homeless children and youth under the McKinney-Vento Act. Serious conflicts have arisen, and child welfare agencies have not used available federal resources for transportation.

In response to these concerns, Congress removed “awaiting foster care placement” from the McKinney-Vento Act, and enacted separate policies for children in foster care in Title I Part A. These new Title I Part A policies recognize that, unlike children who are homeless, children in foster care are in the custody of a state agency that has responsibility - and receives funding - for their safety, permanency, and well-being. Child welfare agencies determine where children in foster care are placed, and when and where they are moved. Unless child welfare agencies pay for or share transportation costs, they have no financial incentive to reduce foster youth’s residential mobility and place students in close proximity to their school of origin. The end result is additional disruption in the lives of children in foster care, exacerbating their educational, social, and emotional challenges. Congress considered all of these concerns in crafting ESSA’s cost-sharing language. ED’s proposed rule destroys this delicate balance and violates Congressional intent.

While we appreciate that ED’s non-regulatory guidance on foster care did not include the same policy as the proposed regulations, we remain very concerned about both the proposed rule, and some interpretations of the statute that appear in the guidance. For example, the non-regulatory guidance recommends that the local transportation procedures developed collaboratively with child welfare agencies include mechanisms for resolving disputes, and encourages States to develop uniform state dispute processes. Yet the guidance also states that school districts must provide transportation while disputes are resolved. This recommendation, like the proposed rule, is likely to lead child welfare agencies to invoke the dispute process in order to avoid paying for transportation. Here, too, the concern is not hypothetical, as the dispute process was misused in this same way under the McKinney-Vento Act.

Finally, in stark contrast to the strong recommendations for LEAs in the non-regulatory guidance, the guidance merely “encourages” child welfare agencies to continue to work with the appropriate LEA(s) in exploring the full range of options for providing and funding transportation. While the guidance mentions the allowable use of IV-E funds for transportation to the school of origin, it provides a link to an ACF Program Instruction from 2010 that is listed on ACF’s website as a “historical document” to be used for “research and reference purposes only.” The fact that ACF did not take the opportunity to update its transportation guidance for child welfare agencies contributes to the impression of a one-sided mandate for educational stability. Worse, it fails to respond to the widespread confusion in the field about how child welfare agencies actually can use IV-E funds for transportation.

In order to ensure that the intent and letter of the statute is upheld, and to ensure meaningful collaboration between agencies, we recommend the following regulation:

“The SEA and the State agency responsible for administering the State plans under parts B and E of title IV of the Social Security Act (42 U.S.C. 621 et seq. and 670 et seq.) will ensure that the State and local child welfare agencies, and LEAs receiving funds under title I, part A of the Act, will collaborate to develop and implement clear written procedures that ensure children in foster care receive transportation to their school of origin when in their best interest, in accordance with section 1112(c)(5)(B) of the Act and sections 475(1)(G) and (4)(A) of the Social Security Act (42 U.S.C. 675(1)(G) and (4)(A)).”

This language acknowledges the mutual and equal statutory obligations in both education and child welfare law by placing the onus on both the SEA and the state child welfare agency, and by referencing both ESSA and the Fostering Connections Act.

In sum, public policy should provide every incentive to ensure that children under the care of the child welfare system experience as little mobility as possible, and to maximize all sources of federal funding for all vulnerable children. ED’s proposed regulation undermines both of these goals. We therefore urge ED to replace its proposed rule in §299.13(c)(1)(ii) with the proposal above.

Additionally, if school districts are required to pay the costs of transporting children in foster care to their schools of origin, the resulting expense will limit the ability of school districts to provide transportation and related services to other students, including homeless students. Although both school districts and child welfare agencies have limited budgets, it would be inappropriate for school districts to be required to cover the cost of decisions made by another agency. This is especially true in light of the fact that school districts are currently struggling to meet the transportation needs of homeless children and youth. Public schools have witnessed a 100% increase in the number of homeless children and youth since the 2006-2007 school year.² McKinney-Vento funds are extremely limited, reaching less than one in four districts and, even in those districts, not meeting needs. As a result, the swelling cost of transportation for homeless children and youth is paid almost entirely from local school district budgets.³

We urge you to consider our views on the proposed regulations for foster care students and the unintended consequences that could result if changes are not made.

Sincerely,

AASA, The School Superintendents Association
Association of Education Service Agencies

² U.S. Department of Education, Education for Homeless Children and Youth Program, Non-Regulatory Guidance, July 27, 2016

³ See [“Kitsap School Districts Not Counting on New Money for Homeless Students,”](#) Kitsap Sun, April 4, 2016; [“School Transportation News: New Data Issued on Homeless Students, School Budgets, and Transportation.”](#) October 1, 2014.

Association of School Business Officials
Coalition for Juvenile Justice
Council of Administrators of Special Education
National Association for the Education of Homeless Children and Youth
National Center on Housing and Child Welfare
National Coalition for the Homeless
National Law Center on Homelessness & Poverty
National Network for Youth
National Rural Education Advocacy Coalition
National Rural Education Association
National School Boards Association
National Title I Association
School Social Work Association of America