RESOLVED, That the American Bar Association supports uninterrupted educational access and stability for homeless children and youth as well as children and youth placed by public agencies in out-of-home settings.

FURTHER RESOLVED, That the American Bar Association urges the United States Department of Education to provide an interpretation of "awaiting foster care placement" under Subtitle VII-B of the McKinney-Vento Act (42 U.S.C. §§11431 et seq.) that will include children and youth placed by public agencies in interim, emergency, or short-term placements to assure such children and youth in temporary out-of-home settings have uninterrupted educational access.

FURTHER RESOLVED, That the American Bar Association urges the United States Congress to enact legislation amending the Individuals with Disabilities Education Act (IDEA), and the United States Department of Education to promulgate regulations to ensure that children and youth with disabilities, including both homeless children and youth as well as children and youth who are in public agency custody, have prompt access to appropriate special education and related services.

FURTHER RESOLVED, That the American Bar Association urges the United States Congress and the Department of Education, and state and local education agencies, to:

1. Implement recommendations from the 2003 White House Task Force for Disadvantaged Youth (1) to improve the quality of education for children and youth who are in public agency custody, (2) to establish a federal advocate and interagency committee on the education of foster children and youth; and (3) to establish state and local education system demonstration programs and interagency collaborations on improving school access for these children and youth;

2. Improve “child find”, expedited assessments and appropriate special education services for children and youth with disabilities who are homeless or are in public agency custody; both in child welfare and juvenile justice custody, and enhance the prompt assignment of “surrogate parents” (which may include suitable foster parents), where appropriate, appointed under the IDEA to protect the student’s educational rights; and

3. Enforce federal law, pursuant to 42 U.S.C. §675(1)(C), that encourages child welfare agencies to give adults caring for children and youth in out-of-home settings up-to-date educational records on those in their care, when available, and that encourages each case plan to include names and addresses of educational providers, grade level performance, the school record, and any other relevant education information, and that encourages each case plan takes into account proximity to the school in which the students were enrolled at the time of placement.

FURTHER RESOLVED, That the American Bar Association urges lawyers, judges and leaders of the organized bar to seek changes in law, policy, and practice that will help remove impediments to the uninterrupted educational access of children and youth who are homeless as well as children and youth in residential, foster, and kinship care, and will help assure prompt provision of appropriate education services, including special education services where needed. These legal system professionals should work closely with state and local education agencies to help assure that policies promote, rather than inhibit, such uninterrupted educational access.
I. Introduction

Homelessness

Approximately 1.35 million children experience homelessness each year. These children and youth represent 39% of the national homeless population. Homelessness is devastating to children. Like other children and youth surviving in extreme poverty, homeless children and youth face appalling living conditions. Many of these horrific conditions directly contribute to physical, mental and emotional disabilities. For example, children experiencing homelessness suffer from: poor nutrition; inadequate health care; greater exposure to environmental hazards like lead poisoning; health problems associated with overcrowded and communal living situations; increased incidence of other health impairments; higher exposure to domestic and other types of violence; and severe emotional stress related to conditions of extreme poverty and instability.

School provides a safe haven for children experiencing homelessness. School delivers peer support, adult mentoring, physical and mental health services, academics, meals, school supplies, stability and a sense of normalcy to homeless students. Subtitle VII-B of the McKinney-Vento Act, reauthorized by the No Child Left Behind Act, greatly strengthened the rights of homeless children and youth to access school and to receive stable, appropriate services in school. Uninterrupted educational access and stability is essential for the well-being of homeless children and youth and to provide them the tools to avoid homelessness and poverty as adults.

Foster Care

Of the over half-million youth in foster care in this country, approximately half will remain in the system for close to a year and a third will remain for more than three years. Many will be placed in foster family homes with non-relatives, the remainder placed with relatives, in group homes and institutions, and in other forms of placement. In school, these children are among those most likely to be left behind. Their schoolwork may suffer for a variety of reasons: their removal from their home and placement in foster care

1 Martha Burt et al., Helping America’s Homeless, 2001: Urban Institute, p.47.
2 Id.
3 Homeless children go hungry more than twice as often as other children. Better Homes Fund, Homeless Children: America’s New Outcasts, 1999: author.
5 10% of homeless preschoolers have lead poisoning, substantially higher than the national rate. U.S. Dep’t of HHS, Trends in the Well-Being of America’s Children and Youth (1998). A third of homeless children under the age of six have never been screened for lead poisoning. Better Homes Fund, supra, note 1.
6 Better Homes Fund, supra, note 1.
7 Children in 40% of homeless families have an average of 2 or more chronic illnesses within a single year, including twice as many ear infections, six times more speech and stammering problems, and four times more cases of asthma. Weinreb, L., et al., “Determinants of health and service use patterns in homeless and low-income housed children,” Pediatrics 102(3) (1998): 554-62.
9 Better Homes Fund, supra, note 1.
leading to a school change and a delay in re-enrollment; changes in placements while in foster care leading to multiple school placements; their need to attend court hearings, counseling, or medical appointments related to the abuse and neglect; or lengthy period of distraction or inability to focus on school based on troubles at home, which may predate child welfare and court system intervention.

Children in out-of-home care are often not provided the opportunity to reach their full potential. Foster children have higher rates of grade retention, lower academic skills as measured by standardized tests, higher absentee and tardy rates, and higher dropout rates. Changing schools and frequent absences due to court dates and mandatory meetings make it difficult for such students to stay at grade level. Approximately 18,000 to 20,000 youth age 16 and older transition out of the foster care system annually. They are less prepared educationally, have a harder time embarking on a productive career, and are more likely to be involved in the legal system. Youth aging out of foster care are less likely to graduate from high school, and have high rates of class failure and school suspensions and expulsions. Studies show that youth in foster care with unmet educational needs are at higher risk for homelessness, poverty, public assistance, and juvenile or adult court involvement.

Also, over one hundred thousand American young people are in juvenile justice system placements, either in detention, correctional or shelter facilities. Illiteracy and school failure among this group are serious and widespread. Detained and committed juveniles score below their expected grade levels across subject areas.

II. Need for interpretation of "awaiting foster care placement" under Subtitle VII-B of the McKinney-Vento Act (42 U.S.C. §§11431 et seq.) that will include children and youth placed by public agencies in interim, emergency, or short-term placements

Subtitle VII-B of the McKinney-Vento Act provides extensive rights to school access and success for children and youth who meet the Act’s definition of “homeless.” For example, the Act permits such children to enroll in school immediately, while documents typically required for enrollment are obtained. The Act also allows children to remain in one school despite their forced residential mobility, to the extent that is feasible. These protections assist children and youth experiencing homelessness to continue progressing in school while their housing is unstable, advancing their academic achievement and social-emotional development. The McKinney-Vento Act is a proven achievement strategy that assists children, schools and social services agencies in reaching their educational goals.

In its definition of homeless, the Act covers children and youth “who lack a fixed, regular, and adequate nighttime residence”, specifically including children and youth “awaiting foster care placement,” 42 U.S.C. §11434A(2)(A) and (B)(i). Although the McKinney-Vento Act clearly covers children and youth awaiting foster care placement, it does not define that phrase. Research and practical experience clearly demonstrate that children experiencing homelessness and those who are in public agency custody often face virtually identical barriers to school stability and access. Both are victims of high residential mobility,
moving constantly among shelters, motels, foster homes, interim social services placements, and other temporary housing arrangements. This mobility makes it difficult or impossible for children to complete even a single academic semester at one school and severely limits children’s ability to succeed academically. Therefore, it is clear why Congress would wish to extend the McKinney-Vento Act’s protections to children and youth awaiting foster care placement.

The U.S. Department of Education (USDE) has not issued sufficient guidance to assist states and school districts in applying the McKinney-Vento Act to children and youth awaiting foster care placement. USDE should issue such guidance, consistent with the Act’s and the agency’s primary goal of improving academic achievement. In practice, when a social services agency removes a child from home, the child necessarily loses his or her residential stability. The child can be said to be lacking a fixed, regular and adequate nighttime residence under the McKinney-Vento Act. However, the language of the Act clearly means to distinguish between children awaiting foster care placement, who are covered by the Act, and those actually in foster care placement, who are not covered. Therefore, the McKinney-Vento Act should not apply to children who have achieved permanency in their living situation. The Act is also unlikely to apply to children in long-term placements, who have not yet achieved permanence.

Sometimes a child moves into a long-term or permanent placement immediately after removal from the home. However, it is not uncommon for children to be placed in interim placements, because appropriate long-term or permanent placements are not available. In general, the term “interim placement” is meant to include any living arrangement which is not intended to be long-term. Rather, the social services agency intends these placements to be a short-term, emergency or interim measure while appropriate long-term accommodations are located. Interim placements are not fixed, regular and adequate. Children in interim placements are waiting for a fixed, regular and adequate accommodation. They are the population that should be considered to be “awaiting foster care placement” under the McKinney-Vento Act. Children in interim placements are also most likely to encounter the kind of barriers to educational access and success that the McKinney-Vento Act is designed to eliminate. They can benefit most from the Act’s protections.

considered the biggest problem areas” to school access for foster children by school districts and social services agencies in recent Pennsylvania study. Education Law Center, Lost in the Shuffle Revisited, January 2002.

For example, a study in the state of Washington found that foster youth scored an average of 15 to 20 percentile points below non-foster youth on statewide achievement tests. “Even after statistically controlling for a variety of factors, a youth that enters foster care is likely to have lower test scores and graduation rates.” Mason Burley and Nina Halpern, Educational Attainment of Foster Youth, November 2001.

17 The U.S. Department of Education’s (USDE) recent Guidance addressed this issue only briefly, noting that “children and youth in foster care are not considered homeless.” U.S. Department of Education, Draft Non-Regulatory Guidance for the Education of Homeless Children and Youth Program, page 27 (March 2003) (emphasis in original). The USDE’s 1995 Guidance also does not clarify this issue. The 1995 Guidance states that “in general, children and youth in foster homes are not considered homeless,” with the caveat that “children placed in foster homes for lack of shelter space, however, should be considered homeless.” U.S. Department of Education, Preliminary Guidance for the Education of Homeless Children and Youth Program, page 21 (June 1995). However, these principles do not help determine the meaning of “awaiting foster care placement.”

18 The Adoption and Safe Families Act requires that the social services agency make efforts to find a permanent placement for the child. That permanent placement may be reunification with parents, adoption, legal guardianship, placement with a relative, or another planned, permanent living arrangement.

19 The intended duration of a placement can be determined in several ways. McKinney-Vento liaisons should be able to obtain this type of information from departments of social services/human services, local juvenile/family courts, court-appointed attorneys/advocates, and other personnel involved in the child’s case. Reference to the child’s permanency plan can also be informative. Due to the nature of social service placements, it will often be impossible to predict how long a child may actually remain in a placement, or how temporary or permanent that placement may be. However, until a determination is made that the child’s placement is appropriate and intended to be long-term, the child should be considered to be awaiting foster care placement.
As with all determinations of McKinney-Vento eligibility, determinations of whether a child is awaiting foster care placement must be made on a case-by-case basis. However, the following types of placements should generally be considered to be interim:

- Shelters
- Emergency / interim / short-term foster homes
- Group homes and residential placements that are not intended to be long-term
- Evaluation centers, or placements for the sole purpose of evaluation

Placements that are unlikely to be considered interim, and therefore unlikely to be covered by the McKinney-Vento Act, include:

- Permanent foster placements
- Pre-adoptive foster homes
- Permanent kinship care
- Group homes and residential placements, if a determination has been made that the placement is appropriate and permanent.

The United States Department of Education should provide an interpretation of "awaiting foster care placement" under Subtitle VII-B of the McKinney-Vento Act (42 U.S.C. §§11431 et seq.) that will include children and youth placed by public agencies in interim, emergency, or short-term placements. The inclusion of these children within the coverage of the McKinney-Vento Act is sound educational and social service policy. It is consistent with the plain language of the statute and the intent of Congress.

III. Prompt access to appropriate and timely special education and related services under Individuals with Disabilities Education Act (IDEA) for homeless children and youth as well as children and youth who are in public agency custody

Due to the increasing barriers homeless students and children in foster care with disabilities face in accessing special education services, the United States Congress should enact legislation amending the Individuals with Disabilities Education Act (IDEA), and the United States Department of Education should promulgate regulations, to ensure children and youth with disabilities, including both homeless children and youth as well as children and youth who are in public agency custody, have prompt access to appropriate and timely special education and related services.

Homelessness

Children and youth experiencing homelessness have a disproportionately high incidence of disabilities. Children experiencing homelessness are diagnosed with learning disabilities at twice the rate of other children. They suffer from emotional or behavioral problems that interfere with learning at almost three times the rate of other children. These mental and emotional difficulties begin at birth, as infants who are homeless have higher rates of low birth weight and need special care immediately after birth four times as often as other children.

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20 It should be noted that different states often use different terminology to refer to the same type of placement. I have tried to use descriptive terms in this memo to make it applicable to all jurisdictions, but some interpretation may be necessary when applying the terms to particular placements.


22 *Id*.

Yet, despite this evidence that students experiencing homelessness suffer from disabilities at a disproportionate rate, children who are homeless are underserved by special education programs.\(^{24}\) A recent study of children in homeless shelters in Los Angeles found that while 45% of the children met the criteria for a special education evaluation, only 22% had ever received special education testing or placement.\(^{25}\) In 1997, 20 of 47 states reporting data to the U.S. Department of Education reported that special education was a major need of children and youth in homeless situations.\(^{26}\) Yet, 39% of states also reported that those students had difficulties accessing special education programs. These difficulties appear to be increasing over time. In their reports to the U.S. Department of Education in 2000, 50% of states reported that students in homeless situations had difficulties accessing special education programs.\(^{27}\)

**Foster Care**

Of the more than 500,000 children in foster care, approximately 30-40% are receiving special education services.\(^{28}\) Many others may need these services, but have not been identified. Still others have been identified inappropriately. Under IDEA, the right to a free and appropriate public education for children with disabilities is a right provided to parents. In order to assess services, and continually monitor the implementation and appropriateness of those services, advocacy on the part of the parents is critical. However, often in cases of children in foster care, the parent is unavailable or unwilling to take part in this essential advocacy. In cases where the parents’ rights to be the education decision maker for the child have been restricted (i.e., termination of parental rights, or other court order restricting education decision-making) it must be determined who is the education decision maker for the child. IDEA allows for certain individuals to “act as the parent” and also for the appointment of surrogate parents, to advocate for and represent a child in all matters relating to special education evaluation and educational placement.\(^{29}\) However, too often for children in foster care, the determination of who has education decision-making authority has not been made. Even when needed, surrogate parents are, often not provided, or not provided in a timely way.

Children in foster care eligible for special education services often experience delays in receiving necessary services due school moves, loss or failure to transfer necessary records in a timely fashion to new schools, and non-existence of a strong education advocate to ensure services are being provided. Federal law requires child welfare agencies to share a child’s educational records with the foster care provider. These education records should include information on each child’s current educational providers, school record and grade level performance, and any other relevant education information.\(^{30}\) Unfortunately, these requirements are frequently disregarded and the provision has not been rigorously enforced. Finally, the lack of knowledge regarding IDEA by those individuals advocating for youth in foster care, such as caseworkers, foster parents, and the courts, also prevents them from taking advantage of special education services.

**IV. White House Task Force Recommendations**

This resolution also recommends, consistent with a recent White House report, creation of programs designed to improve the quality of education for school-age youth in the care and custody

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\(^{24}\) This fact remains true, even recognizing that children living in poverty are often over-identified for special education services.


\(^{30}\) Title 42 U.S. Code Section 675(1)(C).
of state or county children and youth agencies. Such programs would hopefully be established at federal, state, and local levels. They should, for example, include the appointment of someone within the U.S. Department of Education and within every state and local education agency to be in charge of promoting awareness of the barriers faced by children and youth in custody and making improvements that can lead to their educational access and success.

Currently, there is no official at the U.S. Department of Education charged with looking specifically at these issues and coordinating with other Federal agencies, especially the Department of Health and Human Services, to provide assistance to the states and localities on the education of children in out-of-home care. The establishment of a position at the Department of Education with responsibility to represent the needs of children in care and look for ways to address these barriers would be an asset to states, school districts, and the children they are serving. States and local education agencies should also be encouraged to improve outcomes for youth in care and to incorporate policies that would address their needs into school programming. States and local education agencies should be given resources to improve the services offered to these children and to evaluate those methods to ensure that the most effective practices are available for states and local communities to model.

State education agency and local education agency projects could help develop policies and programs to better address the educational needs of children in out-of-home care. Program activities could involve interagency collaboration and facilitate training between the education, child welfare, juvenile justice, and judicial systems, review state and local policies for providing placement and school continuity for children in care, and review state and local policies for identifying youth in care who need special education services. Such efforts could also review policies and practices with regard to surrogate parents for children in care.

V. Active Role of Legal System Professionals

The American Bar Association has long called upon the leaders of the legal profession to address inappropriate child-related legal barriers. In two ABA publications, America’s Children At Risk: A National Agenda for Legal Action (1993) and America’s Children: Still at Risk (2001), the Association highlighted the importance of bar activity in a variety of children’s issues. In the latter book, an entire chapter was devoted to needed education reforms. Over the years, the organized bar has been repeatedly challenged to improve educational access and services for the most vulnerable of our nation’s children. If the reforms described above are to be effectively implemented, it will be critical that lawyers and judges involved in the cases of children who are homeless as well as children in residential, foster, or kinship care, be aware of the reforms, and provide feedback to the education system on how these changes are affecting the children involved.

Respectfully submitted,

William H. Hoch, Chair
Commission on Homelessness & Poverty

August 2004

31 The reforms described in this paragraph have been recommended in an October 2003 report of The White House Task Force for Disadvantaged Youth. This report can be found at: http://www.ncfy.com/disadvantaged/index.htm.
32 Improving “child find,” expediting assessments and providing appropriate special education services will lead to educational access and success. The “child find” provision requires the states to implement policies and procedures to ensure that all children with disabilities in the state who need special education and related services are identified, located, and evaluated. The regulations implementing this provision specifically apply to highly mobile children with disabilities, including homeless children. 20 U.S.C. 1412 (a)(3); 34 C.F.R. 300.125.
1. **Summary of Recommendation(s).**

This recommendation supports policies to help assure uninterrupted educational access, special education and related services, and stability for homeless children and youth as well as children and youth placed by public agencies in out-of-home settings. The recommendation also calls upon lawyers, juvenile and family court judges, and leaders of the organized bar to address factors that may be impeding uninterrupted educational access of children and youth who are homeless as well as children and youth in residential, foster, and kinship care, or that may be inhibiting prompt provision of appropriate education services, including special education services where needed.

2. **Approval by Submitting Entity.**

Approved by the Commission on Homelessness and Poverty on May 6, 2004.

3. **Has this or a similar recommendation been submitted to the House or Board previously?**

   No.

4. **What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?**

   The American Bar Association has long called upon the leaders of the legal profession to address inappropriate child-related legal barriers. In two ABA publications, *America's Children At Risk: A National Agenda for Legal Action* (1993) and *America’s Children: Still at Risk* (2001), the Association highlighted the importance of bar activity in a variety of children’s issues. In the latter book, an entire chapter was devoted to needed education reforms. The House of Delegates has approved numerous resolutions that aim to enhance the quality of life for young people in foster care. These resolutions address topics such as the prevention and treatment of child abuse and neglect, legal system reform to help assure safe and permanent homes for abused and neglected children, standards for the legal representation of abused and neglected children, treatment of child victims of abuse and domestic violence, and unified family courts.

   The approval of this recommendation would further enhance the ABA’s commitment to advocacy on behalf of homeless children and youth as well as children and youth placed by public agencies in out-of-home settings.

5. **What urgency exists which requires action at this meeting of the House?**

   Although the House passed its IDEA bill last year, conference committee activity during fall 2004 and 2005 provides an opportunity for the Association to advocate to ensure the Senate provisions contained in S. 1619 --- amendments to increase access to special education and related services for homeless and foster children --- make it into the final bill. Furthermore, the U.S. Department of Education is presently considering revised guidance related to which children will be considered to be “awaiting foster care placement” under the McKinney-Vento Act.
6. **Status of Legislation.** (If applicable.)

   See above.

7. **Cost to the Association.** (Both direct and indirect costs.)

   There is no direct cost to the Association.

8. **Disclosure of Interest.** (If applicable.)

   N/A

9. **Referrals.**
   The recommendation has been referred to the following ABA entities:
   - Steering Committee on the Unmet Legal Needs of Children
   - Commission on Domestic Violence
   - Commission on Mental and Physical Disability Law
   - Family Law Section
   - Young Lawyers Division

10. **Contact Person.** (Prior to the meeting.)

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11. **Contact Person.** (Who will present the report to the House.)

    William H. Hoch, Chair