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The Homeless School-Age Child: Can Educational Rights Meet Educational Needs?

Camilla M. Cochrane

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The Homeless School-Age Child: Can Educational Rights Meet Educational Needs?

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I. INTRODUCTION

Congress has statutorily defined a homeless child as one who either lacks a fixed, regular, and adequate residence or has a primary nighttime residence in a shelter, an institution, or a place not normally used as a regular sleeping accommodation for human beings.¹ In reality, a homeless child is one who:

suffer[s] the loss associated with separation from [her] home, . . . belongings, and pets; the uncertainty of when [she] will eat [her] next meal and where [she] will sleep during the night; the fear of who might hurt [her] or [her] family members as they live in strange and frequently violent environments; the embarrassment of being noticeably poor; and the frustration of not being able to do anything to alleviate [her] (or [her] family's) suffering.²

The condition of homelessness makes it difficult, if not impossible, for a child to attend and to benefit from school. However, there is no institution better situated to impact upon the cycle³ of homeless-

1. Stewart B. McKinney Homeless Assistance Act, 42 U.S.C. § 11302 (1988).

2. Division of Special Programs, Texas Educ. Agency, *The Texas State Plan for the Education of Homeless Children and Youth 1989-1990*, at 13 (1989).

3. Some commentators view the conditions of homelessness as creating an underclass, "enhanc[ing] the underclass that may already have existed, and, combining newly poor and always-poor together in one common form of penury, assign[ing] the children of them all to an imperiled life." J. KOZOL, *RACHEL AND HER CHILDREN* 20 (1988). Further, Kozol believes homelessness is:

ness than the school. The resolution of this paradox will turn on the efficacy of the educational rights that states and federal governments provide and that the states implement for homeless children. These rights evolve from legislative and litigative determinations that are shaped by legal, political, and social forces. If these forces are allowed to eclipse the reality of the homeless child's educational needs, then educational rights will become a sham. Educators can only realize viable educational rights for homeless children, ones that can make a difference, through a process that identifies and holds constant the educational needs of homeless children.

The homeless school-age child is educationally at risk.⁴ Life within multi-problem families,⁵ in conditions⁶ that are well below the

[an] institution, one of our own invention, which will mass-produce pathologies, addictions, violence, dependencies, perhaps even a longing for retaliation, for self-vindication, on a scale that will transcend, by far, whatever deviant behaviors we may try to write into [the homeless persons'] past. It is the present we must deal with, and the future we must fear.

Id. at 21. Special educators perceive the homeless environment as a breeding ground for handicapping conditions. They question how many of today's homeless children are tomorrow's handicapped and homeless citizens. Based on descriptions of homeless children in today's schools, researchers have concluded that "[t]he future portrait appears to focus on undereducated, cognitively deficient, socially retarded, emotionally debilitated, and potentially handicapped citizens of tomorrow." Russell & Williams, *Homeless Handicapped Children: A Special Education Perspective*, 5 CHILDREN'S ENV'TS Q. 3 (1988).

4. Illinois State Bd. of Educ., State Plan for the Education of Illinois Homeless Children and Youth FYs 1988-90, at 3 (1988) ("Although there is considerable debate about the service delivery mechanism most suited to addressing the educational needs of homeless children and youth, it is clear that such children or youth are at risk."). The Illinois plan identifies the special needs of homeless children, classifying these needs as similar to those of other populations at risk. *Id.* at 3-4. Populations are "at risk" educationally when, because of certain socio/psychological characteristics—such as emotional or developmental disabilities or learning disorders—those in the population are at risk of the system's failing to meet their needs.

5. The factors that can trigger homelessness, such as drug abuse, fire, or domestic violence, are problems that are exacerbated by the problems associated with the condition of homelessness, such as insecurity, fear, and loss of self esteem. See generally J. KOZOL, *supra* note 3.

6. A United States Department of Education report showed that 12% of all homeless children live in publicly operated shelters, 41% live in privately operated shelters, 25% are living temporarily with friends or relatives, and 22% are living in other locations, including welfare hotels, shelters for runaways and battered children, campgrounds, parks, or abandoned buildings. HOMELESS CHILDREN AND YOUTH PROGRAM, U.S. DEP'T OF EDUC., REPORT TO CONGRESS ON HOMELESS CHILDREN AND YOUTH 8 (1990) [hereinafter U.S. DEP'T OF EDUC.]. Newspaper reporters and commentators have provided less quantitative, but more insightful, information on the effects of the homeless student's living conditions. See, e.g., Sanchez, *For Homeless, School No Shelter from Shame*, Wash. Post, Dec. 19, 1988, at A1, col. 4 (describing teachers faced with educating children who disappear for weeks at a time, and with building self-esteem in children who have been pelted by rocks and taunted by other children while walking home); Schmitt, *Ordeal for Homeless Students in Suburbs*, N.Y. Times, Nov. 16, 1987, at B1, col. 2 (reporting that "motel children . . . as young as [five] or [six] years

nationally defined standard of poverty,⁷ leaves the homeless child with unmet physical and emotional needs. These conditions are producing a population of children handicapped with severe psychological problems that affect their capacity to learn.⁸ Although formal clinical studies are just emerging and long-term data are not yet available, preliminary indications are that developmental delays, severe depression, anxiety, and learning difficulties are common among homeless children.⁹ Researchers have extrapolated findings from related areas of psychological research—for example, the effects of rootlessness on migrant children—that identify additional impediments to the homeless child's learning process.¹⁰

Historically, advocacy groups surveying limited populations

old" endure school days in excess of eight hours long because of bus and train commutes to and from their temporary shelters). Jonathan Kozol's case histories of homeless persons provides some of the most vivid descriptions of homeless children's lives. See J. KOZOL, *supra* note 3. "Families [in emergency shelters] are confronted with drug paraphernalia in shared rest rooms. . . . [H]omeless children play in corridors while, twenty feet away, prostitutes and clients take turns waiting to make use of the same room." *Id.* at 89. To illustrate the disempowerment of these families in the face of bureaucracy, Kozol recounted the experience one mother of three had while waiting for a temporary shelter:

"We spent another seven days sitting in the welfare center, 9:00 to 5:00, and every evening 6:00 to 8:00 A.M. trying to sleep there. . . . All we had to eat that week was peanut butter, jelly and cheese sandwiches." Not wanting to exaggerate, she adds: "They gave my children juice and little packages of milk."

Id. at 158-59.

7. The U.S. in the 1980s may be the first society in history in which children are distinctly worse off than adults; that is to say that a large proportion of children in the U.S. live below our defined standard of poverty; that there are a large number of such children; and that no other age group may be so characterized.

Bassuk & Rubin, *Homeless Children: A Neglected Population*, 57 AM. J. ORTHOPSYCHIATRY 279, 284 (1987) (citing D. MOYNIHAN, FAMILY AND NATION (1986)).

8. A 1985 study of 51 mothers and 78 children living in shelters found that:

Forty-seven percent of the preschoolers exhibited impairments in language skills and motor and social development. A childhood depression scale revealed that 51% of the children over the age of five were depressed. This is higher than that of comparably poor children and those registered in a psychiatric clinic. It was inferred that the high levels of depression and anxiety were interfering with their capacity to learn: 54% had repeated a grade and 29% were in special education classes.

Gewirtzman & Fodor, *The Homeless Child at School: From Welfare Hotel to Classroom*, 66 CHILD WELFARE 237, 241 (1987) (citing E. Bassuk, *The Feminization of Homelessness: Homeless Families in Boston Shelters* (1985) (unpublished manuscript available from Harvard Science Center)).

9. Bassuk & Rubin, *supra* note 7, at 284. Researchers gathered clinical information from 82 homeless families, including 156 children, living in 14 family shelters. *Id.* at 279. The study indicated that approximately half of the sheltered homeless children required psychiatric referral and evaluation. *Id.* at 284.

10. The effects of rootlessness include a sense of life as temporary, developmental regression, insufficient pre-learning skills, increased anxiety, and a wide array of behavioral problems. Gewirtzman & Fodor, *supra* note 8, at 240.

have generated information concerning the educational status of homeless children.¹¹ Institutions that were the potential providers of educational services to these at risk children had no systematic approach for identifying either the children's numbers or needs. Consequently, educational practitioners understood neither the extent nor the nature of the problem.¹²

However, by 1987, through the efforts of advocacy groups, legislators recognized that families with children were the fastest growing segment of a rapidly expanding homeless population.¹³ Consequently, when Congress finally responded to the national problem of homelessness¹⁴ through the passage of the Stewart B. McKinney Homeless Assistance Act ("McKinney Act" or "Act")¹⁵ in 1987, it addressed

11. In 1987, the Center for Law and Education, the National Coalition for the Homeless, the National Network of Runaway and Youth Services, and The Homelessness Exchange surveyed approximately 110 shelter providers throughout the country to document difficulties experienced by homeless school age children in enrolling and continuing in school. S. Jackson, *The Education Rights of Homeless Children 1* (May 1990), reprinted in *MATERIALS ON THE EDUCATION OF HOMELESS CHILDREN* (May 1990 ed.) (available from the Center for Law and Education, Cambridge, MA). One-third of the shelter providers surveyed reported instances in which these children were denied access to school. *Id.* The survey identified a variety of problems that contributed to this denial. *Id.*

12. In 1987, the Center for Law and Education surveyed state officials and found that state officials had little knowledge of either the number of homeless school-aged children or the problems that they faced. *Id.* This contrasts with an advocacy study done during the same year which found that approximately 500,000 children were homeless and that, within an eight-city survey, 43% of these homeless children did not attend school. NATIONAL COALITION FOR THE HOMELESS, *BROKEN LIVES: DENIAL OF EDUCATION TO HOMELESS CHILDREN 1* (1987) (citing a 1987 Child Welfare League of America study).

13. NATIONAL COALITION FOR THE HOMELESS, *supra* note 12, at 1. This growth resulted in 40% of the homeless population being composed of members of families. *Id.* In 1984, estimates of the total United States homeless population ranged from a low by the Reagan administration of 250,000 to 350,000 persons, to a National Coalition of the Homeless estimate of three million persons. National Coalition for the Homeless, *Homelessness in the United States: Background and Federal Response—A Briefing Paper for Congressional Candidates 4 n.1* (Sept. 1988) [hereinafter *National Coalition for the Homeless Briefing Paper*]. In 1987, studies surveying cities around the country found an average increase in the homeless population of 21% to 25%. *Id.* at 4 (citing U.S. CONFERENCE OF MAYORS, *THE CONTINUING GROWTH OF HUNGER, HOMELESSNESS AND POVERTY IN AMERICA'S CITIES: 1987*, at 15 (1987); and NATIONAL COALITION FOR THE HOMELESS, *PUSHED OUT: AMERICA'S HOMELESS, THANKSGIVING, 1987*, at 1 (1987)).

14. The first Congressional hearings on homelessness, since the Depression, began in 1982. National Coalition for the Homeless Briefing Paper, *supra* note 13, at 18. However, the Reagan Administration's position—to the extent that it recognized homelessness—was that it was a local problem that required no federal response. *Id.* (citing *The Federal Response to the Homeless Crisis: Hearings Before the Subcomm. on Intergovernmental Relations and Human Resources*, 98th Cong., 2d Sess. 205 (1984)).

15. Pub. L. No. 100-77, 101 Stat. 482 (1987) (codified as amended at 42 U.S.C. § 11301 (1988)). The Act's educational provisions originally covered fiscal years 1987 and 1988. 42 U.S.C. § 11432(g) (1988). In November 1988, Congress reauthorized the Act, including its educational provisions, to extend through fiscal year 1990. Stewart B. McKinney Homeless

legislatively the plight of homeless children who were being denied an education.¹⁶

This Comment examines the body of educational rights for homeless children that is emerging from the McKinney Act and from educational jurisprudence arising from other federal statutes. It examines educational rights as applied both to the barriers that deny homeless children access to education, and educational practices that allow children to receive a free, appropriate public education once these barriers have been overcome. Section II of the Comment analyzes statutory educational rights for homeless children contained in the educational provisions of the McKinney Act.¹⁷ Because the McKinney Act is a non-prescriptive statute,¹⁸ one which delegates a substantial amount of power to the states,¹⁹ and yet provides no sanctions for noncompliance, the rights derived from this statute are extremely dependant on the initiative of individual states to implement the provisions of the Act. Therefore, the analysis in Section II relies extensively on information contained in state educational agency plans. Section III provides a selected overview of the special education jurisprudence that courts have developed under the Educa-

Assistance Amendments Act of 1988, Pub. L. No. 100-628, 102 Stat. 3224 (codified at 42 U.S.C. § 11301 (1988)). In November 1990, Congress reauthorized the Act, with substantial modifications to its educational provisions, to extend through fiscal year 1993. Stewart B. McKinney Homeless Assistance Amendments Act of 1990, Pub. L. No. 101-645, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 4673 (to be codified at 42 U.S.C. § 11301).

16. 42 U.S.C. §§ 11431-11435 (1988).

17. *Id.* This Comment's analysis covers the McKinney Act's educational provisions prior to the passage of the 1990 amendments. See *supra* note 15. For a discussion of the promise that the newly enacted provisions hold, see *infra* notes 182-84 and accompanying text.

18. The McKinney Act authorizes the allocation of funds to state educational agencies to enable them to carry out policies related to providing a free, appropriate public education for homeless children. 42 U.S.C. §§ 11432-11433 (1988); see also U.S. Dep't of Educ., Nonregulatory Guidance 1 (Nov. 1987). Congress has left the implementation of these policies to the determination of the state (or local) education agency. For example, section 11432 of the Act requires states to provide procedures for resolving disputes over educational placements, but does not specify the particular dispute resolution process to be used. 42 U.S.C. § 11432(e)(1)(B) (1988).

19. The United States Department of Education reviews state plans to ensure that states address the issues contained in the Act. Where the state follows the nonregulatory guidance provided by the Department of Education, the state is considered to be in compliance with the educational provisions of the Act. U.S. Dep't of Educ., *supra* note 18, at 1. However, when the states applied for fiscal year 1988 McKinney funds, the Department of Education initially rejected 30 of the 51 plans for failure to either address or adequately address the educational provisions of the Act. S. Jackson, *supra* note 11, at 5. As a result of plan revisions, clarifications, and negotiations between state officials and the Department of Education, the Department of Education approved all state plans by September 1989. *Id.* Apart from its authority to review the content of state plans, the Department of Education has no real enforcement power and must rely, to a great extent, on the assurances contained in each state's application for funding.

tion for All Handicapped Children Act,²⁰ the Rehabilitation Act of 1973,²¹ and the Civil Rights Act of 1971,²² and discusses ways in which educators and advocates can use this jurisprudence as a vehicle to assert additional educational rights for homeless children. The Comment concludes with an assessment of the effectiveness of asserting the educational rights of homeless children to enable them to participate in a meaningful educational process directed toward breaking the cycle of homelessness.

This Comment's premise is that educational rights that provide access to a free, appropriate public education for *all* homeless children can accomplish this task. However, success depends on the degree to which legislatures, courts, educational practitioners, and advocates, within legal, political, and social constraints, are able to shape substantive educational rights to meet the educational needs of homeless children.

II. EDUCATIONAL RIGHTS AND THE STEWART B. MCKINNEY HOMELESS ASSISTANCE ACT

The McKinney Act's educational provisions reflects Congress' concern with the increasing number of homeless families with children.²³ The drafters of the Act designed the educational provisions to ensure equal access to education for homeless children²⁴ by requiring states to ascertain the extent of the need for educational services to homeless children and to develop state plans to provide these services.²⁵ The Act provides grant funds to state educational agencies to accomplish the Act's purposes.²⁶ Each state educational agency must submit annually a report prepared from designated state coordinator activities designed to: (1) gather data on the number and location of school-age homeless children; (2) determine the nature and extent of problems that homeless children have gaining admission or access to

20. 20 U.S.C. § 1400 (1988).

21. 29 U.S.C. § 794 (1988).

22. 42 U.S.C. § 1983 (1988).

23. H.R. CONF. REP. NO. 174, 100th Cong., 1st Sess. 93, *reprinted in* 1987 U.S. CODE CONG. & ADMIN. NEWS 441, 472.

24. 42 U.S.C. § 11431(1) (1988).

25. *Id.* § 11432.

26. *Id.* § 11432(a). The nonregulatory guidelines issued by the United States Department of Education requires states to use grant funds for the following purposes:

- (1) To carry out the policies . . . of the Act. . . ;
- (2) To establish or designate an Office of Coordinator of Education of Homeless Children and Youth; and
- (3) To prepare and carry out a state plan to provide for education of homeless children and youth. The funds may not be used, however, to pay the actual costs of educating homeless children and youth.

U.S. Dep't of Educ., *supra* note 18, at 2-3.

public schools; and (3) identify the special educational needs of homeless children and the difficulties that states experience in determining these needs.²⁷

The state coordinator is responsible for developing and carrying out the state plan. Each state plan must contain provisions granting authority to the agency or person responsible for making determinations under the Act,²⁸ and must provide procedures for dispute resolution.²⁹ The state plan assures, "to the extent practicable under requirements relating to education established by State law, that local educational agencies within the State comply with the [McKinney Act's] requirements."³⁰ Local educational agencies must either continue the educational placement of the homeless child in her school district of origin or enroll the child where she is actually living—whichever is in the child's best interest.³¹ Within this placement, educational services³² for the homeless child are to be comparable to those offered to other students in the school selected.³³ The local agency also is responsible for maintaining the school records of each homeless child.³⁴

Data from the compilation of the 1989 annual reports submitted by state educational agencies indicate that there are between 216,000 and 273,000 school-age homeless children in this country.³⁵ An estimated twenty-eight percent of these children, or as many as 67,400, are not attending school.³⁶ Although educators believe these numbers

27. 42 U.S.C. § 11432(d)(3).

28. *Id.* § 11432(e)(1)(A).

29. *Id.* § 11432(e)(1)(B).

30. *Id.* § 11432(e)(2).

31. *Id.* § 11432(e)(3).

32. "[Services include] educational services for which the child meets the eligibility criteria, such as compensatory educational programs for the disadvantaged, and educational programs for the handicapped and for students with limited English proficiency; programs in vocational education; programs for the gifted and talented; and school meals programs." *Id.* § 11432(e)(5).

33. *Id.* Services are to be in accord with the best interest placement standard of 42 U.S.C. § 11432(e)(3).

34. *Id.* § 11432(e)(6).

35. Educational agency reports from the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, and American Samoa reflect diverse methodologies for counting the number of homeless children. *See* U.S. DEP'T OF EDUC., *supra* note 6, at Table 4. In addition, 36 states did not extrapolate their counts from partial or one-day data to year-long estimates. *Id.* at 9. The 216,000 figure represents totals using the unextrapolated data, while the higher estimate of 273,000 includes data from the 18 states that extrapolated. *Id.* The Department of Education's report notes that the totals contained in the report are "not true totals of similar numbers," and cautions that they are "broad estimates only." *See, e.g., id.* at note to Table 3.

36. *Id.* at 8, Table 3.

to be broad estimates, they signal a problem of serious proportions.³⁷

A. Access to the Educational System

The McKinney Act's equal access policy³⁸ is supported by provisions aimed at breaking down barriers inhibiting equal access to educational opportunity.³⁹ The Act's intent is to ensure that every homeless child is given the same opportunity to receive free, appropriate educational services as non-homeless children who are state residents.⁴⁰ The McKinney Act addresses two barriers, residency requirements⁴¹ and education records requirements,⁴² that advocacy groups historically have identified as primary impediments to access to education for these children.⁴³ Residency requirements can result not only in express denials of educational opportunity, but also in de facto denials. For example, when an inter- or intra-school system dispute occurs over the residency of a homeless child and the concomitant responsibility to educate that child, the state's failure to resolve this dispute in an expeditious manner results in a denial of educational opportunity for the duration of the gridlock.

Finally, a less tangible, but much more pervasive, barrier exists that operates to deny access—one to which the McKinney Act obliquely refers.⁴⁴ This is the barrier of the unknown child. If the homeless child is not known to the educational system, educators cannot address or surmount any of the other substantive barriers to access. The fact is, homeless individuals (including their children) are hard to find. Many are transient; many are reticent to publicly acknowledge their status; and many others, struggling to survive,

37. The 1989 extrapolated total represents a 24% increase over the 1988 count. *Id.* at 11. When the Department of Education released the lower 1988 figures, Edward E. Smith, the federal official who prepared the report, indicated that "the policy implications are staggering." Jennings, *Report Expected to Sharpen Policy Debate on Homeless*, *Educ. Week*, Feb. 8, 1989, at 1, col. 1, 19, col. 1.

38. "[E]ach State educational agency shall assure that each child of a homeless individual and each homeless youth have access to a free, appropriate public education which would be provided to the children of a resident of a State and is consistent with the State school attendance laws . . ." 42 U.S.C. § 11431(1). "No child or youth should be denied access to any educational services simply because he or she is homeless." H.R. CONF. REP. NO. 174, *supra* note 23, at 93, 1987 U.S. CODE CONG. & ADMIN. NEWS at 472.

39. *E.g.*, 42 U.S.C. §§ 11431(2), 11432(e).

40. H.R. CONF. REPORT. NO. 174, *supra* note 23, at 93, 1987 U.S. CODE CONG. & ADMIN. NEWS at 472.

41. 42 U.S.C. § 11431(2).

42. *Id.* § 11432(e)(6).

43. See NATIONAL COALITION FOR THE HOMELESS, *supra* note 12, at 5.

44. The state Coordinator of Education for Homeless Children and Youth must gather data on the number and location of homeless children in the state. 42 U.S.C. § 11432(d)(1).

place a low priority on education.⁴⁵ To the extent that school system management and the provision of educational services depend upon information flow, a school system's inability to obtain student information may result in the exclusion of that student.

1. RESIDENCY REQUIREMENTS

State residency regulations generally have required that a child attend school in the school district in which she is a resident or in which her parent or guardian resides. For the homeless child, residency determination can be a critical problem because homeless children, by definition, have no residence.⁴⁶ The combination of ambiguous, statutory definitions and the courts' often intentionalist statutory construction of residency requirements allows school systems to disclaim responsibility for educating a "non-resident" child. Consequently, residency requirements have served effectively to deny education to numerous homeless children.⁴⁷

Prior to the McKinney Act, courts decided the few cases concerning the education of homeless children primarily on the basis of residency law. A New York Department of Education administrative appeal, *Richards v. Board of Education*,⁴⁸ illustrates this approach. After finding that the petitioner was a resident of the defendant school district from which the family had moved in order to receive emergency shelter, the New York Commissioner of Education (the "Commissioner") found that the petitioner's children were entitled to receive educational services from that district.⁴⁹ The decision turned on the Commissioner's interpretation of the New York school residency statute, and was predicated on an analysis of the petitioner's action and intent.⁵⁰ The Commissioner declined to issue a declaratory ruling that any student who became homeless and was placed in emergency living quarters in a different school district would continue to be a resident of the school district in which she had attended school

45. See generally J. KOZOL, *supra* note 3. The United States Department of Education's 1990 Report to Congress is testimony to the multitude of factors compounding problems in identifying the homeless in our society. See U.S. DEP'T. OF EDUC., *supra* note 6, at 5-12.

46. See NATIONAL COALITION FOR THE HOMELESS, *supra* note 12, at 5 (stating that schools sometimes use residency rules "to deny homeless children access to education in any school district at all").

47. See *id.* at 5-7.

48. No. 11490, N.Y. Dep't. Educ. (July 17, 1985), reprinted in MATERIALS ON THE EDUCATION OF HOMELESS CHILDREN, *supra* note 11, at Section III.A.

49. *Id.*

50. *Id.* (finding that Richards had been required to leave her home because of circumstances beyond her control and that she had neither expressed nor implied any intention of abandoning her residence or of establishing a new one).

at the time she became homeless.⁵¹ Instead, the Commissioner held that under state law, each student has the right to attend school in her district of residence, and that determinations of residency were mixed questions of law and fact to be decided on a case by case basis.⁵² In this and other cases argued prior to the passage of the McKinney Act,⁵³ litigants fought for the child's placement, which turned on residency determination.⁵⁴ The right to education was never in question.

The removal of the residency barrier was a threshold concern for the drafters of the McKinney Act. For example, Senator Kennedy observed that "by definition homeless children have no permanent residence," and that as a result, "it had been easy for a school district to say that homeless children are someone else's responsibility."⁵⁵ Even after the Senate's passage of the McKinney Act, Senator Moynihan emphasized the need for continued efforts on behalf of children who lose their education rights through local residency rules that operate to deny public education to children living in shelters or lacking a fixed address.⁵⁶ The McKinney Act's policy statement reflects this concern by requiring "any State with a residency requirement as a component of its compulsory school attendance laws . . . to review and undertake steps to revise such laws to assure that [homeless children] are provided a free and appropriate education."⁵⁷ A 1988 post-McKinney Act survey of state educational agencies reported that of the thirty-three states responding, the majority planned a review and

51. *Id.* The Commissioner noted that, in the absence of state legislation specifically addressing the educational rights of homeless children, it was "not possible to declare in a single ruling the rights of all homeless students placed in temporary housing." *Id.*

52. *Id.*

53. *See, e.g., Delgado v. Freeport Pub. School Dist.*, 131 Misc. 2d 102, 499 N.Y.S.2d 606 (Sup. Ct. 1986). In *Delgado*, both the school district of plaintiff's former residence and the school district to which she had been moved for temporary shelter denied plaintiff education for her children. *Id.* at 103, 499 N.Y.S.2d at 608. Basing the question of residency on fact rather than surmise as to the projected duration of residence, the trial court rejected the plaintiff's preference to have her children educated in their former district. *Id.* at 104, 499 N.Y.S.2d at 608. The court found that the plaintiff had not established significant or determinative ties with the former district to which she had alleged the intention to return; the ties that were shown "amount[ed] merely to living there." *Id.* at 105, 499 N.Y.S.2d at 608.

54. *See, e.g., id.* at 103-04, 499 N.Y.S.2d at 607 (defining issue as one of residency determination where both school districts refused to enroll the homeless children); *Richards*, No. 11490, N.Y. Dept. Educ. (citing N.Y. EDUC. LAW § 3202(1) (1981) for the proposition that "each student has the right to attend school in his or her school district of residence").

55. 133 CONG. REC. S8944 (daily ed. June 27, 1987) (statement of Senator Kennedy).

56. 133 CONG. REC. S9078 (daily ed. June 30, 1987) (statement of Senator Moynihan).

57. 42 U.S.C. § 11431(2) (1988). The Department of Education's nonregulatory guidelines reiterate the policy stipulation requiring review of residency laws. U.S. Dep't of Educ., *supra* note 18, at 1. The guidelines categorically state that residency requirements should not pose any barriers to the education of homeless individuals. *Id.*

possible revision of state residency laws.⁵⁸ State implementation activities include: promulgating regulations to avoid residency law denial of access;⁵⁹ amending residency laws;⁶⁰ issuing legal advisories from the state board of education to public school districts;⁶¹ and surveying each of the state's local school district residency laws to ensure compliance.⁶²

Even when there is no express denial based on residency requirements, a possibility exists that disputes between two or more school districts over the residency of a particular homeless child might result in the child's being denied enrollment in any program.⁶³ Drafters of the McKinney Act evidenced concern that the potential for disputes, coupled with the lack of an expeditious dispute resolution mechanism, could result in de facto denial of education to homeless children.⁶⁴ Therefore, the Act's conferees stipulated that state plans must contain a mechanism for resolving disputes "[b]etween and within local edu-

58. S. Jackson, *supra* note 11, at 3. The Center for Law and Education has compiled a listing of state education laws that includes residency and attendance requirements. Center for Law & Educ., *State Compulsory School Attendance, Residency and Other Relevant Education Laws Affecting Homeless School-Age Children*, in MATERIALS ON THE EDUCATION OF HOMELESS CHILDREN, *supra* note 11, at Section II.C. Notwithstanding the planned review and revision of state residency laws, a 1990, 20-state survey by the National Law Center on Homelessness and Poverty found that 12 states still imposed "outright" residency requirements. NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY, SHUT OUT: DENIAL OF EDUCATION TO HOMELESS CHILDREN 26 (1990).

59. S. Jackson, *supra* note 11, at 3. Board of Education regulations for the state of New York now give parents of homeless students the right to choose whether their child attends school in the district last attended prior to homelessness or the district in which the temporary shelter is located. *Id.* at 3, 10 n.13. Changes in New York's residency law affected the outcome in *Orozco v. Sobol*, 703 F. Supp. 1113 (S.D.N.Y. 1989), in which the plaintiff alleged denial of access to education and challenged New York's residency requirements as violative of due process. *Id.* at 1115. The state adopted regulations changing these residency requirements prior to trial. The district court granted the defendant's motion to dismiss, holding that the plaintiff's claims for declaratory and injunctive relief were moot as a result of the newly promulgated residency requirements. *Id.* at 1116.

60. For example, Connecticut amended its residency law in 1987 to provide that homeless children may attend school in either the district of temporary residence or the district of origin. See S. Jackson, *supra* note 11, at 3, 10 n.14.

61. Illinois State Bd. of Educ., *supra* note 4, at 7.

62. Michigan State Bd. of Educ., State Plan for the Administration of the Education of Homeless Children and Youth Program 9 (1989).

63. See, e.g., *Delgado v. Freeport Pub. School Dist.*, 131 Misc. 2d 102, 499 N.Y.S.2d 606 (Sup. Ct. 1986). In *Delgado*, a homeless child was effectively denied access to any educational program while the child's parent and two local school districts fought over the question of residency. *Id.* at 103, 499 N.Y.S.2d at 607.

64. See H.R. CONF. REP. NO. 174, *supra* note 23, at 93, 1987 U.S. CODE CONG. & ADMIN. NEWS at 472. The National Coalition for the Homeless was perhaps the first organization to characterize the situation that results from prolonged disputes over residency as "de facto denial" of access to education. NATIONAL COALITION FOR THE HOMELESS, *supra* note 12, at 77.

cational agencies regarding the responsibility for providing educational services to homeless children located therein *in an expeditious and timely manner*.”⁶⁵ Textually and contextually, the McKinney Act provision differs from the conferees’ intent. The Act calls for state educational agency plans to provide procedures for “the resolution of disputes regarding the educational placement of homeless children and youth.”⁶⁶ On its face, the provision omits any reference to timeliness, which the conferees thought to be crucial in deterring de facto denial of education.⁶⁷ In addition, by placing the dispute resolution provision within the content requirements of the state plan,⁶⁸ and failing to reference it within the requirements for local educational agencies,⁶⁹ the mechanism is subject to interpretation as a form of an appeal process at the state level, instead of its intended function as an expeditor of placement and services at the local level.

The Act’s failure to prescribe the procedures to be used for dispute resolution of placement issues resulted in diverse state approaches—many of which neglected to address the issue of de facto denial. States appear to be almost evenly divided on whether the placement issue is to be brought initially to the attention of local or state officials.⁷⁰ Pre-existing complaint management systems within state educational agencies often are used as mechanisms to handle McKinney Act placement disputes.⁷¹ Typically, the existing complaint management system within a state educational agency deals with the entire educational process. By allowing states to incorporate

65. H.R. CONF. REP. NO. 174, *supra* note 23, at 93, 1987 U.S. CODE CONG. & ADMIN. NEWS at 472 (emphasis added). The *Delgado* court expressed a similar concern, stressing that it was essential that the plaintiff’s children promptly return to school, and ordering the appropriate school district to register the children within three days. *Delgado*, 131 Misc. 2d. at 105-06, 499 N.Y.S.2d at 608-09.

66. 42 U.S.C. § 11432(e)(1)(B) (1988).

67. *See supra* notes 64-65 and accompanying text.

68. 42 U.S.C. § 11432(e)(1)(B).

69. *Id.* § 11432(e)(3)-(6).

70. S. JACKSON, STATE PLANS FOR THE EDUCATION OF HOMELESS CHILDREN AND YOUTH: A SELECTED SURVEY OF THIRTY-FIVE STATES 9 (1990) (available from the Center for Law and Education, Cambridge, MA.).

71. In Texas, for example, the state has appointed both the Division of Complaints and Administration and the Division of Legal Services to resolve disputes that have arisen over the placement of homeless children. Division of Special Programs, Texas Educ. Agency, *supra* note 2, at 8. Florida, although encouraging litigants to settle disputes at the local level, has recommended a case by case appeal process at the state level. Homeless Educ. Project, Fla. Dep’t of Educ., Public Education Access for Children of the Homeless: Florida’s State Education Plan for Homeless Children and Youth 11 (Apr. 1989). In contrast, Ohio has applied a more literal meaning to the provision by directing the superintendent of public instruction to determine the school district in which the parent resides in the event of any disagreement. Ohio Dep’t of Educ., State Plan for the Education of Ohio’s Homeless Children and Youth 10 (1989).

dispute resolution for placement issues into existing complaint management systems, the McKinney Act may be encouraging states to expand functionally the scope of the disputes addressed under the Act.⁷² The Act's failure unambiguously to require procedures, at the school district level, for the immediate resolution of conflicts over placement, could detract from the Act's effectiveness in breaking down barriers to education that are based on residency. Nevertheless, state agency mechanisms that are capable of addressing a broad spectrum of complaints related to educational placement and programming may, in the long term, prove to be the most constructive vehicles for safeguarding *all* of the educational rights set out in the McKinney Act, including placement rights.⁷³

Only ten out of thirty-five states surveyed by the Center for Law and Education included specific timelines for dispute resolution.⁷⁴ Although states may have incorporated timelines into existing state-level complaint management systems,⁷⁵ the states' failure to acknowledge the timelines within their McKinney Act plans belies the conferees' goal of expeditious and timely dispute resolution. The problems presented by the bureaucratic remoteness of state-level dispute resolution and the omission of timelines are compounded by the states' failure to provide interim placement procedures. Less than twenty-five percent of the states surveyed by the Center for Law and Education addressed this issue.⁷⁶ These indices strongly suggest that state educational agencies are not recognizing the existence of *de facto* denial.

2. RECORD MANAGEMENT

A lack of education and medical records for homeless students can present a bureaucratic barrier to education. In the 1987 National Coalition for the Homeless survey,⁷⁷ twenty-five percent of the shelters reported difficulty in registering homeless children, and some homeless children faced actual denial of placement because of a lack of records from another school district.⁷⁸ Sixteen state educational

72. For instance, the Georgia state plan construes the dispute resolution process as applicable to any action "believed to be in non-compliance with the Stewart B. McKinney Act," and to the "[provision] of public education to a child designated as homeless." Georgia Dep't of Educ., *Georgia State Plan for Homeless 4* (Oct. 1988).

73. This would inadvertently fulfill the drafters' intention to include within the dispute resolution process disputes over the responsibility for providing educational *services*. H.R. CONF REP. NO. 174, *supra* note 23, at 93, 1987 U.S. CODE CONG. & ADMIN. NEWS at 472.

74. S. JACKSON, *supra* note 70, at 13.

75. *Id.* at 14.

76. *Id.*

77. NATIONAL COALITION FOR THE HOMELESS, *supra* note 12, at 4.

78. *Id.* at 10.

agencies indicated that lack of student records was among the top five reasons why homeless children were not attending school.⁷⁹

The McKinney Act addresses this problem by requiring local educational agencies to maintain school records so that they are available in a timely manner when a child enters a new school district.⁸⁰ Although state and local educational agencies may differ on their policies for matriculating homeless students who lack school records, and on their mechanisms used for collecting, storing, and retrieving data, there appears to be substantial dissolution of this barrier.⁸¹ Some states either require or recommend that local educational agencies enroll homeless children, who are without school records, on demand.⁸² Other states recommend "lenient" local educational agency policies,⁸³ aimed at preventing delays in enrollment due to failure to conform to record requirements. Student tracking systems, systems that provide comprehensive, current information on students as they move within a school district or from one district to another, exist at both state and local levels.⁸⁴

3. CHILD IDENTIFICATION

The experience of researchers assisting with the development of the Georgia state plan for educating homeless children⁸⁵ illustrates the difficulty involved in identifying the homeless population. Researchers canvassed the state's local school systems, county social services offices responsible for administering the Aid to Families with Dependent Children Program, shelters, community action agencies, and even sheriff's departments serving eviction notices.⁸⁶ They conducted field surveys in selected counties, aided by social service workers who pointed out known locations of homeless families with

79. U.S. DEP'T OF EDUC., *supra* note 6, at 10.

80. 42 U.S.C. § 11432(e)(6) (1988).

81. *See* S. JACKSON, *supra* note 70, at 15-18.

82. *Id.* at 15-16. Massachusetts, Iowa, and Pennsylvania prohibit the exclusion of students due to a lack of records, while Florida, Georgia, Maryland, and Utah recommend enrollment upon demand. *Id.*

83. *Id.* at 16 (including California, Indiana, Minnesota, and North Dakota).

84. *Id.* at 16-17. California encourages local educational agencies to establish student tracking systems, Maryland has established a state-wide system, and Florida encourages local school districts to use the existing student information base for transmitting student records. *Id.*

85. In 1987, the Georgia Department of Education contracted with the Center for Public and Urban Research at Georgia State University to conduct research activities related to assessing barriers to educational opportunities among homeless children in Georgia. Their final report is contained in the Georgia State Plan for Homeless, *supra* note 72, at 6.

86. *Id.* at 6-10.

children,⁸⁷ and collected data from the Georgia Office of Migrant Education.⁸⁸ The researchers observed that the project “[r]einforced the notion that counting the homeless is an extremely complex and difficult task.”⁸⁹ Even though they believed that the ranges for their estimates were essentially accurate, they concluded that “[n]o one can really say how many homeless children there are in Georgia.”⁹⁰

Under the non-prescriptive McKinney Act provisions, the individual state educational agency has discretion in formulating and implementing affirmative child-find efforts.⁹¹ Although one may infer from the Act’s policy statement that the McKinney Act’s goal is to provide free, appropriate public education to *all* homeless children,⁹² the Act’s provisions do not require the educational agency to act in concert with other social service providers to identify the total homeless population.

B. The Provision of a Free, Appropriate Public Education Within the Educational System

The McKinney Act provides for access to educational opportunity, defined as access to “a free, appropriate public education which would be provided to the children of a resident of a State and is consistent with State school attendance laws.”⁹³ The Act does not specifically define a free, appropriate public education. However, the non-regulatory guidelines adopt the description of comparable services contained in the Act⁹⁴ to define the substance of a free, appropriate public education as “educational services for which the child meets the eligibility criteria, such as compensatory education programs for the disadvantaged, and educational programs for the handicapped

87. *Id.* at 11.

88. *Id.* at 30-31.

89. *Id.* at 35.

90. *Id.*

91. The Act requires each state to “gather data on the number and location of homeless children and youth,” but neither stipulates how data is to be collected, nor outlines the level of effort that educational agencies must extend to locate homeless children. See 42 U.S.C. § 11432(d)(1) (1988). States have used, therefore, a vast array of field methodologies and statistical analyses to identify those children that each state defines as “homeless.” This ad hoc approach has resulted in summary data at the national level that is of limited credibility. See U.S. DEP’T OF EDUC., *supra* note 6, at 5.

92. “[E]ach State educational agency shall assure that each child of a homeless individual and each homeless youth have access to a free, appropriate public education” 42 U.S.C. § 11431(1). “The purpose of this subtitle is to make plain the intent and policy of Congress that every child of a homeless family and each homeless youth be provided the same opportunities to receive free, appropriate educational services” H.R. CONF. REP. NO. 174, *supra* note 23, at 93, 1987 U.S. CODE CONG. & ADMIN. NEWS at 472 (emphasis added).

93. 42 U.S.C. § 11431(1).

94. *Id.* § 11432(e)(5).

and for students with limited English proficiency; programs in vocational education, programs for the gifted and talented; and school meals program[s]."⁹⁵

The homeless child is to receive this free, appropriate public education (comparable services) in the school in which she has been placed according to the standards set forth in the Act.⁹⁶ This school, either in the school district of origin or in the district where the child is actually living, must be the one which is in the child's best interest.⁹⁷ The McKinney Act thus provides a national standard for placement decisions.⁹⁸ This best interest standard implies that neither administrative cost nor convenience should enter into the decision process.⁹⁹ However, neither the McKinney Act nor the non-regula-

95. U.S. Dep't of Educ., *supra* note 18, at 2.

96. 42 U.S.C. § 11432(e)(3).

97. *Id.*

98. In its review of New York State denial of education cases, the Center for Law and Education attributed erratic results to the varied interpretations of state residency law applied on a case by case basis instead of on a uniform standard. The Center noted that, with application and acceptance of homeless education funds under the McKinney Homeless Assistance Act, decisions would now turn on the "best interest of the child." Center for L. Educ. Newsnotes, Sept. 1987, at 7, col. 1.

99. Advocates in Massachusetts complained that in the absence of adequate funding for transportation, the implementation of the McKinney Act's best interest standard meant little. S. Jackson, *supra* note 11, at 4. Historically, the provision of or payment for transportation has been an issue that administrative agencies considered in placement decisions. The lack of transportation has often resulted in the outright exclusion of a child. A 1987 survey conducted by the National Coalition for the Homeless found that 15% of the shelters reported that shelter children were unable to obtain transportation to school. NATIONAL COALITION FOR THE HOMELESS, *supra* note 12, at 9. In 1990, the United States Department of Education reported to Congress that 28 state educational agencies cited a lack of transportation as one of the top five reasons why homeless children were not attending school. U.S. DEP'T OF EDUC., *supra* note 6, at 10. The convenience and practicality of the available transportation is also an issue. Long-term busing can make it difficult to attend school. Students are known to have been bused to former school districts up to 60 miles away from their shelters—a commute that is guaranteed to have a severe impact upon the child's ability to function during the school day. NATIONAL COALITION FOR THE HOMELESS, *supra* note 12, at 10. Drafters of the McKinney Act also viewed transportation as a component of the educational services to be provided to homeless children. In addition to educational programs, conferees stated their intention that services such as transportation be provided at the same level and to the same degree as those offered to other students in the homeless student's school. H.R. CONF. REP. NO. 174, *supra* note 23, at 94, 1987 U.S. CODE CONG. & ADMIN. NEWS at 473. Senator Kennedy included transportation as a service, along with special programs, that was to be provided to homeless students just as it was provided to other children. 133 CONG. REC. S8944 (daily ed. June 27, 1985). Interestingly, the provision of the Act covering services to be provided does not include transportation. The inference is that transportation as an administrative issue is moot, and that considerations of practicality and convenience related to transportation will be made under the best interest standard. Notwithstanding this inference, transportation continues to be an unaddressed barrier to educational access. Eleven of the 35 state plans surveyed by the Center for Law and Education omitted transportation as an issue

tory guidelines address who is to make the determination¹⁰⁰ and upon what child-centered criteria the determination is to be made. Absent federal direction, state educational agencies have approached these issues in several different ways. A Center for Law and Education review of thirty-five state plans found that states typically authorize education officials, rather than parents, to make placement decisions.¹⁰¹ A minority of plans recommend that education officials should take parental preferences into account when making placement decisions.¹⁰² Only a few states give parents an absolute or predominant role in the process.¹⁰³ In rare instances, state educational agencies have provided for a team approach that vests a joint decision in an educational agency representative, the parent(s), and social service or health department representatives.¹⁰⁴

In addition to determining who will make placement decisions, education officials, educators, and parents also should determine the criteria by which to evaluate options in order to ensure that they are in the child's best interest. Currently, less than half of the states surveyed identified some type of best interest criteria.¹⁰⁵ Criteria most frequently cited included continuity in the educational program and parental views.¹⁰⁶ However, the state plans offered even those factors in isolation—with no indication as to how they would be used in the decisionmaking process. By comparison, Texas views the placement determination in the child's best interest as a process of decisionmaking milestones, with a built-in default to the school district in which the child is actually living.¹⁰⁷ As part of this process, Texas has iden-

for discussion. S. JACKSON, *supra* note 70, at 20. Only five states outlined policies and procedures to meet transportation needs. *Id.*

100. The state plan is to contain a provision to "[a]uthorize the State educational agency, the local educational agency, the parent or guardian of the homeless child, the homeless youth, or the applicable social worker to make determinations required under this section [which includes placement decisions]." 42 U.S.C. § 11432(e)(1)(A).

101. S. JACKSON, *supra* note 70, at 9-10.

102. *Id.* at 10.

103. *Id.* Parents of homeless children in New York who receive public assistance, and parents in West Virginia have an absolute right to determine placement. *Id.* Other states allocate conditional rights to parents. Massachusetts, for example, allows parental determination only in those cases where the choice is between placement in one of two school districts. *Id.* Where the choice is between attendance areas within the same school district, the local educational agency determines placement. *Id.*

104. *Id.* at 11. In Tennessee, for example, "homeless placement teams" make placement decisions. *Id.*

105. *Id.* at 12.

106. *Id.*

107. The Texas state plan allows the parent to determine that it is in the best interest of the child to attend school in the district in which she is living. If the parent concludes that this is not in the child's best interest, the parent, the school district of origin, and the school district where the child lives must reach a consensus that it is in the child's best interest to continue

tified child-centered criteria for officials to use at the dispute resolution stage to determine what is in the child's best interest.¹⁰⁸ These include:

Services the student was receiving in the previous school district, the ability of the school district where the student is temporarily residing to duplicate those services, the student's success in the previous school, the likelihood of the student's success in the school where the student is temporarily residing, the student's rate of attendance at the previous school, and factors that might affect the student's rate of attendance if the student remained at the previous school or attended the school district where the student temporarily resides.¹⁰⁹

The Texas plan is an anomaly. It focuses on comparative aspects of the two placements—original or current district—in relation to the student's potential for success. The majority of the states that have even addressed the issue of the best interest standard have done so in a much more cursory fashion. They identify isolated indices, in lieu of grounding the standard in an educational philosophy.

Most state educational agency plans recognize the homeless child's right to a free, appropriate public education through comparable services as defined in the Act.¹¹⁰ This boiler-plate language, however, fails to define substantively either the type of educational services that will be available to meet the learning needs of the homeless child or the methods by which state and local educational agencies will deliver their services. Absent statutory direction, those state plans that went beyond the textual definition did so in a variety of ways. Some plans delegated additional responsibilities to local educational agencies,¹¹¹ while others recommended local educational agency activities for homeless student services.¹¹² A few states

the child in the district of origin. Division of Special Programs, Texas Educ. Agency, *supra* note 2, at 20. Lacking consensus, the State assumes that attendance in the school district where the child is living is in the child's best interest, unless one of the parties initiates the dispute resolution process. *Id.*

108. *Id.*

109. *Id.*

110. S. JACKSON, *supra* note 70, at 18. "[S]tate plans recited verbatim the McKinney Act language that local educational agencies provide homeless students with services 'comparable' to those provided non-homeless children." *Id.*

111. *Id.* Responsibilities included the designation of a local educational agency contact person, the implementation of a "case conference" to plan for individualized educational services, and the designation of an interagency team to "ensure that the basic needs of homeless students are met." *Id.* at 19.

112. *Id.* Recommendations included characterizing homeless students as "'at risk' and thus eligible for certain additional services," creating interagency committees, and incorporating service issues in school-level plans for the homeless. *Id.*

showed an awareness of the need for specific individualized services to accommodate the particular needs of homeless students. Georgia, for example, observed that homeless children may need more educational instruction than that provided in the typical school day and suggested that tutorial assistance be offered.¹¹³ Similarly, Texas acknowledged the existence of academic deficits in homeless children caused by environmental or educational deprivation.¹¹⁴ Although these students do not qualify for special education because their deficits are not the result of a handicapping condition, they require appropriate educational services that address their unique disadvantages.¹¹⁵ The Texas plan categorically states that homeless children will have difficulty benefiting from education without counseling.¹¹⁶ It recommends that local educational agencies coordinate their counseling services with other interdisciplinary efforts.¹¹⁷

Ultimately, the provision of a free, appropriate public education under the McKinney Act is a highly state-subjective matter. It is a function of each state's interpretation of the best interest standard and the extent to which the state's provision of comparable services meets the unique educational needs of the homeless child.

III. EDUCATIONAL RIGHTS AND SPECIAL EDUCATION JURISPRUDENCE

Since the 1975 enactment of the Education for All Handicapped Children Act ("EAHCA"),¹¹⁸ the courts have developed a body of federal jurisprudence¹¹⁹ from the interplay of the EAHCA with the provisions of the Civil Rights Act of 1871, as codified at 42 U.S.C.

113. Georgia Dep't of Educ., *supra* note 72, at 37-38.

114. Division of Special Programs, Texas Educ. Agency, *supra* note 2, at 12.

115. One example provided by Texas is that of a five-year-old who, because he had been brought up in a shelter, had not acquired the language experiences of a typical five-year old. Although the student would exhibit a severe language deficit at school, the deficit would not be attributable to a handicapping condition. Lacking an identifiable handicapping condition, this child may not be eligible for special education services to remedy his language problem. *Id.*

116. *Id.* at 13. This conclusion was based on three factors: (1) a Texas survey of shelter directors finding that 52% of the respondents believed that homeless children need counseling services to increase the likelihood of their success in school; (2) the educational agency's responsiveness to recent research findings; and (3) the educational agency's understanding of the life situation of the homeless. *Id.*

117. S. JACKSON, *supra* note 70, at 19.

118. Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1400-1485 (1988)).

119. This Comment adopts Wegner's identification and description of a composite special education jurisprudence. Wegner, *Educational Rights of Handicapped Children: Three Federal Statutes and an Evolving Jurisprudence* (pts. 1 & 2), 17 J.L. & EDUC. 387, 625 (1988). Wegner demonstrates that each of the three federal statutes reflects distinctive approaches to protecting members of vulnerable groups, yet together provide a fundamentally coherent

§ 1983,¹²⁰ and section 504 of the Rehabilitation Act of 1973.¹²¹ Litigants have used section 1983 and section 504 extensively to assert claims for handicapped children in areas not covered by the EAHCA, or where the EAHCA would provide only limited remedies.¹²²

The EAHCA is highly prescriptive, comprehensive legislation designed to ensure that handicapped children receive education appropriate to their needs.¹²³ Its individual child-centered focus, premised on a zero-reject principle, provides handicapped children with a clear entitlement to a free, appropriate public education.¹²⁴ The statute guarantees procedural rights to ensure that handicapped children receive their entitlement.¹²⁵

Section 1983 creates no new substantive rights.¹²⁶ Rather, advocates use it as a vehicle for asserting rights drawn from other sources.¹²⁷ Litigants must establish two elements to state a prima facie case under section 1983: the conduct complained of must be committed by a person acting under color of state law, and the conduct must deprive the plaintiff of rights secured by the Constitution or laws of the United States.¹²⁸ The United States Supreme Court has narrowed the construction of section 1983 to permit its use in asserting rights arising under other federal statutes only in those cases where the underlying statute creates enforceable rights, but does not provide its own comprehensive remedial scheme.¹²⁹ Either state or

special education jurisprudence that can serve as a framework to aid litigants and the courts. *Id.* at 696.

120. 42 U.S.C. § 1983 (1988).

121. 29 U.S.C. § 794 (1988).

122. Wegner, *supra* note 119, at 388-89.

123. See 20 U.S.C. §§ 1400-1401, 1406 & 1411-1420 (1988).

124. *Id.* § 1400(c).

125. *Id.* § 1415.

126. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 618 (1979) (concluding that section 1983, standing alone, provides no new protection for civil rights as it provides no new substantive rights at all). Section 1983 states in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1988).

127. *Chapman*, 441 U.S. at 618.

128. See *Parratt v. Taylor*, 451 U.S. 527, 535 (1981) (stating that section 1983 provides a civil remedy for deprivation of federally protected rights where the essential elements are present).

129. See *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 13-15 (1981) (holding that the underlying statute with its own comprehensive remedial scheme does not give rise to a section 1983 remedy).

federal courts may hear section 1983 claims,¹³⁰ and plaintiffs may pursue these claims under federal jurisdiction without having exhausted all available state administrative remedies.¹³¹ For purposes of section 1983 lawsuits, employees of state and local education agencies have generally been found to have acted under color of law.¹³²

Congress's objective in enacting section 504 was to remedy discrimination of the handicapped in the areas of education, employment, and access to public facilities.¹³³ Although limited to federally funded programs, section 504 is characterized by broad coverage. "Handicapped individuals" include those who have "a physical or mental impairment which substantially limits one or more of [their] major life activities, [have a] record of such impairment, [or] are regarded as having such an impairment."¹³⁴ Children falling outside of the classification of handicapped under the EAHCA, but covered under section 504, include those with AIDS, alcoholism, or temporary disabilities.¹³⁵ Insofar as the circumstances and conditions faced by homeless children impair their ability to learn, they may be able to assert claims under section 504, as homeless handicapped children, to access benefits from federally funded programs.

Congress designed section 504 to control institutional behavior

130. *Martinez v. California*, 444 U.S. 277, 283 n.7 (1980) (noting that state courts may, but are not required to, hear claims under section 1983).

131. *Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 502-12 (1982) (holding that exhaustion of state administrative remedies is not a prerequisite to an action under section 1983).

132. *See, e.g., Manecke v. School Bd. of Pinellas County*, 762 F.2d 912 (11th Cir. 1985) (local educational agency); *Rose v. Nebraska*, 748 F.2d 1258 (8th Cir. 1984) (state employee and state educational agency).

133. Section 504, as amended, provides in pertinent part:

No otherwise qualified individual with handicaps . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794 (1988).

134. *Id.* § 706(8)(B). Regulations define "physical or mental impairment" as:

(A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 34 C.F.R. § 104.3(j)(2)(i) (1989). "Major life activities" include "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Id.* § 104.3(j)(2)(ii).

135. Wegner, *supra* note 119, at 648.

by insuring that federal funds not be expended in a discriminatory way. As such, it prohibits three types of conduct: exclusion, denial of benefits, and discrimination.¹³⁶ An unjustified determination that a handicapped child is unqualified and, therefore, ineligible to participate in an activity or program is an example of exclusion.¹³⁷ When a handicapped child meets applicable selection and retention criteria for a program, but is denied an opportunity to participate meaningfully in it, a denial of benefits occurs.¹³⁸ Discrimination occurs when there is unequal treatment of handicapped and non-handicapped students.¹³⁹

A. Access to the Educational System

All handicapped children, including homeless handicapped children, are guaranteed a free, appropriate education under the EAHCA.¹⁴⁰ Estimates of the number of homeless children who would qualify for services under the EAHCA tend to be higher than those for the population as a whole.¹⁴¹ There is a likelihood that, given the socio-psychological problems associated with the environmental condition of homelessness, homeless children are at high risk for developmental disabilities.¹⁴² Nevertheless, at least two factors operate to deny special education opportunities to homeless children. The first is imbedded in the basic problem of identification.¹⁴³ States cannot provide services to a homeless child who cannot be found. Unlike the McKinney Act, however, the EAHCA is premised upon a zero-reject, child find policy;¹⁴⁴ a state violates the EAHCA's requirements if it fails to identify all homeless handicapped children within its jurisdiction. The second factor operating to deny special education opportunities to homeless children arises when states fail to identify and place in special education programs homeless students who are in school, and who would qualify for the EAHCA programs and services. The transiency of many homeless children precludes access to

136. *Id.* at 400.

137. *Id.* (giving examples of unjustified determinations, including the imposition of unjustified screening criteria that precludes participation in intramural sports, or the incorrect conclusion that certain handicapped children cannot participate safely in a mainstream educational program).

138. A school district may refuse to make threshold accommodations that would enable the child to participate, thus denying him the benefit. *Id.*

139. *Id.*

140. See 20 U.S.C. § 1400(e) (1988).

141. See, e.g., Russell & Williams, *supra* note 3, at 3-5 (1988) (positing that homeless children are at high risk of handicaps due to prenatal, postnatal, and early childhood environments).

142. *Id.* at 3-4.

143. See *supra* notes 44-45 and accompanying text.

144. See 20 U.S.C. §§ 1412-1413.

special education programs because the student is not in a school or district long enough to complete the often extensive educational evaluation and placement process required under the EAHCA.¹⁴⁵ Advocates for homeless children should press claims under the EAHCA when either factor operates to deny access to special education services. Advocates should also bring suit when inflexible procedures for participation in special education programs systematically discriminate against homeless handicapped children whose mobility prevents them from meeting the established service delivery models.

Because rights under the EAHCA are generally more extensive than those afforded under section 1983, only a small body of case law exists concerning educational rights of handicapped children under section 1983 claims.¹⁴⁶ The majority of these claims are in the area of procedural due process.¹⁴⁷ Federal courts have found a protected interest either through a state constitutional right or in a state's commitment to recognize that handicapped children have a right to a free, appropriate education as a matter of state law in order to qualify for federal funds under the EAHCA.¹⁴⁸ Assuming that a protected interest exists, the claim turns on whether the state has deprived the child of that interest without due process of law. A constitutional violation may only be shown, however, where a child has been denied an appropriate education, not where the educational agency has failed to provide her with the most appropriate education.¹⁴⁹

Courts have found that handicapped children have been deprived of their interest in two types of cases.¹⁵⁰ The first is where the state has failed to provide a meaningful hearing prior to governmental actions that would have the effect of denying a free, appropriate public education.¹⁵¹ The second involves de facto denials of procedural due process.¹⁵² These claims typically involve cases of fundamentally

145. See Division of Special Programs, Texas Educ. Agency, *supra* note 2, at 11.

146. Wegner, *supra* note 119, at 626 (stating that litigants generally bring section 1983 claims in connection with educational rights of handicapped children as the basis for attorney's fees awards).

147. *Id.* (noting courts' "growing recognition" and allowance of due process claims, even though they are likely to be available only in "rare, egregious situations").

148. *Id.* at 627.

149. See, e.g., Gallagher v. Pontiac School Dist., 807 F.2d 75, 79 (6th Cir. 1986) (adhering to the view that due process secures no right to the most appropriate educational placement).

150. Wegner, *supra* note 119, at 627.

151. *Id.* For example, in one case where the state had denied a child access to educational services for almost two years while school personnel failed to hold the necessary conference to develop an individualized educational program, a federal court found that the school's inaction failed to provide even the minimal procedural due process protections. *Id.* (citing Jackson v. Franklin County School Bd., 806 F.2d 623 (5th Cir. 1986)).

152. *Id.* at 628.

flawed administrative review process.¹⁵³

State assurances under the McKinney Act that each homeless child will have access to a free, appropriate public education, supported by state compliance with revision of residency law requirements, present the necessary protected interest under section 1983. Claims under section 1983 challenging arbitrary denial of access to education for homeless children may fall into either of the aforementioned categories. For example, state or local educational agency failure to implement dispute resolution procedures to provide for the timely placement of a homeless child could trigger a claim asserting lack of due process prior to governmental action. Local educational agencies that place homeless students in programs based on a flawed best interest standard may be vulnerable to a claim of de facto denial of procedural due process.

Equal protection claims for handicapped children also have been asserted under section 1983. With the exception of earlier cases addressing either exclusion of handicapped students as a group from state-funded educational programs or the denial of appropriate services to an individual child,¹⁵⁴ equal protection claims have been relatively unsuccessful.¹⁵⁵ This is attributable primarily because such claims do not evoke enhanced scrutiny. The Court's refusal to recognize a federally protected right to education,¹⁵⁶ and the determination that classification on the basis of handicap is not a suspect or quasi-suspect classification,¹⁵⁷ have resulted in a lower level of scrutiny. Nonetheless, outright exclusion of homeless children from state-funded educational opportunities by school districts that continue to

153. *Id.* Examples of de facto denials of procedural due process include cases in which a question exists as to the impartiality of a hearing officer and those in which state educational procedures allow someone other than an impartial hearing officer to make administrative review determinations. *Id.*

154. See *Frederick L. v. Thomas*, 408 F. Supp. 832 (E.D. Pa. 1976) (holding that learning disabled students who are not receiving instruction specifically suited to their handicaps stated a claim for relief under equal protection clause); *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972) (addressing systematic exclusion).

155. See *Wegner*, *supra* note 119, at 630. Often the courts dispose of equal protection claims on the merits by rejecting litigants' assertions that the absence of desired educational services gives rise to a constitutional exclusion, by determining that the litigant has failed to show an inequality of treatment between handicapped and non-handicapped children, or by maintaining that the Constitution does not require that handicapped children receive special services. *Id.*

156. See *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (stating that although public education is not a fundamental right, it is more than some "governmental 'benefit' indistinguishable from other forms of social welfare legislation") (citing *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (stating that public education is not a right granted to the individual by the Constitution)).

157. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439-43 (1985).

interpret state residency laws in a discriminatory manner may be actionable under section 1983 as a violation of the equal protection clause.¹⁵⁸

Claims of substantial denial of educational opportunity are actionable under section 504 in cases where many students have “experienced serious adverse effects amounting to exclusion from or denial of educational opportunities as a result of policies or practices of state or local educational agencies.”¹⁵⁹ It is well settled, however, that in individual cases, as well as in cases involving systemic flaws, a litigant must show substantial injury. Routine disputes concerning the appropriate program or placement or minor procedural irregularities are not actionable.¹⁶⁰

Section 504 could provide a vehicle for homeless section 504-handicapped children to assert claims for substantial denials of educational opportunity. A state’s failure to develop and implement state plan requirements related to breaking down barriers to educational access—as in a failure to provide transportation—would be grounds for a claim.

B. *The Provision of a Free, Appropriate Public Education Within the Educational System*

Under the EAHCA, the guarantee of a free, appropriate public education¹⁶¹ is composed of: (1) “special education,” defined as “spe-

158. See *Wood v. Strickland*, 420 U.S. 308 (1975); *Caitlin v. Ambach*, 1986-87 Educ. Handicapped L. Rep. (CRR) 558:165 (N.D.N.Y. 1986) (holding that school district’s refusal to provide educational services based on residency of handicapped child’s parents violated equal protection clause where interests in local autonomy, proper planning for schools, and availability of financial resources were not at issue).

159. See *Wegner*, *supra* note 119, at 636. Courts have found violations of section 504 where:

Far-reaching problems with personnel and budget support . . . led to deficient identification and diagnostic processes and plainly inadequate counseling services; . . . where school officials categorically excluded a group of mentally retarded students from participation in public school classes based on unfounded concerns that they would transmit hepatitis-B to other students; where a state’s failure to provide adequate support led to a breakdown and long delays in the evaluation and placement of students; and where special day schools for seriously emotionally disturbed students lacked adequate support staff, curriculum and facilities.

Id. (citations omitted).

160. *Id.* at 637 (citing *Timms v. Metropolitan School Dist.*, 722 F.2d 1310 (7th Cir. 1983); *Powell v. Defoe*, 699 F.2d 1078 (11th Cir. 1983) (dicta); and *Monahan v. Nebraska*, 687 F.2d 1164 (8th Cir. 1982)). “The United States Office of Civil Rights also declines to pursue routine complaints regarding programming and placement unless exceptional circumstances such as exclusion from educational opportunities are alleged.” *Id.* at 637 n.62 (citing *Conel, Aronson & Whitted (IL)*, Educ. Handicapped L. Rep. (CRR) 257:427 (OCR 1985)).

161. 20 U.S.C. § 1401(18) (1988) (including special education and related services).

cially designed instruction, at no cost to parents or guardians to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions";¹⁶² and (2) "related services," which includes "transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a handicapped child to benefit from special education."¹⁶³ The provision of a free, appropriate public education is one of the most nettlesome requirements of the statute. Since the EAHCA's enactment, the courts have developed a body of litigation concerning the substantive definition of "appropriate."¹⁶⁴ The United States Supreme Court's landmark decision, in *Board of Education v. Rowley*,¹⁶⁵ defined "appropriate" education as "consist[ing] of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction."¹⁶⁶ The Court held that the statute did not describe the level of educational programming necessary to satisfy the benefit test.¹⁶⁷ In its review of legislative history, the Court found that Congress was concerned with providing access to public education for handicapped children, not with providing a particular level of services.¹⁶⁸ According to the Court, a student in the regular classroom receives some benefit as long as a student's individualized program is "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."¹⁶⁹ Post-*Rowley*, courts have not ordered schools to provide the best possible education or to maximize student potential.¹⁷⁰

This interpretation of "appropriate" education presents an interesting situation for homeless handicapped children falling under the EAHCA. The *Rowley* Court rejected the equal opportunity standard used by the trial court,¹⁷¹ and in so doing, rejected as well the proposition that handicapped children are entitled to a level of services com-

162. *Id.* (defining free, appropriate public education to include special education and related services); see *id.* § 1401(16) (defining special education).

163. *Id.* § 1401(17).

164. See generally Myers & Jenson, *The Meaning of "Appropriate" Educational Programming Under the Education for All Handicapped Children Act*, 3 S. ILL. U.L.J. 401 (1984) (tracing the concept of "appropriate" educational programming through case law).

165. 458 U.S. 176 (1982).

166. *Id.* at 188-89.

167. *Id.* at 189.

168. *Id.* at 192.

169. *Id.* at 203-04 (footnote omitted).

170. See, e.g., *Georgia Ass'n of Retarded Citizens v. McDaniel*, 716 F.2d 1565, 1570-71 (11th Cir. 1983), vacated on other grounds and remanded, 468 U.S. 1213 (1984).

171. *Rowley*, 458 U.S. at 189-90 (stating that statutory language "contains no requirement

parable to that provided to non-handicapped children. In contrast, the McKinney Act, with its equal opportunity policy, specifies comparability of services.¹⁷² If this provision is read broadly, advocates could argue that homeless handicapped children are entitled to more than the "some-benefit" standard under the EAHCA.

Interpretation of the McKinney Act's equal opportunity standard may be impacted by section 504 precedent. Early claims brought under section 504 raised the question whether the statute's equal opportunity mandate required objective equality of opportunity by permitting access to existing programs as they were presently designed, or subjective equality necessitating modification of programs to meet the needs of handicapped children. In *Southeastern Community College v. Davis*,¹⁷³ the Court adopted the objective equality standard when it ruled that section 504 required "evenhanded action," rather than "substantial modifications," to reshape programs to meet the needs of the handicapped.¹⁷⁴ In 1985, the Court clarified the *Davis* holding, stating that the decision entailed:

str[iking] a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs: while a grantee need not be required to make "fundamental" or "substantial" modifications to accommodate the handicapped, it may be required to make "reasonable ones."¹⁷⁵

The Court predicated this ruling on an understanding that although the needs of handicapped children need not be fully met, equal treatment of unequals can effectively deny equal opportunity.¹⁷⁶

Litigants may be able to use section 504's equal opportunity premise to attack the basic educational structure of the McKinney Act. The McKinney Act, by equating free, appropriate public education with comparable services, could be viewed as treating unequals equally. If a litigant can show that the condition of homelessness affects the child's ability to learn, then the litigant could argue that providing homeless children with services *comparable* to services designed for children who are able to learn is tantamount to denial of equal treatment under the law.

Under this interpretation, section 504 homeless children may be

. . . that States maximize the potential of handicapped children 'commensurate with the opportunity provided to other children'").

172. 42 U.S.C. § 11432(e)(5) (1988).

173. 442 U.S. 397 (1979).

174. *Id.* at 405, 410-11 & 413.

175. *Alexander v. Choate*, 469 U.S. 287, 300 (1985).

176. *Id.* at 297-99.

entitled to some modification in programs in order to accommodate their learning problems. For example, they may be entitled to summer school programs to compensate for periods of absence during the school year. Procedures for special education placement and programming may be adapted to accommodate the transiency of homeless children. Protection of individual children under section 504 mandates that handicapped children cannot be suspended or expelled for misconduct related to the handicapping condition.¹⁷⁷ This provision may apply to behavior exhibited by homeless children as a result of the stressfulness of their homeless situation.

Section 504 also may provide homeless children with some protection from arbitrary procedural requirements. Litigants have raised actionable claims successfully for children denied any meaningful educational program¹⁷⁸ and for those denied an appropriate education,¹⁷⁹ as a result of serious procedural flaws. Similarly, "any decision or action that in practice prevents a child from benefiting from the federally-funded educational program" may give rise to a section 504 claim.¹⁸⁰ Litigants may assert these rights for homeless children as long as substantial injury can be shown. So employed, section 504 would serve to reinforce the best interest standard of the McKinney Act.

IV. CONCLUSION

The McKinney Act provides a wellspring for the pursuit of educational programs and services for homeless children. It sets out national policy and puts into place a framework of state assurances and requirements for local educational agencies. In turn, this framework provides both a state property interest in education for homeless children and standards and requirements related to that interest. It

177. *S-1 v. Turlington*, 635 F.2d 342, 346 (5th Cir. 1981) (stating that a school must accompany expulsion by a determination as to whether a handicapped student's misconduct is related to her handicap).

178. *See Patton v. Dumpson*, 498 F. Supp. 933, 936-39 (S.D.N.Y. 1980) (holding that a private right of action under section 504 for money damages is appropriate where a handicapped child is allegedly discriminated against through denial of educational programs based on child's physical and mental handicaps).

179. *See Sanders v. Marquette Pub. Schools*, 561 F. Supp. 1361, 1372 (W.D. Mich. 1983) (holding that a cause of action exists where a plaintiff claims that defendant's failure to assess properly and accommodate disabilities denied her the benefit of measures that would have made education appropriate); *Boxall v. Union High School Dist.*, 464 F. Supp. 1104, 1109-10 (N.D. Cal. 1979) (recognizing a private right of action to review questions of what constitutes an "appropriate" education).

180. *See John A. v. Gill*, 565 F. Supp. 372, 383 (N.D. Ill. 1983) (recognizing a cause of action for allegations related to defendant's failure to process appeals related to educational placements of handicapped children).

can, therefore, serve as a vehicle for educational claims arising under the Act itself or under section 1983. Rights may flow from the federal policy enumerated within the Act or from a state's statutes, plans, and procedures developed in response to the Act's requirements.

The McKinney Act's effectiveness, however, is limited in part by its non-prescriptive requirements and its failure to provide any sort of guarantee of free, appropriate educational programming. Although states must submit detailed plans to receive funding¹⁸¹ under the Act, they are allowed great latitude in actual implementation. Moreover, the Act imposes no sanctions for noncompliance with its provisions.

Another weakness of the McKinney Act is the flawed educational premise that homeless children are subject to educational needs—and consequently rights—comparable to those of non-homeless children. Educational research and the experience of state educators and advocates, evidenced by the textual material of individual state plans, confirm the differences between homeless and non-homeless children. Homelessness affects the ability to learn. Therefore, an act predicated upon the provision of a free, appropriate public education, textually defined as services comparable to those provided to students who are residents of the state, is insufficient. Only the grosser violations of a homeless child's educational rights are addressed under this educational standard. If a homeless child is to attend and benefit from school, and ultimately break the cycle of homelessness, the state must recognize her unequal ability to learn. The courts must interpret the McKinney Act, which textually treats unequals as equals, in its broadest sense.

The recently enacted amendments to the McKinney Act¹⁸² address some of the weaknesses discussed in this Comment. The amendments both expand some of the statutory rights for homeless children¹⁸³ and increase the probability that educational services

181. Congress had under-funded the Act's educational provisions since the original authorization of \$12.5 million. This included \$5 million in guaranteed grants to states for fiscal years 1987 and 1988, and an additional \$2.5 million in exemplary grants to state or local agencies in fiscal year 1988. 42 U.S.C. §§ 11432(g), 11433(f) (1988). Congressional authorizations for the Act's extension to fiscal years 1989 and 1990 were the same as in the original Act. Stewart B. McKinney Homeless Assistance Amendment Act of 1988, Pub. L. No. 100-628, § 702(a)(5)(b), 102 Stat. 3245 (codified at 42 U.S.C. §§ 11432(g), 11433(f) (1988)). However, the 1990 amendments increased authorizations to \$50 million for fiscal year 1990, and "such sums as may be necessary for each of the fiscal years 1992 and 1993." Stewart B. McKinney Homeless Assistance Amendments Act of 1990, Pub. L. No. 101-645, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 4673 (to be codified at 42 U.S.C. § 11301).

182. Pub. L. No. 101-645, §§ 612, 723, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) at 4735, 4739.

183. Congress enlarged the scope of the Act's policy statement. In addition to addressing the dissolution of the barrier caused by residency requirements in attendance laws, the Act

available under these rights will reach the child.¹⁸⁴ However, although the amendments hold great promise, the Act remains a non-prescriptive statute whose effectiveness is dependent on the quality of state and local educational agency implementation. Moreover, to the extent that the implementation of new provisions requires the development of state and local delivery systems, the amendments' impact will be delayed. But most importantly, the amendments still fail to answer the questions that would unlock the meaning of the Act's statutory rights for homeless children. They fail to define what *is* a free, appropriate public education, provided through an educational placement determined under a best interest standard.

It is at this point that the incorporation of rights growing out of special education jurisprudence is essential. These rights can provide teeth for the McKinney Act. They can provide procedural rights and substantive interpretations needed to meet the unique educational needs of homeless children. The McKinney Act, together with the EAHCA, section 1983, and section 504, can help to resolve the paradox of the homeless school-age child.

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now encompasses "other laws, regulations, practices, or policies that may act as a barrier to the enrollment, attendance, or success in school." *Id.* § 612 (to be codified at 42 U.S.C. § 11431). Identified problems now include transportation issues and enrollment delays caused by immunization requirements and guardianship issues. *Id.* (to be codified at 42 U.S.C. § 11432(e)(1)(G)). State plans are to provide for the *prompt* resolution of disputes—inferring a prohibition against practices that result in the de facto denial of education to homeless students. *Id.* (to be codified at 42 U.S.C. § 11432(e)(1)(B)). The Act now recognizes the right not only to enroll and to attend, but also to succeed in school. *Id.* (to be codified at 42 U.S.C. § 11432(c)(2)) (providing that grants be used for "activities for and services to homeless children and homeless youths that enable such children and youths to enroll in, attend and achieve success in school").

184. The authorized funding level for fiscal year 1991 is 10 times greater than fiscal year 1990. *Id.* (to be codified at 42 U.S.C. § 11432(g)). State educational agencies may use these funds for grants to local educational agencies "for the purpose of facilitating the enrollment, attendance and success of homeless children and youths in schools." *Id.* § 723 (to be codified at 42 U.S.C. § 11433 (a)(1)). Assuming that local educational agencies respond to this funding carrot, and apply for grant monies, they now will have the wherewithal to provide a variety of educational and support services to homeless children. The Amendments specify that primary activities, which must account for not less than 50% of the grant funds, include "tutoring, remedial education services, or other education services." *Id.* (to be codified at 42 U.S.C. § 11433(b)). Other related activities for which states may use grant funds include expedited evaluations, assistance to defray excess transportation costs, before- and after-school and summer programs, counseling, social work and psychological services, and the purchase of school supplies. *Id.* (to be codified at 42 U.S.C. § 11433(b)(2)).