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Patching the Umbrella: Sheltering the Education of Homeless Youth under the McKinney-Vento Act in the Modern Era

“The direction in which education starts a man will determine his future life.”¹

Introduction

Across the United States approximately 1.5 million students attending public elementary schools, middle schools, and high schools currently experience homelessness.² Like “traditional” K-12 students, homeless students face ordinary concerns about school, such as studying for upcoming tests, and keeping up with assignments.³ However, homeless students face additional concerns due to their nomadic status, including constant food insecurity, concern about where they will sleep on any given night, and uncertainty about where they will go to school throughout the year.⁴ For students facing homelessness, school often serves as a place of security and safety.⁵ The unpredictable life of a homeless student temporarily stabilizes at school. At school, children generally have access to food, a caring environment, and the comfort of a daily organized schedule.⁶

In addition to concerns about food and shelter, homeless students are often disadvantaged by a weak academic foundation, and limited family support.⁷ School and education have become a clear way out of poverty in the modern age of high schools geared toward college preparation

¹ Plato, *The Republic* 132 (First Avenue Editions 2015) (1908).

² National Center for Education Statistics (NCES), *Back to School Statistics*, National Center for Education Statistics Home Page, <https://nces.ed.gov/fastfacts/display.asp?id=372> (last visited Mar. 20, 2021); National Center for Education Statistics (NCES), *Digest of Education Statistics*, Annual Reports, https://nces.ed.gov/programs/digest/d19/tables/dt19_105.30.asp (last visited Mar. 20, 2021).

³ National Center for Homeless Education, *Children and Youth Experiencing Homelessness: An Introduction to the Issues*, Homeless Education – General (Aug. 2017), <https://nche.ed.gov/wp-content/uploads/2018/10/introduction.pdf>.

⁴ *Id.* (Noting that homeless students frequently transfer schools to accommodate their fluid housing situations).

⁵ *Id.*

⁶ *Id.*

⁷ Government Accountability Office, *Higher education: Actions needed to improve access to federal financial assistance for homeless and foster youth*, Reports & Testimonies (May 19, 2016), <https://www.gao.gov/products/GAO-16-343>.

and career readiness.⁸ Homeless students struggle with higher academic concerns and have lower GPAs than students with homes.⁹ Housing instability often means the lack of a place to do homework, which leads to lower grades.¹⁰ For many homeless students, the desire for a better life often serves as motivation to earn a high school diploma.¹¹ Homeless youth seeking school enrollment commonly struggle with transportation and an insurmountable preoccupation with survival.¹²

Congress first enacted legislation addressing the educational needs of homeless youth in 1987 when it created the Stewart B. McKinney Homeless Assistance Act.¹³ President Bill Clinton renamed the Act in 2000 as the McKinney-Vento Homeless Assistance Act.¹⁴ Among other achievements, the McKinney-Vento Act created the United States Interagency Council on Homelessness, effectively shining a political spotlight on America's growing homelessness problem.¹⁵ The McKinney-Vento Act creates a broad range of protective measures for homeless people across the United States of America, including housing assistance, the federal emergency management food and shelter program, identification and use of surplus federal property, and education programs.¹⁶

In the over-thirty-year history since the enactment of the McKinney-Vento Act, the Act has auspiciously protected and uplifted the country's homeless population. However, the Act also leaves the homeless population vulnerable, despite many adjacent protections the Act

⁸ *Id.*

⁹ School House Connection, *Youth Homelessness and Higher Education: An Overview* (Feb. 16, 2020), https://schoolhouseconnection.org/youth-homelessness-and-higher-education-an-overview/#_ednref15.

¹⁰ Institute for Children, Poverty & Homelessness, *Part 7: School Climate*, No Longer Hidden (January 2, 2020), <https://storymaps.arcgis.com/stories/cb7493a6130e43e991b48badd502699a>.

¹¹ *Id.*

¹² U.S. Department of Education, *State and District Implementation of the Education for Homeless Children and Youth Program*, Results in Brief (Feb. 2015),

<https://www2.ed.gov/rschstat/research/pubs/homeless/state-district-implementation-homeless-children-brief.pdf>.

¹³ PL 100–77 (HR 558), PL 100–77, July 22, 1987, 101 Stat 482.

¹⁴ H.R. 5417, 104th Cong. (2000) (enacted).

¹⁵ H.R. 558, 100th Cong. (1987); 42 U.S.C. § 11311.

¹⁶ 42 U.S.C. § 11301.

provides. For example, where the Act provides liaisons and social workers, the Act does not create ancillary actionable protections from social problems the homeless students face once they get into the schools. The Act does not discuss the issue of age. Age limits that would make sense for traditional students serve as a disadvantageous hurdle for homeless students.¹⁷ The Act does not tackle potential abuse from school districts avoiding judgments. It also does not address inconsistent local policy that conflicts with the Act's intentions.

To identify and address remaining issues weighing against homeless youth in achieving an education, Section I of this article explores the McKinney-Vento Act's broad definition of homelessness, statistics on the modern homeless population across the United States of America, and funding under the Act.¹⁸ Section II of this article gives a focused overview of protections under the umbrella of the McKinney-Vento Act, particularly, discussing the Act's requirement about school choice and transportation. Section III discusses areas where the Act fails to meet needs or needs improvement, including connecting with homeless students, homeless people knowing rights to education, how administrators unjustly avoid liability, inadequate funding, New York City's conflicting housing assistance, modern education technology needs, sociological issues facing homeless youth seeking education, and age bars on education. Finally, Section IV briefly proposes and explores potential solutions and first steps towards solving the problems preventing homeless youth from getting an education with the assistance of the McKinney-Vento Act.

¹⁷ See *infra* note 193 and accompanying text.

¹⁸ This paper will be limited to discussing conditions affecting students facing homelessness while living with a parent or family member. This paper will not discuss runaway homeless youth and the challenges they face in obtaining education, as runaway and otherwise unaccompanied homeless youth are a separate homeless subpopulation who face different causes of homelessness and have different needs from homeless youth living with family. 42 U.S.C. § 11301(a)(4); 34 U.S.C. § 11201. See Substance Abuse and Mental Health Services Admin., *Youth Experiencing Homelessness Face Many Challenges*, U.S. Dep't of Health & Human Services (Aug. 12, 2019), <https://www.samhsa.gov/homelessness-programs-resources/hpr-resources/youth-experiencing-homelessness> (last visited Apr. 22, 2021) (discussing challenges homeless youth face, including struggling to get a job, and avoiding adult shelters because of dangers like drugs, alcohol, and sexual assault).

For the sake of homeless youth in public school systems across the country, the McKinney-Vento Act needs stronger administrative legislation and enforcement concerning housing homeless families. The Act should be strengthened without aggravating a young person's education to ensure those youth can receive the full benefit of early education, creating a strong foundation to keep them from becoming homeless adults. The Act must also provide more sociologically and psychologically focused resources to be truly effective in leveling the field for homeless youth. Homeless youth need more than a path to the classroom in order to succeed.

I. The McKinney-Vento Act

Congress founded the McKinney-Vento Act on the policy that states must create and ensure equal access to the appropriate public education for homeless youth and the children of homeless people.¹⁹ This "equal access" provision protects homeless children's education ranging from pre-school to high school.²⁰ In creating the McKinney-Vento Act, Congress addressed the fact that homeless youth face different circumstances than youth who are settled in a home.²¹ Notably, compulsory residency requirements pose a substantial obstacle for homeless youth, since they would cause frequent changes of school districts for students without a stable home.²² The Act acknowledges that some standard requirements for securing education are set too high for homeless youth, and would otherwise make it impossible for a homeless parent to enroll their child in a school.²³ The Act requires state and local educational agencies to revise the laws and

¹⁹ 42 U.S.C. § 11431(1).

²⁰ *Id.*; Nat'l Law Ctr. on Homelessness & Poverty, *R.I. v. New York*, 224 F.R.D. 314, 326 (E.D.N.Y. 2004) (holding that plaintiffs had formed a class in a McKinney-Vento Act action, where the class included all homeless children in Suffolk County, including at least one pre-school age child).

²¹ 42 U.S.C. § 11431(2).

²² *Id.*

²³ 42 U.S.C. § 11431(2); *S.C. v. Riverview Gardens Sch. Dist.*, No. 18-4162-CV-C-NKL, 2020 U.S. Dist. LEXIS 160826, at *15 (W.D. Mo. Sep. 3, 2020) (emphasizing the Act's focus on protecting the rights of homeless individuals and distinguishing the McKinney-Vento Act's definition of "free, appropriate public education" from the

policies to give homeless youth the same public education opportunities as students in a fixed home.²⁴ The Act also protects students outside of the classroom through provisions requiring transportation accommodations and the preservation of enrollment at a homeless child's original school.²⁵

Defining Homelessness

Under the McKinney-Vento Act, the term “homeless children and youths” covers all individuals without “fixed, regular, and adequate nighttime residence.”²⁶ As defined, a wide range of living situations sweep a child into the homeless youth category. This definition of homeless youth includes children living in cars, parks, substandard housing, abandoned buildings, public spaces, bus or train stations, or similar settings.²⁷ These are all spaces we as a society have come to typically associate with homeless living. Surprisingly, a child also falls into the category of “homeless youth” when sharing housing of others because of loss of their own housing, economic hardship, or a similar reasons.²⁸ Homeless youth are also those living in motels, hotels, camping grounds, or trailer parks due to lacking alternative housing.²⁹ In the McKinney-Vento context a combination of the location in which a person lives and the reason or situation under which they are living in that location defines homelessness.³⁰ The liberal definition of homelessness under the McKinney-Vento Act accounts for the total circumstance surrounding the child's living situation and then the Act provides resources and other assistance to address this “homelessness.”

definition of the same phrase used in the Individuals with Disabilities Education Act, which carries an exhaustion requirement).

²⁴ *Id.*

²⁵ 42 U.S.C. § 11432 (g)(1)(J)(iii).

²⁶ 42 U.S.C. § 11434a(2)(A).

²⁷ 42 U.S.C. § 11434a(2)(B).

²⁸ *Id.*; G.S. v. Rose Tree Media Sch. Dist., 914 F.3d 206, 211 (3d Cir. 2018)(student lived with his grandmother but was homeless under the McKinney-Vento Act).

²⁹ *Id.*

³⁰ 42 U.S.C. § 11434a.

Homeless Youth by the Numbers

The U.S. Department of Housing and Urban Development (“HUD”) conducts an annual point-in-time count, which shows a count of people experiencing homelessness across the country on a single night.³¹ Despite data on homelessness, like point-in-time checks and school surveys, homeless people often remain unaccounted for and invisible.³² Homeless families especially tend to stay hidden in fear of being separated by state child protective services and to avoid other external threats posed by sleeping on the streets.³³ While the HUD count scans the streets, those who are well-hidden cannot be accounted for, making these numbers only estimations, and an incomplete view of the true size of the homeless population.

According to a point-in-time (“PIT”) count conducted by HUD in January 2019, approximately 567,715 people were experiencing homelessness.³⁴ Of that half-million population, 35,038 were unaccompanied youth.³⁵ The PIT count also found 171,670 homeless people in families, including an undistinguished number of school age children.³⁶ Unsheltered homeless people make up 49.5% of the PIT count.³⁷ HUD’s 2019 PIT Count showed a 3 percent increase in the homeless population over previous years, making three consecutive years of a

³¹ HUD Exchange, *Point-in-Time Count and Housing Inventory Count*, <https://www.hudexchange.info/programs/hdx/pit-hic/> (last visited Mar. 20, 2021).

³² Alastair Boone, *Is There a Better Way to Count the Homeless?*, Bloomberg CityLab, (March 4, 2109), <https://www.bloomberg.com/news/articles/2019-03-04/the-problem-with-hud-s-point-in-time-homeless-count>.

³³ Office of Planning, Research and Evaluation (OPRE), *Child Separation among Families Experiencing Homelessness* (Apr. 27, 2018), <https://www.acf.hhs.gov/opre/report/child-separation-among-families-experiencing-homelessness>.

³⁴ National Alliance to End Homelessness, *Homelessness in America, State of Homelessness: 2020 Edition*, <https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness-2020/>.

³⁵ *Id.* This paper will not discuss the special and additional problems facing unaccompanied youth in the discussing the McKinney-Vento Act, but will focus on youth living in a family setting.

³⁶ *Id.*

³⁷ *Id.*

national increase in homelessness.³⁸ With the COVID-19 pandemic creating financial instability throughout America, the number of homeless people only stands to increase.³⁹

Grants Under the McKinney-Vento Act

People who are not forced to face homelessness often choose to ignore it and its ubiquitous presence in the United States population.⁴⁰ The capitalistic nature of the United States of America makes it easier to ignore the issues that homeless people face because of the pervasive attitude that the homeless are strangers who should be working, and the omnipresent individualistic mentality society encourages.⁴¹ Those same mentalities may contribute to ignoring the population of homeless youth in need of basic education. Through funding incentives, the McKinney-Vento Act serves to force focus back on the homeless youth and their education.⁴² The Act allows specific funding conditioned on the given state maintaining certain requirements for providing an education to homeless youth.⁴³

The fundamental requirement of the Act is that the state must assure that “each homeless youth has equal access to the same free, appropriate public education, including a public preschool education, as provided to other children and youths.”⁴⁴ Grants appropriated under the Act may be used for a specified list of purposes, including services to better identify homeless children, establishing an agency to carry out the duties of the Act, and professional development programs for liaisons in the educational agency.⁴⁵ By contributing money to the states, the Act

³⁸ *Id.*

³⁹ National Alliance to End Homelessness, *New Report Shows Rise in Homeless in Advance of COVID-19 Crisis* (March 18, 2021), <https://endhomelessness.org/new-report-shows-rise-in-homelessness-in-advance-of-covid-19-crisis/>.

⁴⁰ Andrew Van Dam, *The Surprising Holes in Our Knowledge of America's Homeless Population*, The Washington Post (September 17, 2019 at 2:45pm), <https://www.washingtonpost.com/business/2019/09/18/surprising-holes-our-knowledge-americas-homeless-population/>.

⁴¹ Mimi Kirk, *How the Streets Got So Mean*, Bloomberg CityLab (May 13, 2020 at 12:26pm), <https://www.bloomberg.com/news/articles/2020-05-13/what-causes-homelessness-start-with-capitalism>.

⁴² 42 U.S.C. § 11431(2).

⁴³ *Id.*

⁴⁴ 42 U.S.C. § 11431(1).

⁴⁵ 42 U.S.C. § 11432(d).

ensures homeless youth have a protected right to public education and a legal course of action when that right is violated.⁴⁶ The Act also effectively incentivizes the state investing in the education of the homeless youth.

II. The Umbrella of the McKinney-Vento Act

School of Origin – “Best Interest” Provision and Transportation

For homeless youth pursuing education, the need to change schools or school districts when the child is dislocated presents a major challenge. The Act requires states receiving federal funding from the Act to maintain broad flexibility when placing homeless youth in school districts.⁴⁷ The “best interest” provision of the Act requires the local educational agency (“LEA”) to operate in the youth’s “best interest” by continuing their education in their original school for the entire time they are homeless, when the family becomes homeless between or during academic years.⁴⁸ The Act also provides that the student stay in the school of origin during the entire period of litigation, when there is litigation on the subject of which school the child should attend.⁴⁹ The best interest standard requires the LEA to operate under the presumption that it is in the best interest of the child to be kept in their original school, unless it is contrary to the request of the parent or guardian.⁵⁰ Alternatively, the educational agency may, if it is in the best interest of the homeless youth, enroll them in any public school the child would be eligible to attend by living in the area in which the youth actively or temporarily lives.⁵¹ The LEA must also consider the impact of mobility on achievement, health, safety, and education.⁵²

⁴⁶ *Lampkin v. D.C.*, 27 F.3d 605, 611 (D.C. Cir. 1994)(holding that the McKinney-Vento Act is enforceable through an action under 42 U.S.C. § 1983).

⁴⁷ 42 U.S.C. § 11432(g).

⁴⁸ 42 U.S.C. § 11432(g)(3)(A).

⁴⁹ 42 U.S.C. § 11432(g)(3)(E)(i); *N.J. v. New York*, 872 F. Supp. 2d 204, 215 (E.D.N.Y. 2011)(holding an injunction to prevent disenrollment of students was appropriate while the mother was awaiting the result of her appeal of the decision on her family’s status as “homeless” within the McKinney-Vento Act’s definitions).

⁵⁰ 42 U.S.C. § 11432(g)(3)(B)(i).

⁵¹ 42 U.S.C. § 11432(g)(3)(A).

⁵² 42 U.S.C. § 11432(g)(3)(B)(ii).

Under the protection of this provision, to whatever extent possible, the state is required to minimize disruption to the homeless youth's educational environment.⁵³ Though the "best interest" provision does not solve all problems for a young student facing homelessness, the provision successfully lessens one barrier to the success of homeless youth in schools.⁵⁴

In the same effort as the "best interest" provision, the Act creates an option for state and local agencies to coordinate with state and local housing agencies to minimize educational disruption for homeless youths.⁵⁵ The coordination helps identify the homeless youth, ensure they have access to public education, and raises awareness for the school about challenges associated with homelessness.⁵⁶ This section of the legislation primarily serves to ensure there is a state-supported system for homeless youth to smoothly function in the total school system, but can also help lessen the need for "bending the rules" about residency to accommodate the "best interest" provision.

Despite the clear provisions, students have been forced to bring litigation to protect the rights granted under the Act. Courts tend to side in favor of the homeless children by allowing them to stay in the same school. In 2010, a Pennsylvania child, named L.R., and his guardian, his grandmother, were living in Steelton, Pennsylvania, where L.R. attended school.⁵⁷ They became homeless when their house burned down.⁵⁸ L.R. and his grandmother relocated to a house in Harrisburg, living with four other people, and with restricted use of the facilities.⁵⁹ The Steelton district initially agreed that L.R. was homeless within the McKinney-Vento Act and allowed

⁵³ *Id.*

⁵⁴ *L.R. ex rel. G.R. v. Steelton-Highspire Sch. Dist.*, No. 1:10-CV-00468, 2010 WL 1433146, at 5 (M.D. Pa. Apr. 7, 2010) (holding that the district's decision not to enroll the student pending the merits of the case directly violated the McKinney-Vento Act's protection of homeless children); *G.S.*, 914 F.3d at 212.

⁵⁵ 42 U.S.C. § 11432(g)(5)(B).

⁵⁶ 42 U.S.C. § 11432(g)(5)(C).

⁵⁷ *L.R.*, 2010 U.S. Dist. LEXIS 34254, at *2.

⁵⁸ *Id.*

⁵⁹ *Id.* at *2-3.

L.R. continued enrollment in the district through June of that school year.⁶⁰ The grandmother intended to move back to Steelton as soon as possible.⁶¹ In August, the district refused enrollment for L.R. on the grounds that he was still living at the same location in Harrisburg.⁶² The court granted an injunction to allow L.R. to continue his education in Steelton.⁶³ The court reinforced that the McKinney-Vento Act and public interest both dictate that homeless children are vulnerable and it is in their best interest to stay enrolled in a school pending the determination of the appropriate school selection.⁶⁴

Once a district allows a homeless child to remain in their school of origin, the battle to transport the child to the school begins. If a homeless child moves far enough from a school that their enrollment is threatened, the commute to school is guaranteed to be long and the district will need to provide that transportation.⁶⁵ Parents of homeless children in Suffolk County, New York brought an action to enforce the McKinney-Vento Act, in 2004.⁶⁶ The parents sought an injunction against New York state and several other parties to enforce the McKinney-Vento Act, claiming the county failed to locate and enroll homeless youth, provide uninterrupted transportation, provide immediate enrollment when a child became homeless, and provide education services comparable to those received by other students.⁶⁷ In denying the state's motion to dismiss, the Court held that the McKinney-Vento Act requires that the school district accommodate the homeless student's transportation needs to keep the child's education

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at *4.

⁶³ *Id.* at *6.

⁶⁴ *Id.* at *5.

⁶⁵ When a child's living arrangements put them outside the area served by the local educational agency while the child attends the school of origin, "the local educational agency of origin and the local educational agency in which the child or youth is living shall agree upon a method to apportion the responsibility and costs for providing the child or youth with transportation to and from the school of origin." 42 U.S.C. § 11432(g)(1)(J)(iii)(II).

⁶⁶ *R.I.*, 224 F.R.D. at 316.

⁶⁷ *Id.* at 317.

uninterrupted.⁶⁸ Under the McKinney-Vento Act, a homeless child can stay in their original school, and travel to school each day at no new cost.

III. Holes in the Umbrella of the McKinney-Vento Act

The McKinney-Vento Act was created as the first and only body of federal legislation in response to the growing homelessness issues of the 1980's.⁶⁹ President Franklin D. Roosevelt said, "The school is the last expenditure upon which America should be willing to economize."⁷⁰ The McKinney-Vento Act has not met President Roosevelt's caution. Since its creation, the McKinney-Vento Act has sheltered many homeless children from inequities and dangers created by their status in the national community.⁷¹ While the victories on McKinney-Vento claims have protected homeless youth pursuing education, the failed cases run the gamut of unaddressed needs that slip through the cracks of the Act. Several of the issues unaddressed by the McKinney-Vento Act rest on sociological conditions that could be protected or improved through legislation.

The McKinney-Vento Act has led to more awareness of homeless children in the education system. The Education for Homeless Children and Youth ("EHCY") Program, established under the McKinney-Vento Act, provides formula grants to state education agencies, aiming to ensure that all homeless children have equal access to the same free public education.⁷² In 2012, 26 states reported making site visits to districts not funded by the EHCY Program to

⁶⁸ *Id.* at 320; 42 U.S.C. 11432(g)(1)(J)(iii).

⁶⁹ 42 U.S.C. § 11301; National Coalition for the Homeless, *McKinney-Vento Act*, 1 (June 2006), <https://www.nationalhomeless.org/publications/facts/McKinney.pdf>.

⁷⁰ Roosevelt, Franklin D. (1938), *Public Papers of the Presidents of the United States: F.D. Roosevelt, 1936*, Volume 5, 470.

⁷¹ Education for Homeless Children and Youths, *Program Profile*, CFDA 88.196, U.S. Dep't of Educ., (May 2020), https://nche.ed.gov/wp-content/uploads/2018/12/ehcy_profile.pdf.

⁷² National Coalition for the Homeless, *NCH Fact Sheet #10*, (Aug. 2017), <https://www.nationalhomeless.org/publications/facts/education.pdf>.

monitor those districts' efforts to lessen barriers to homeless youth.⁷³ These districts make site visits without the incentive of funding because they are aware of the barriers that prevent homeless youth from pursuing a public-school education.

Under the McKinney-Vento Act, each state receiving funding has an established coordinator for the education of homeless children, tasked with gathering and making publicly available reliable, comprehensive information.⁷⁴ At the state level, coordinators focus primarily on providing technical assistance to districts, coordinating with organizations, and clarifying the role of district liaisons.⁷⁵ EHCY state coordinators have identified needs to strengthen the program and more effectively provide assistance.⁷⁶ Among those weaknesses is a need for enhanced parental involvement, additional learning opportunities for the homeless students in the school day, and inter-district transportation.⁷⁷ At the district level, liaisons focus on identifying homeless students and ensuring they receive appropriate services, such as transportation.⁷⁸ EHCY district liaisons have identified a need for more technical assistance to clarify the requirements of the Act, legal responsibilities of the district liaison, and appropriate methods for collecting, reporting, and using data on homeless children.⁷⁹

There is no right of action under the Act against schools not protecting homeless students from bullying or prejudicial treatment that motivates them to leave school. The homeless are not a federally protected class.⁸⁰ Though the homeless should not be elevated to the status of a

⁷³ *State and District Implementation of the Education for Homeless Children and Youth Program*, *supra* at note 12.

⁷⁴ 42 U.S.C. § 11432(f).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *State and District Implementation of the Education for Homeless Children and Youth Program*, Results in Brief, *supra* note 73.

⁸⁰ Through several acts, federal anti-discrimination law protect race, religion, age, sex, pregnancy, familial status, disability status, veteran status, and genetic information. *See e.g.*, 42 U.S.C. §§ 12101-12113; 29 U.S.C. §§ 621-634; 42 U.S.C. § 2000ff; 42 U.S.C. § 2000e.

protected class, legislation should specifically protect the homeless against recurring issues they face. The McKinney-Vento Act should be amended to obligate schools to monitor activity and protect homeless students from bullying. One way the Act could obligate this protection is by requiring schools to receive and investigate complaints from the homeless students.⁸¹ Congress can use the McKinney-Vento Act to take steps towards protecting homeless students from disadvantage in the classroom as well.

Knowing Your Rights + Private Right of Action

One of the first problems concerning any legislation meant to protect individuals is the basic knowledge of rights. Because of society's tendency to ignore the homeless population, more likely than not, people do not often discuss the legislative protections for the homeless. Across the United States of America, each state has a "State Coordinator for Homeless Education," tasked with overseeing the statewide implementation of the McKinney-Vento Act.⁸² There are also homeless education liaisons to support the education of homeless students.⁸³ The liaison is tasked with connecting the parents and children in homeless families with appropriate resources.⁸⁴ Under the Act, a school receiving funding from the Act must notify the parents of homeless children of their rights upon enrollment and then twice annually.⁸⁵ However, the requirement does not protect people against the vulnerability of not knowing their rights before they become homeless. The Act should require that all parents regularly directly receive information on resources for homeless students.

The McKinney-Vento Act does not explicitly supply a private right of action for homeless parents advocating for their children. In 1994, just seven years after the Act was first

⁸¹ See *infra* note 186 and accompanying text.

⁸² *Children and Youth Experiencing Homelessness*, *supra* note 3.

⁸³ *Id.*

⁸⁴ National Center for Homeless Education, *Local Homeless Education Liaisons* (last visited Mar. 20, 2021), <https://files.eric.ed.gov/fulltext/ED594624.pdf>.

⁸⁵ 42 U.S.C. 11432(e)(3)(C).

initiated, the District of Columbia Circuit Court of Appeals decided *Lampkin v. District of Columbia*, brought by parents of homeless children in the District of Columbia to enforce the McKinney Act.⁸⁶ The parents sought an order to have the school district consider the parents' request in making best interest determinations for placing the homeless children in schools, and to assure the homeless students would have access to appropriate transportation and school meal and education programs.⁸⁷ The district court found the parents had no private right of action under the McKinney Act.⁸⁸ The circuit court looked at the Act to determine whether a private right of action did in fact exist under the McKinney Act.⁸⁹ The court ultimately concluded that the McKinney Act did not foreclose a private right of action enforced pursuant to 42 U.S.C. § 1983.⁹⁰ The court found that, under section 11432(e)(3) of the McKinney Act, beneficiaries had enforceable rights.⁹¹ While the court left the door open for a private right of action, the Act would be stronger if it provided directly for a private right of action.⁹² Under the Act, a distressed individual does not have an administrative enforcement mechanism against a federal agency granting funds to a local agency. The lack of recourse signals that Congress contemplated § 1983 when deciding on remedies.⁹³

Avoided Liability + Third Party Action

The Act makes it too easy for school districts to escape liability, while also making it more difficult than necessary for the homeless youth to establish liability against the district and hold them accountable. In 2010 a case in the District of Columbia concluded that the McKinney-Vento Act did not have a statutory mechanism for enforcing a beneficiary's rights

⁸⁶ *Lampkin*, 27 F.3d at 606.

⁸⁷ *Id.* at 607.

⁸⁸ *Id.*

⁸⁹ *Id.* at 610.

⁹⁰ *Id.* at 611.

⁹¹ *Id.*

⁹² The Secretary of Education is authorized to “‘make grants’ and ‘review’ state plans, but is not authorized to take any enforcement for violations of the Act. 42 U.S.C. § 11434.” *R.I.*, 224 F.R.D. at 320.

⁹³ *Id.*

administratively.⁹⁴ The Court held that the mother could assert a McKinney-Vento Act violation by way of a § 1983 claim in court, but not in combination with other education related claims in a state administrative hearing.⁹⁵ The court found that the mother may have asserted a violation under the McKinney-Vento Act based on the school district's decision not to provide the child with transportation, but that an administrative hearing officer did not have to consider those claims.⁹⁶ The court denied the school board's motion to dismiss the mother's § 1983 claim as far as it covered a violation under the Act unrelated to the hearing officer's refusal to exercise jurisdiction over the mother's McKinney-Vento claim.⁹⁷ Despite the McKinney-Vento Act's broad definition of homelessness, the Act fails to provide children with the easiest or the speediest method to enforce their rights. This is particularly so when the child is already in an administrative proceeding attempting to enforce educational rights under several statutory entitlements.

The McKinney-Vento Act makes an effort to help the homeless but does not successfully support external efforts to shelter the homeless school aged children. Though families most commonly bring McKinney-Vento education claims, others outside of the education system who aim to assist homeless families can struggle without a statutory mechanism to assert claims meant to protect the homeless under the Act. In 2005, a Massachusetts court held that, while the McKinney Act created rights for the homeless to bring actions concerning barriers to their participation in education, a homeless service provider lacked the requisite standing to bring a claim under the Act.⁹⁸ Plaintiff Sylvia's Haven, Inc., was a not-for-profit charity providing a transitional shelter for homeless women and children on a closed Massachusetts military base.⁹⁹

⁹⁴ Holmes-Ramsey v. D.C., 747 F. Supp. 2d 32, 41 (D.D.C. 2010).

⁹⁵ *Id.* at 43.

⁹⁶ *Id.* at 42.

⁹⁷ *Id.* at 41-42.

⁹⁸ Sylvia's Haven, Inc. v. Mass. Dev. Fin. Agency, 397 F. Supp. 2d 202, 217 (D. Mass. 2005).

⁹⁹ *Id.* at 211-12.

Initially, the charity leased the property for payment of one dollar per year, but eventually, the local redevelopment authority appointed to oversee the homeless provider required the charity to reimburse the local redevelopment authority for the “education of children on the premises.”¹⁰⁰

This case distinctly highlights two blind spots in the McKinney-Vento Act. Most clearly, the court highlights the fact that the Act has no explicit stating of a private right of action, though the Act does not lack the necessary legislative intent to allow a private right of action.¹⁰¹ However, the court found that there was no Congressional intent to give organizations assisting homeless people a mechanism for a private right of action.¹⁰² This case also brings forth the question of whether the funding provided under the Act is sufficient for reaching the many standards simultaneously imposed by the Act. In this case, the plaintiff lost primarily because the court did not find their arguments for standing to be persuasive.¹⁰³ In addition, court emphasized that the McKinney-Vento Act provides homeless children with a right to a free public education but does not provide a statutory right to receive specific support services.¹⁰⁴ If the Act provided a right to receive support services, the Plaintiffs in the case would have been more likely to establish standing and continue providing support for the homeless children.

Avoiding Judgment

A moot case can help hide a district’s issues with homeless students. A mother in Alabama brought an action in 2010, alleging a McKinney-Vento Act violation when her son was denied enrollment at high school.¹⁰⁵ The school district still allowed the student to continue at the same school and use the bus service while the civil action was pending, but did not admit to

¹⁰⁰ *Id.* at 213.

¹⁰¹ *Id.* at 219.

¹⁰² *Id.*

¹⁰³ *Id.* at 206-07.

¹⁰⁴ *Id.* at 207.

¹⁰⁵ *F.R. v. Gonsoulin*, 434 F. Supp. 3d 1279, 1280-81 (N.D. Ala. 2020).

violating the McKinney-Vento Act.¹⁰⁶ Because the school district allowed the student to finish the school year, the court did not reach a conclusion on whether the district had violated the Act.¹⁰⁷ The student had already received the desired remedy and the violation was not ongoing at that point.¹⁰⁸ The case was ultimately dismissed due to mootness.¹⁰⁹ In this particular case, the court could not take any further action because there was no further relief to be provided. However, situations like this Alabama case are one of the many ways school districts slip just beyond reach of the protection the McKinney-Vento Act envisioned for homeless students. When the district escapes judicial penalty, the McKinney-Vento Act should additionally require the state's education department to conduct an independent investigation into the district's treatment of homeless students.

The Act currently requires school compliance with provisions concerning school choice and providing assistance to parents or guardians.¹¹⁰ The Act also requires the Secretary of Education to report on the schools receiving funding, detailing compliance, barriers to school access, the school's progress on integrating homeless children in the mainstream school environment, and progress the schools make to help students meet state academic standards.¹¹¹ The McKinney-Vento claims that go to court are only the claims parents make and pursue with determination. There is no way to know if they are the only examples where a homeless student was denied enrollment in this district; because the district avoided a negative judgment from the court, there is no other way to ensure this situation does not arise again. The McKinney-Vento Act should incorporate a compliance trigger to monitor patterns in districts, even when claims

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1284.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ 42 U.S.C. § 11432(e)(3)(C)(iv).

¹¹¹ 42 U.S.C. § 11432(e)(3)(F).

are mooted or parents do not persist in pursuing their homeless child's rights. Investigation could play a crucial role in proactively protecting homeless students.

Not Homeless Enough?

On occasion, courts have denied requests for injunctions where children were displaced from their first home but did not meet other aspects of the Act's definition of homeless.¹¹² In a Connecticut case the court held that a family's argument that their residential property was not "adequate" because it was a rental property did not rise to the definition of homelessness under the McKinney-Vento Act.¹¹³ A father appealed a judgment that the local school board was impartial in deciding that his children were not residents of Farmington due to their indefinite absence from Farmington, and that the children were not entitled to free school accommodations in Farmington.¹¹⁴ The father attempted to bring a claim for accommodations under the McKinney-Vento Act when he and his family moved to a previous address to allow construction on their house in Farmington because heavy rain had damaged the Farmington property, making it uninhabitable.¹¹⁵ The family had clear intent to live in Farmington, as they paid taxes, had friends in the community, and went to church in Farmington.¹¹⁶ Because the Farmington property was uninhabitable, the family cancelled their lease with a potential tenant and stayed in the rental property they owned in New Britain.¹¹⁷ While the family was in litigation with their insurance provider to repair the Farmington home, the Farmington school board informed the family that they were no longer entitled to free school accommodations in Farmington.¹¹⁸ A family that resides at a rental property due to a natural disaster does not fall under the education

¹¹² See *supra* notes 113-20 and accompanying text.

¹¹³ *Mangiafico v. State Bd. of Educ.*, 53 A.3d 1066, 1076 (Conn. App. Ct. 2012).

¹¹⁴ *Id.* at 1070.

¹¹⁵ *Id.* at 1071.

¹¹⁶ *Id.* at 1070.

¹¹⁷ *Id.* at 1071.

¹¹⁸ *Id.*

protections of the McKinney-Vento Act.¹¹⁹ However, a natural disaster displacing a family would put them into the homeless accommodations category if they ended up living in someone else's house.¹²⁰

In another case, a Delaware district court denied a request for a preliminary injunction because the plaintiffs failed to meet the burden of showing they were entitled to have the children attend Skyline Middle School in Red Clay Consolidated School District.¹²¹ A mother brought a claim under the McKinney-Vento Act on behalf of her two children.¹²² The mother had gone on unpaid medical leave and lost her apartment as a result.¹²³ That summer, the mother sent the children to live with their father.¹²⁴ The father lived in a rented apartment with four other adults and one other child, but the court found the children were not homeless despite the mother's homelessness, since the father had joint custody of them.¹²⁵ The mother had enrolled the children in Skyline Middle School, located in Red Clay Consolidated School District, where the mother had rented the original apartment.¹²⁶ After the children had attended one day of school, the father enrolled the children in a Bayard Middle School, located in the Christina School District.¹²⁷ At some point before their case reached the court, the children had moved yet again, this time to their godmother's house, which was located in the Colonia School District, another district.¹²⁸ The mother and the children agreed that the children should attend Skyline, so the mother requested a preliminary injunction to get the children back into Skyline.¹²⁹

¹¹⁹ *Id.* at 1075.

¹²⁰ 42 U.S.C. § 11434a(2)(B).

¹²¹ J.S. by and through S.S. v. Red Clay Consol. Sch. Dist., C.A. No. 15–876–LPS, 2015 WL 5920316, at *1 (D. Del., 2015).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at *2.

¹²⁶ *Id.* at *1.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

For the purpose of the McKinney-Vento Act, when someone brings a claim for a right under the Act, there should be an extension of the definition of homelessness. The court should be able to inquire as to what has led the children's parent or guardian to seek homeless status for education.¹³⁰

Adequacy of Funding

While the McKinney-Vento Act contributes funding to states that comply with the requirements, the homeless population in the country is large and continues to grow.¹³¹ With that growing population comes additional costs. Most importantly, the homeless youth make up the portion of the homeless population least likely to be able to financially support themselves in any way because of their young age. This need for financial support begs the question: Who will pay for the education of the homeless youth? State and local budgets must set aside funding for education costs, but they must also account for the homeless youth in the school system who may not be able to afford any costs attached to education, not even the minor costs that come with a "free" public education.¹³²

Though the Act's requirements contribute funding to complicit states, the Act also creates a heavy burden of accommodations for the states involved. Consider the way that an average public-school district is formulated. The school populations are often determined by who lives closest to the school or within certain defined limits. In addition, the school provides a set amount of resources for each student to ensure that students can reach school and perform sufficiently in the academic setting.¹³³ One of the resources provided to students is transportation to and from the school building, often depending on how far away the student lives from the

¹³⁰ *But see Id.* at *2.

¹³¹ *Homelessness in America*, *supra* note 34.

¹³² 42 U.S.C. §§11432(g)(1)(I), (g)(7); National Association for the Education of Homeless Children and Youth, *The Most Frequently Asked Questions on the Education Rights of Children and Youth in Homeless Situations*, 23 (Nov. 2009) <http://nompengacademy.us/sites/default/files/2018-02/FAQ-Homeless%20rights.pdf>.

¹³³ *Local Homeless Education Liaisons*, *supra* note 84.

school.¹³⁴ Under the McKinney-Vento Act, specifically under the considerations of the “best interest” provision, displaced homeless youth may live in temporary shelter significantly further from their school than what a district imagined when first organizing amenities, such as a bus service.¹³⁵ In order to serve the homeless youth who live outside of the district in which their school is located, the school districts must spend more on transporting that one student. The cost of getting the student to school is not the only one to consider. The Act also encourages the creation of professional support for homeless youth in the school system.¹³⁶ With these varying needs demanding the same funds from the McKinney-Vento Act, homeless students are still left in difficult situations with fewer resources. The Act comes with funding but does not have specific allocations for that funding when it is given to the state. The Act should be modified to require a more detailed analysis of the funding required for homeless students, so the federal arm of the Act can more efficiently distribute funding or raise additional funding where necessary.

New York City: Housing v. Education

Though the McKinney-Vento Act aims to remove barriers that prevent homeless children from attending school, the Act does not remove barriers that force children to skip school. According to the United States Census Bureau, New York City is the single most populous city in America, with an estimated population of 8,336,817 spread over 302 square miles.¹³⁷ Among that population, over an estimated 78,000 people are homeless.¹³⁸ That’s approximately 94 homeless people for every 10,000 people in the population.¹³⁹ That population includes 5,428

¹³⁴ National Center for Homeless Education, *Transporting Children and Youth Experiencing Homelessness* (Aug. 2017), <https://files.eric.ed.gov/fulltext/ED594679.pdf>.

¹³⁵ 42 U.S.C. § 11432(g)(3)(A).

¹³⁶ 42 U.S.C. § 11432 (Grants for State and local activities for the education of homeless children and youth).

¹³⁷ United States Census Bureau, *New York City, New York*, Quick Facts (2019), <https://www.census.gov/quickfacts/newyorkcitynewyork>.

¹³⁸ National Alliance to End Homelessness, *SOH: State and CoC Dashboards*, Homelessness Statistics, <https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness-dashboards/?State=New%20York>.

¹³⁹ *Id.*

youth and 52,070 people in families.¹⁴⁰ New York City is currently facing its highest homeless population since the Great Depression.¹⁴¹ This information makes it clear that there is a subpopulation of homeless school-aged children who would be in need of the protections afforded by the McKinney-Vento Act.

The McKinney-Vento Act's statement of policy includes the statement "[h]omelessness is not sufficient reason to separate students from the mainstream school environment."¹⁴² The Act even goes as far as to explicitly declare that states may not segregate the homeless students into a separate school or program of schooling based on their housing status.¹⁴³ It stands to reason that the legislators intended to ensure that homeless youth would be treated the same as children with fixed addresses.¹⁴⁴ It goes against that same reasoning that some states require disruption of a child's education in order for the child to get the housing necessary to continue school. One example of that situation can be found in New York City.

In 2019, 43 percent of New York City's homeless youth were chronically absent from school, missing at least 10 percent of the school year.¹⁴⁵ In New York City, all homeless families with children must go to the Prevention Assistance and Temporary Housing ("PATH") intake center to apply for housing.¹⁴⁶ The PATH intake center also offers onsite services, including Child Protective and Family Support Services, Domestic Violence Assistance, Medical Assistance, and School-Related Supports.¹⁴⁷ The PATH intake center, which is specifically for

¹⁴⁰ *Id.*

¹⁴¹ Samantha M. Shapiro, *The Children in the Shadows: New York City's Homeless Students*, The New York Times (Sept. 9, 2020), <https://www.nytimes.com/interactive/2020/09/09/magazine/homeless-students.html>; Department of Homeless Services, *Families with Children: Applying for Temporary Housing Assistance*, Department of Social Services (last visited Apr. 30, 2021), <https://www1.nyc.gov/site/dhs/shelter/families/families-with-children-applying.page>.

¹⁴² 42 U.S.C. § 11431.

¹⁴³ 42 U.S.C. § 11432(e)(3)(A).

¹⁴⁴ 42 U.S.C. § 11431(1).

¹⁴⁵ Samantha Shapiro, *supra* note 141.

¹⁴⁶ *Families with Children*, *supra* note 141.

¹⁴⁷ NYC Department of Homeless Services, *Learn More About Prevention and Temporary Housing* (last visited Apr. 30, 2021), <https://www1.nyc.gov/assets/dhs/downloads/pdf/path-brochure.pdf>.

pregnant women and families with children, requires that all family members are present for the application process.¹⁴⁸ Requiring all family members being present also requires the parents to bring their children to intake centers to qualify for housing, despite the fact that the children may have to miss school during the application process.¹⁴⁹ This requirement forces homeless youth to choose between having a place to sleep the next night or learning the next math equation for a test. The New York City system for assisting the homeless does not give enough consideration to the education needs of homeless youth.

New York's history with the McKinney-Vento Act dates back to one of the first cases brought under the Act. In 1987, the same year the Stewart B. McKinney Homeless Assistance Act was enacted by Congress, a woman brought an action against the New York State Department of Education when they would not allow her seven-year-old child to attend school because of the residency requirement.¹⁵⁰ The child fit squarely within the McKinney-Vento definition of "homeless" but the family had only recently moved back to New York from Puerto Rico and had not established housing in a specific location.¹⁵¹ The mother hoped to live in Mount Vernon when the family settled, but at the time of the action the family temporarily resided in Yonkers.¹⁵² The court concluded that the family services placement would determine the child's "residence" for the purposes of school placement.¹⁵³ The case solidifies the fact that homeless youth do not have the right to free public education in any district of New York, only in the district where the youth resides.¹⁵⁴ The court also recognized the full extent to which

¹⁴⁸ *Id.*

¹⁴⁹ Samantha Shapiro *supra* note 141.

¹⁵⁰ Orozco v. Sobol, 674 F. Supp. 125 (S.D.N.Y. 1987).

¹⁵¹ *Id.* at 126.

¹⁵² *Id.*

¹⁵³ *Id.* at 131.

¹⁵⁴ *Id.* at 129.

disruptions to education or denial of placement in a school can cause irreparable damage to a child's educational progress.¹⁵⁵

To address the education of homeless youth in New York, the state has enacted the New York Education Law §3209, which incorporates the McKinney-Vento Act requirements.¹⁵⁶ However, New York still struggles to serve homeless students.¹⁵⁷ Based on the cases in New York state and the general tone of the state's legislation concerning the education of homeless youth, it is fully understood that disruptions to a young person's education can have irreparable harm on their academic progress and their future in education. Considering this understanding, there is a major inconsistency in the fact that New York City requires families seeking temporary housing to be accompanied by children during school hours, preventing those same children from getting an education. The McKinney-Vento Act should create an override for requirements that would interrupt the weekly education of a homeless student.

Modern Education and Technology-Era Challenges for Homeless Youth Pursuing Education

Throughout the twenty-first century, technology use in the classroom has consistently increased, with the United States as the country with the highest use of technology in the classroom on a global scale.¹⁵⁸ When the COVID-19 pandemic forced public schools across the country to move to remote instruction, the need for technology became prominent as educators

¹⁵⁵ *Id.* at 128.

¹⁵⁶ N.Y. Educ. Law § 3209 (McKinney).

¹⁵⁷ New York more recently battled a McKinney-Vento claim in 2011 when a mother's home was destroyed in a fire and she brought an action against the New York State Education Department for attempting to dis-enroll her children from their schools after the family moved into temporary housing outside of the district. *N.J.*, 872 F. Supp. 2d 204.

¹⁵⁸ In 2018, Cambridge Assessment conducted a global survey on the use of technology in the K-12 classroom setting across more than 100 countries with nearly 20,000 respondents. According to the survey, the United States of America ranked first in use of Desktops (75%), Smartboards (59%), and Smartphones (74%) in the classroom. *The 2018 Cambridge International Global Education Census*, Cambridge Assessment International Education (Nov. 2018), <https://www.cambridgeinternational.org/Images/514611-global-education-census-survey-report.pdf>.

re-imagined the public education process.¹⁵⁹ In the midst of the pandemic, with most schools closed to in-person instruction, student access to technology and internet was more important than ever.¹⁶⁰ Wi-fi in the virtual classroom is as important as transportation to the physical classroom.¹⁶¹

On March 15, 2020, New York City public schools shut down in response to the COVID-19 pandemic.¹⁶² Approximately 114,000 homeless students attend schools across New York City.¹⁶³ Just like all the other public-school students in New York City, those 114,000 homeless students were required to continue their education remotely.¹⁶⁴ Many of the homeless students lacked internet access or a device that could access internet, and therefore they were unable to smoothly and effectively transition to remote learning.¹⁶⁵

Under the pressure of court scrutiny, New York City has begun to directly address and rectify the technology disadvantage for homeless youth.¹⁶⁶ In 2020, through the case of *E.G. v. City of New York*, the Coalition for the Homeless and parents of school-age children living in

¹⁵⁹ Valerie Strauss, *The Education Technology Students Will Need – and Won't – After Coronavirus*, The Washington Post (Aug. 6, 2020, 1:09 PM), <https://www.washingtonpost.com/education/2020/08/06/education-technology-students-will-need-wont-after-covid-19/>.

¹⁶⁰ Robin Lake and Alvin Makori, *The Digital Divide Among Students During COVID-19: Who Has Access? Who Doesn't*, Center of Reinventing Public Education (Jun. 16, 2020), <https://www.crpe.org/thelens/digital-divide-among-students-during-covid-19-who-has-access-who-doesnt>. A New York Times article on the technology disadvantages faced by homeless youth at the beginning of pandemic remote education highlighted that students lacking proper equipment would fall days or weeks behind their classmates who had access to proper equipment. The student at the center of the article, 10-year-old Allia Phillips, lived with her mother and grandmother in a homeless shelter and did not have access to Wi-Fi. Allia enjoyed school and did not want to miss any classes because she hoped to reach the fourth-grade honor roll again. Nikita Stewart, *She's 10, Homeless and Eager to Learn. But She Has No Internet*, The New York Times (Mar. 26, 2020), <https://www.nytimes.com/2020/03/26/nyregion/new-york-homeless-students-coronavirus.html>.

¹⁶¹ John Wachen and Mark Johnson, *Examining Equity in Remote Learning Plans: A Content Analysis of State Responses to COVID-19*, The Learning Partnership (Nov. 2020), https://www.jointhepartnership.net/wp-content/uploads/2020/11/State-Remote-Learning-Analysis_TechReport_Nov2020.pdf.

¹⁶² *E.G. v. City of New York*, No. 20-CV-9879 (AJN), 2020 WL 7774346, at *1 (S.D.N.Y. Dec. 30, 2020).

¹⁶³ Eliza Shapiro, *114,000 Students in N.Y.C. Are Homeless. These Two Let Us Into Their Lives.*, The New York Times (Nov. 19, 2019), <https://www.nytimes.com/interactive/2019/11/19/nyregion/student-homelessness-nyc.html>. The estimation of 114,000 homeless students is based on a New York State Education Department survey. NYSTEACHS, *Data on Student Homelessness in NYS*, <https://nysteachs.org/topic-resource/data-on-student-homelessness-nys/>.

¹⁶⁴ Jessica Fregni, *What Homeless Students Lose When Schools Go Digital*, Teach for America (Jul. 1, 2020), <https://www.teachforamerica.org/stories/what-homeless-students-lose-when-schools-go-digital>.

¹⁶⁵ *Id.*

¹⁶⁶ *E.G.*, 2020 WL 7774346, at *1.

homeless shelters filed a class action suit against New York City.¹⁶⁷ The class alleged the city failed to provide homeless students with reliable and adequate access to the internet, and that the failure violated the students' rights to basic education despite living in homeless shelters.¹⁶⁸ The problem was that very few of the homeless shelters in the city had broadband Wi-Fi available.¹⁶⁹ As a result of not having access to the internet, these homeless children were effectively deprived of access to their education.¹⁷⁰

Under a plan devised by the Department of Education, the City supplied iPads with cellular plans contracted through T-Mobile; however, the service was unreliable and students were struggling to connect the devices to the internet.¹⁷¹ In response to the internet issues, the City replaced the devices of students complaining of connectivity issues with Verizon supported devices.¹⁷² However, students continued having connectivity issues.¹⁷³ In response, the city planned to ensure all shelters had Wi-Fi access, though the plan would likely take at least six months.¹⁷⁴ The parents filed for a preliminary injunction to order all NYC shelters housing school-aged children to provide reliable Wi-Fi access by January 4, 2021.¹⁷⁵ In an order issued in December 2020, the court denied the City's request to deny the motion for an injunction, on the grounds that the plaintiffs had sufficiently stated a claim under the New York State Education Law, which is modeled on the McKinney-Vento Act.¹⁷⁶

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* The iPads were provided to all NYC public school students and select categories of charter and private school students. NYC Department of Education, *Request an iPad*, (last visited Apr. 30, 2021) <https://www.schools.nyc.gov/learning/blended-learning/technical-tools-and-support/ipads-and-laptops/ipad-requests>.

¹⁷² *E.G.*, 2020 WL 7774346, at *2.

¹⁷³ *Id.*

¹⁷⁴ At the time the court order was published, additional facts were still in dispute pending additional discovery. *Id.* at *1.

¹⁷⁵ *Id.* at *1

¹⁷⁶ *Id.* at *4.

The City did not dispute the fact that the decision to move education to a remote format meant they must provide adequate internet access to the homeless students.¹⁷⁷ The City did, however, argue that their efforts satisfied the statutory requirement and they were not violating § 3209 of the New York Education Law.¹⁷⁸ The City also argued that the statute did not require the City to provide a “particular accommodation” requested by the parents.¹⁷⁹ The court made an important distinction in how to classify the role of Wi-Fi in remote education:

To the extent that Defendants’ efforts to date have failed to remedy the barriers that prevent homeless children from being able to participate in remote learning, the question is not whether those children are entitled to a *particular* accommodation but to *any* accommodation that meaningfully fixes the problems that have been identified. And as discussed above, Plaintiffs have adequately pled that notwithstanding the City’s efforts, significant barriers to homeless students’ education persist.¹⁸⁰

The underlying facts for understanding the exact extent of damage from the issue have yet to be determined, and the court has not yet given a final ruling on this case.¹⁸¹ The court granted the plaintiff’s request for expedited discovery on the factual issues.¹⁸²

Likely, even after the COVID-19 threat subsides and in-person instruction is safe again, hybrid learning and technology in the classroom will continue as a permanent part of the education institution.¹⁸³ A partial solution to the McKinney-Vento Act’s shortcomings with technology may already be in the works, with an increase in recorded and transcribed lessons available for students to access outside of the classrooms.¹⁸⁴ With recorded lessons, students can

¹⁷⁷ *Id.* at *3.

¹⁷⁸ *Id.* (“Section 3209(6)(b) of the New York Education Law . . . provides, in relevant part, that school districts must ‘review and revise any local regulations, policies, or practices that may act as barriers to the enrollment or attendance of homeless children in school or their receipt of comparable services.’”).

¹⁷⁹ *Id.* at *4.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at *5.

¹⁸² *Id.*

¹⁸³ Mike Peters, *What It Takes to Get Hybrid Instruction Right*, Ed Tech Magazine (Mar. 11, 2021), <https://edtechmagazine.com/k12/article/2021/03/what-it-takes-get-hybrid-instruction-right>.

¹⁸⁴ *Id.*

catch up on missed class assignments and review materials,¹⁸⁵ potentially making it easier for homeless youth to stay connected to their education and keep pace with their classmates.

Sociological Issues of Homeless Youth in Securing Education

When homeless students are present in school, thanks to bussing or technology, the gaps between the McKinney-Vento Act and its implementation create enough room for students to fall between the cracks.¹⁸⁶ Even when a student facing homelessness manages to move past the potential for apathy towards education, the challenge of the school environment can still prevent the child from fully engaging. Homeless students are more likely to get bullied at school or skip school because they feel unsafe at the school.¹⁸⁷ Because homeless students have less access to showers and clean clothes, they are bullied by classmates.¹⁸⁸

For youth, homelessness often leads to “deep educational estrangement and adverse impacts on [their] social-emotional development.”¹⁸⁹ Homeless students often repeatedly have lower grades and substandard performance on the standardized tests.¹⁹⁰ Many homeless students have developed a negative relationship with school because of the curriculum. To balance their disinterest, many homeless children find their excitement for school in extracurricular subjects and activities along the lines of music, art, and gym classes.¹⁹¹ However, these same children often are unable to attend the classes they enjoy because they are removed from those classes to take remedial classes aimed towards reaching state standards.¹⁹² The schools should be awarded

¹⁸⁵ *Id.*

¹⁸⁶ Institute for Children, Poverty & Homelessness, *Part 7: School Climate, No Longer Hidden* (Jan. 2, 2020), <https://storymaps.arcgis.com/stories/cb7493a6130e43e991b48badd502699a>.

¹⁸⁷ *Id.* A reported 23% of homeless students miss school because they feel unsafe at school, compared to the 6% of housed students who miss school because they feel unsafe. A reported 42% of homeless students reported being bullied, making them twice as likely to be bullied than student who are housed [23% of housed students reported bullying].

¹⁸⁸ *Id.*

¹⁸⁹ Rajni Shankar-Brown, *Layers of Estrangement: Social-Emotional and Educational Implications of Homelessness on K–12 Students* National Youth-At-Risk Journal, Issue 2, Vol. 2 (2017), <https://files.eric.ed.gov/fulltext/EJ1275739.pdf>.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

additional funding for enrichment, targeted specifically at homeless students who are disadvantaged.

Age

Age can be another barrier preventing homeless youth from enjoying the full benefits and experience of a free public education. A 19-year-old college student brought an action to review the Oregon School Activities Association's denial of a waiver of the age requirement the state held for interscholastic activities.¹⁹³ Significant to the facts of this case, the student had experienced extreme poverty throughout his childhood and was homeless during his high school career.¹⁹⁴ The student showered in a church and commuted for two hours on public transit to get to school across town because he was homeless.¹⁹⁵ The transient nature of his homelessness had led him to lacking the necessary school records to enroll in a higher grade.¹⁹⁶ While nothing was denied to the student in this case based on his transient state, the issue of age was a product of the educational disadvantages he faced as a homeless student.¹⁹⁷ The McKinney-Vento Act should require schools to make automatic exception for students whose age would bar them from activities available to other students.

IV. Conclusion – Patching the Holes in the McKinney-Vento Act

Homelessness is a community concern, and it is well known that the homeless youth population is particularly vulnerable. As addressed in the Massachusetts charity case above, the McKinney-Vento Act does not allow enough freedom for who can bring a case under the Act.¹⁹⁸ Congress could easily reinforce the protections afforded by the McKinney-Vento Act and the

¹⁹³ Oregon Sch. Activities Ass'n v. State Bd. of Educ., 260 P.3d 735, 736 (Or2011).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Sylvia's Haven, Inc.*, 397 F. Supp. 2d at 217.

Act's general purposes by explicitly allowing a private right of action for the homeless. Because homeless people are often forced to move around and face additional stresses created by their homeless status, it is more difficult for the homeless to assert their own rights. In addition, charities and other organizations created to assist the homeless would be more effective if there was an explicit right to support services because the organizations would be able to bring claims in court and prevent the homeless under their protection from ever suffering whatever harm is at issue. While McKinney-Vento Act uses money to incentivize states taking a more active role in the support, protection, and elevation of the local homeless communities, the Act does not do enough to fully make the state responsible for the effort surrounding the education of the homeless youth.

The root of the McKinney-Vento Act's troubles with the education of homeless youth is the epidemic status of homelessness in the United States. The most obvious solution is for Congress to enact more laws geared towards preventing homelessness. Homelessness in large part results from economic struggles related to maintaining housing.¹⁹⁹ Congress should use the yearly surveys of the homeless population to assess and estimate the full extent to which the homeless need assistance in finding shelter. Following that assessment, Congress should take aggressive steps to create legislation that will ensure that each state will do its part in making sure that people can find suitable and affordable housing. The constant need to change location, sometimes caused purely by unsuitable facilities provided by agencies created to assist the homeless, is just another obstacle that should be removed from the path of homeless youth looking for a stable residence to anchor their education.²⁰⁰

¹⁹⁹ National Alliance to End Homelessness, *What Causes Homelessness?* (last visited Apr. 30, 2021), <https://endhomelessness.org/homelessness-in-america/what-causes-homelessness/>.

²⁰⁰ Samantha Shapiro, *supra* note 141.

Beyond providing financial support and resource programs for homeless youth in the education system, the Act needs stronger requirements for social and psychological assistance for homeless youth. Along the lines of the disinterest many homeless students feel while at school, the treatment these students receive from other students and teachers weighs equally against their ultimate success.²⁰¹ While the school administration may not be able to entirely prevent the usual cruelties of children, they should at least reinforce with the adults in the school that they need to encourage and protect the homeless students from unnecessary stresses and obstacles in the already difficult life they are experiencing.²⁰² There is a clear gap that needs to be filled with social work. There is a clear need for stronger academic and social support services for homeless children.²⁰³

The requirements of the McKinney-Vento Act should be extended. Though the Act has been in effect for more than thirty years, the same consistent and persistent issues face homeless students and bar them from getting an education. The program requires data on homeless students' achievement on state assessments. A majority of states also have collected data on attendance rates, as well as graduation and dropout rates.²⁰⁴ Within states the information is often collected from areas receiving subgrants and areas not receiving subgrants.²⁰⁵ Among the data reported, the most common causes for homeless students missing school were the lack of transportation to and from school, and families preoccupied with survival needs.²⁰⁶ Also among the barriers to school enrollment, homeless students reported struggling with delays in obtaining

²⁰¹ Shankar-Brown, *supra* note 189.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *State and District Implementation of the Education for Homeless Children and Youth Program*, *supra* note 12.

²⁰⁵ *Id.*

²⁰⁶ Department of Education, *State and District Implementation of the Education for Homeless Children and Youth Program* (2015), <https://www2.ed.gov/rschstat/research/pubs/homeless/state-district-implementation-homeless-children-report.pdf>.

school records, and residency requirements for school enrollment.²⁰⁷ Despite the McKinney-Vento Act's current policies, homeless students still suffer from the same issues originally identified by Congress.

Congress must bolster the McKinney-Vento Act through new legislation that redistributes and solidifies the responsibility for providing equal education for homeless youth. The ultimate solution to the homeless education problems the McKinney-Vento Act attempts to tackle is to solve the problem of homelessness altogether. There needs to be more affordable housing nationwide. But, in lieu of affordable housing, the least each state and city can do is eliminate any and all policies concerning homeless children that would require or cause those youth to be absent from school for any period of time. Congress must remove counterproductive hurdles in the path of the education of homeless children.

²⁰⁷ *Id.*